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JUDGES

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¹ Appointed September 10, 1901, by virtue of Acts 1901, p. 42, c. 4905.

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Rules 41 and 42 (amended and consolidated). All applications for rehearing must be filed with the secretary of the justices, accompanied by brief for the applicant and a certificate of counsel that a copy of such brief has been delivered to opposing counsel, within fifteen days after the rendition of the judgment, whether such period extends beyond the term of the court or not; and such applications may be passed upon at any regu-

lar or special term of the court. No application shall be received or filed which is not presented in strict compliance with this rule, and no second application shall be received or filed in any case. Without the order of the court or a justice thereof, the pendency of an application for rehearing shall not stay or suspend the execution of the judgment of this court.

Adopted Nov. 15, 1898.

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COTTRELL v. SOUTHERN RY. CO.

(Supreme Court of Mississippi. May 19, 1902.)
RAILROADS—PERSONAL INJURIES—CROSSINGS.

When plaintiff saw defendant's approaching train, and unsuccessfully attempted to drive across before it, but there was evidence that the train was traveling at an unlawful rate of speed, which increased as it approached the crossing, and that the engineer was on the lookout, the question whether proper diligence on his part would have avoided the injury, notwithstanding plaintiff's negligence, should have been submitted to the jury.

Appeal from circuit court, Clay county; W. F. Stevens, Judge.

"To be officially reported."

Action by Ashley Cottrell against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Critz, Beckett & Kimbrough, for appellant.
S. M. Roan and Catchings & Catchings, for appellee.

TERRAL, J. Cottrell was driving a two-horse wagon along a street of West Point, and, when he neared the crossing of the Southern Railway Company, he saw a train of said company proceeding towards the crossing before him; and, supposing that he could safely cross the track before the engine reached that point, he drove his team upon the crossing, and endeavored to cross over, but failed, and the left hind wheel of his wagon, lacking some 12 inches of being out of the way, was struck, from which misfortune Cottrell was violently thrown from his wagon, and received the injuries here complained of. As Cottrell was doubtless guilty of contributory negligence in attempting to cross the railroad track of appellee in front of a rapidly moving train, if this were the whole case the peremptory instruction would have been correct. But the record discloses the fact that the train of appellee, though within the corporate limits of the city of West Point, and within plain view of the crossing, was running at a speed much greater than six miles per hour, and that it continuously increased its speed from the

point where first noticed until it struck the wagon of appellant. The witness Thomas testifies that when the train was about the pump house he saw the engineer looking towards the crossing, and we must presume that he saw the appellant's wagon upon the track; and, under such circumstances, it was the duty of appellee's servants to use all ordinary care to prevent running over appellant. It is a wholesome rule of law that, even where a person has voluntarily placed himself in a place of peril upon a railroad track, yet, where his peril becomes known to the engineer, it is his duty to use proper care not to inflict injury upon such person. Whether, therefore, the engineer, when he saw the danger threatening appellant, should have shut off steam and put on his brakes, or used other means in his power to lessen the speed of the train, and whether proper diligence on his part would have avoided the injury suffered by appellant, are questions which we think should have been submitted to the jury for solution. 1 Thomp. Negl. § 237. The peremptory instruction was erroneous.

Reversed and remanded.

BOONE v. DULION.

(Supreme Court of Mississippi. May 19, 1902.)

TAX DEED—DESCRIPTION—REFORMATION.

A bill will not lie to make a tax collector's conveyance conform to a description which did not exist at the time of the assessment.

Appeal from chancery court, Harrison county; Stone Deavors, Chancellor.

Suit by W. F. Boone against T. P. Dullon to confirm a tax title. From a decree for defendant, complainant appeals. Affirmed.

The bill alleges that complainant is the owner of the following described lot: "One lot of land bounded on the south by the property of T. P. Dullon, on the east by the property of Frank Volvedich, on the west by Fayard street, and on the north by the property of Bradford, having a front on Fayard street of seventy-five feet, running back east between parallel lines seventy-eight feet." The bill then alleges that the above-

described land is the identical land described in complainant's tax deed as "one lot S. & W. by Thompson, E. by Voivedich, N. by Bradford, T. 7, R. 9"; that complainant acquired title to said land by tax sale, at which he purchased. The prayer is for confirmation of the tax title and for possession. From a decree dismissing his bill, complainant appeals.

Harper & Harper, for appellant. Ford & White, for appellee.

CALHOON, J. The bill in this case, purporting to be one to confirm a tax title, is, in effect, one to reform a tax collector's conveyance to make it conform to a description which did not exist at the date of the assessment or conveyance, or for several years before either. This is never allowable. The tax collector's conveyance is void unless it conforms to the assessment, of course; and both are void unless the sheriff or surveyor could determine exactly what and where the land is as the boundaries were at the time of the assessment, notwithstanding he might be able to do so if he should apply them to what was a correct description three or four years before the assessment. In this case, if he went to find "one lot S. & W. by Thompson, E. by Voivedich, N. by Bradford, T. 7, R. 9," he would search in vain. But complainant wants the court to decree that he go to the land which he describes in his bill according to the calls of private conveyances made before the assessment, and which he avers to be the same land, as "one lot bounded on the south by the property of T. P. Dullon, on the east by the property of Frank Voivedich, on the west by Fayard street, and on the north by the property of Bradford, having a front on Fayard street of 75 feet, running back east between parallel lines 78 feet." This cannot be, and also be in conformity with legal principles pertaining to tax titles.

Affirmed.

EATON v. STATE.

(Supreme Court of Mississippi. May 19, 1902.)
OYSTER DREDGING—STEAM DREDGES—RIGHT TO USE.

Acts 1898, c. 90, confers on all persons the right to dredge for oysters in all waters 14 feet deep, and this right is not restricted by the mode of operating the dredge; and an ordinance of the board of supervisors of a county which denies the right entirely of dredging for oysters in such waters with a steam dredge is void.

Appeal from circuit court, Hancock county; J. H. Neville, Judge.

F. W. Eaton was convicted of a crime, and appeals. Reversed.

W. G. Evans, Jr., Dodds & Griffith, and Miller & Ford, for appellant. Monroe McClurg, Atty. Gen., for the State.

TERRAL, J. The appellant was convicted and fined \$100 for taking oysters from the

public reefs of Hancock county with a dredge operated by steam, contrary to the ordinance of said county. His contention is that the ordinance of the board of supervisors is in conflict with chapter 90, Acts 1898. Said chapter does, as we view it, confer upon all persons the right to dredge for oysters in all waters 14 feet and more in depth; and this right is not restricted by the mode of operating the dredge. The power to dredge, without any limitation in the manner of its exercise, is specifically conferred by the legislature, and such power cannot be denied or abridged by the board of supervisors. Such regulations as the board may make must be consistent with the provisions of the act of the legislature. The ordinance of the board here questioned does not merely regulate dredging for oysters, but it denies entirely the dredging for oysters by steam appliances. Fourteen-foot waters are, as to dredging, taken entirely from the authority of the board by the act of 1898.

Reversed and dismissed.

SULLIVAN v. STATE.

(Supreme Court of Mississippi. May 12, 1902.)
MURDER—EVIDENCE—TRIAL—INSTRUCTIONS.

1. In a prosecution for murder, evidence of a witness, who was walking past the house where deceased was shot, that he heard a shot fired, and saw defendant come out of the house through a window, and then go in the door, and heard some one say: "You are trying to cut me, are you? Come out; come out,"—which was repeated, and that such statement was in a man's voice, after which a second shot was fired, and thereafter witness and another went into the house, and found deceased lying on the floor with an open razor in his hand, whereupon defendant said that deceased was trying to cut him, and that he shot him, was admissible.

2. A difficulty arose between defendant and deceased, who started toward defendant with an open razor. Defendant ran from the room, procured a pistol, told deceased not to come out of the window near which he was standing, and that, if he did, defendant would shoot him. Deceased turned, and threw one leg on the window casing, when defendant shot him. The court charged that if the jury believed defendant raised his pistol to fire the shot, and that deceased turned his back, and then defendant fired, killing deceased, defendant not then being in imminent danger of life or limb, he was guilty; and refused to charge that if the jury believed that defendant was on the gallery of the house, and deceased was in the room adjoining, and that deceased, armed with an open razor, attempted to get through the open window, in order to assault defendant with the razor, and while attempting to do so defendant shot and killed him, then he was justified. *Held*, that the giving of the first instruction and the refusal of the second limited the jury to consider the fact that deceased was shot in the back, without allowing them to consider the testimony as to how he came to be so shot, and was therefore prejudicial error.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

Charles Sullivan was convicted of manslaughter, and he appeals. Reversed.

The evidence in the record shows that the homicide occurred at the house of a negro woman in the city of Meridian, at which house defendant was at the time stopping; that deceased, Dudley Scott, entered the house where defendant was, and that a difficulty arose between them; that deceased started toward defendant with an open razor, when defendant ran out of the room, and as he passed by a bed in the room got his pistol from under the bolster of the bed, and ran out on the gallery of the house, and stopped at the doorsteps; deceased was in the room from which defendant had gone, and was standing near a window which opened out upon the gallery; that defendant told deceased not to come out of the window with the razor, and that, if he did, he (defendant) would shoot deceased; that at this time they were facing each other; that deceased turned around, and threw one leg upon the window casing, when defendant shot him, as he turned, in the back. John Inge, over defendant's objection, testified: That he was walking along the street 30 or 40 yards from the house where deceased was shot, heard one shot fired, and saw Charles Sullivan come out of the house through a window, and go 10 or 12 feet to a door, and go in at the door, and then heard some one say: "You are trying to cut me, are you? Come out; come out." This was repeated several times. Did not know whether it was Sullivan that said this or not, but it was a man's voice. After these words, a second shot was fired. That a few minutes afterwards witness and one Stroud went into the house, and found deceased lying on the floor on his back, with an open razor in his right hand. That Stroud asked Sullivan what was the matter, when Sullivan replied, "He was trying to cut me, and I shot him." The second instruction given for the state, and which is assigned as error on this appeal, is as follows: "The court charges the jury for the state that, if they believe from the evidence beyond a reasonable doubt that Sullivan raised his pistol to fire the deadly shot, and that Scott turned his back, and that then Sullivan lowered his pistol and fired, killing Scott, he (Sullivan) not being in imminent danger of life or limb at the hands of Scott, that Sullivan is guilty as charged in the indictment, and the jury should so find." The action of the court in refusing instruction No. 10 asked by defendant is also assigned as error. This instruction is as follows: "If the jury believe, or have a reasonable doubt, even, that defendant, Sullivan, was on the gallery of the house testified about, and that deceased was in the room adjoining said gallery, and that deceased, armed with an open razor, attempted to get through the open window on the gallery in order to assault said Sullivan with said razor, and that while attempting so to do Sullivan shot and killed deceased, then he was justifiable, and the jury should return a verdict of not guilty."

Woods, Fewell & Fewell, for appellant.
Monroe McClurg, Atty. Gen., for the State.

WHITFIELD, C. J. Inge's testimony was properly admitted. It was fatal error to give the second instruction for the state and refuse the tenth for the defendant. The tenth asked by the defendant put his case, on his evidence, correctly, and should have been given as asked. The second for the state shut the jury in to consider the fact that Scott was shot in the back, without putting before them the testimony as to how he came to be so shot. The giving of the one and the refusal of the other make reversal imperative on the testimony in this record. We do not think the modifications of defendant's third and fourth instructions materially changed them. We notice no other assignment.

Reversed and remanded.

ALLEN et al. v. KANSAS CITY, M. & B. R. CO.

(Supreme Court of Mississippi. May 19, 1902.)
RAILROADS—PERSONAL INJURIES—PEREMPTORY INSTRUCTION.

A 15 year old girl, while riding in a buggy with a man of mature years, was killed in a railroad collision. The track was several feet higher than the road which crossed it. The evidence showed that there were only a few places from which the train could have been seen. The man driving testified that he was looking out and listening all the time; that he was going at a trot, but about 75 feet before he got to the track he crossed a little bridge, and stopped to look and listen, but did not see or hear the train until within 2 or 3 feet of the track; that the railroad employes did not ring or whistle. Defendant's testimony was that the employes complied with all the statutory regulations, and, after seeing the buggy, did everything possible to prevent the accident. *Held* error to give a peremptory instruction for defendant.

Appeal from circuit court, Marshall county; Z. M. Stephens, Judge.

Action by Maggie Allen and another against the Kansas City, Memphis & Birmingham Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Lela Allen left Holly Springs, Miss., in a buggy with Mr. M. W. Boswell, who was driving the buggy. They were going north. The public road they were traveling crossed the railroad of the defendant company at an angle of about 45°. The railroad track there is on a fill, and is several feet higher than the dirt road. As they were crossing the railroad the buggy was struck by a train, and Lela Allen was thrown out of the buggy, and received such injuries that she died in a few hours afterwards. This is a suit brought by Maggie Allen and her brother (they being the only brother and sister of Lela Allen, and both their father and mother being dead) against the Kansas City, Memphis & Birmingham Railroad Company, to recover dam-

ages for the killing of their sister, Lela Allen. The defendant pleaded the general issue, and that Lela Allen was guilty of contributory negligence. The evidence showed that there were only a few places where the trains on the railroad could be seen from the public road by one going north across the track. M. W. Boswell testified for plaintiffs that he was driving the buggy, and that he was looking and listening all the time; that he was going in a trot, but about 75 feet before he got to the track he crossed a little bridge, and he stopped to look and listen, and did not see or hear the train until he was within 2 or 3 feet of the track; that the employes on the train did not whistle for the crossing or ring the bell. The testimony for appellee was to the effect that the employes complied strictly with all statutory regulations, and, after the buggy was seen approaching the track, they used every effort to prevent the accident. The court gave a peremptory instruction to find for defendant. From a verdict and judgment in accordance therewith, plaintiffs appeal.

W. A. Belk and Brame & Brame, for appellants. R. T. Fant and J. W. Buchanan, for appellee.

TERRAL, J. The appellants sued appellee for causing the death of their sister, Lela Allen, and a verdict was rendered against them by the peremptory order of the court. Upon the record, we think it quite plain that the case should have been submitted to the jury. There was evidence before the jury tending to show that the railroad company was negligent in causing the death of Lela Allen, and from which negligence might have been found by the jury; and whether Lela Allen was guilty of contributory negligence, so as to bar appellants' recovery, was also a question that should have been submitted to the jury, under proper instructions. Lela Allen was in her fifteenth year at her death, and, when caused, she was in the buggy of Mr. Boswell, a man of mature years, who was driving the buggy along the public road across the railroad track, and who had entire control of it; and it cannot be safely said that any negligence on her part contributing to such injury, if any such negligence there was, was so manifest that it should have been declared by the court, rather than found by the jury, to whom such questions usually belong. We think the peremptory instruction was erroneous.

Reversed and remanded.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. WOODRUFF.

(Supreme Court of Mississippi. May 19, 1902.)
LIFE INSURANCE—BENEFIT SOCIETIES—CONDITIONAL WAIVER IN POLICY—AMENDMENT OF BY-LAWS—VACCINATION—ALLOWANCE FOR MONUMENT—RIGHT OF RECOVERY.

1. In reply to questions in the application, insured stated that he had never been success-

fully vaccinated, and waived claim under the certificate, should his death result from smallpox. At the time of his death the constitution and by-laws had been amended so as to substitute for such second question one requiring an applicant who had not been successfully vaccinated to waive claim for death from smallpox until he had been successfully vaccinated. Held that, on the death of insured from smallpox after the amendment, the beneficiary could recover under the certificate; insured having been successfully vaccinated meanwhile.

2. Where defendant insurance company called as witness a physician who testified that insured had been successfully vaccinated, and he was not further questioned on that point, and there was no evidence to the contrary, it was sufficient to support a finding of successful vaccination.

3. Questions in application for a benefit certificate requiring the applicant, if not vaccinated, to waive all claim under the certificate for death from smallpox until he should have been "successfully vaccinated," meant only vaccination which had produced the usual symptoms of vaccination, which is deemed effective, and did not mean such as would render the subject absolutely immune from smallpox.

4. Where a benefit certificate was for the payment of \$3,000 to the wife, and \$100 for a monument for insured, without specifying to whom the \$100 was payable, but the rules of the society required it to be paid to the contractor employed to do the work, it was error, in an action by the wife, to award her a judgment for \$3,100.

Appeal from circuit court, Bolivar county; F. A. Montgomery, Judge.

Action by Mrs. J. L. Woodruff against the Sovereign Camp Woodmen of the World. From a judgment for plaintiff, defendant appeals. Affirmed conditionally.

Fontain Jones, and J. W. Cutrer, for appellant. Sillers & Owen, for appellee.

TERRAL, J. On the 16th day of June, 1898, J. C. Woodruff, a member of the Woodmen of the World, received of the appellant fraternity a beneficial certificate in the sum of \$3,000, payable at his death to his wife, and for the payment of \$100 for placing a monument at his grave. The certificate does not specify to whom the \$100 for the monument shall be paid, but section 69 of the constitution and laws of the sovereign camp provides that said \$100 shall be paid to the contractor employed for the execution of said work. Sovereign Woodruff died January 10, 1900, in good standing in said order, with all fines, assessments, and charges against him duly paid. Mrs. Woodruff sued appellant for \$100 for the monument fund, as well as for the \$3,000, the life insurance, and, by a peremptory instruction, recovered said sums,—\$3,100.

Woodruff, in his application for insurance, was asked, "Have you been successfully vaccinated?" to which he answered, "No." (2) "If no, do you waive all claims under your certificate, should your death result from smallpox?" Answer, "Yes." And at the time of the death of Woodruff the constitution and laws of the order had been so amended as to substitute for the foregoing two questions the

following: "Have you been successfully vaccinated? If no, until you are, do you waive all claims under your certificate, should your death result from smallpox?" Upon the trial of the case the attorneys representing appellant and appellee agreed in a statement, to be placed before the jury, that Woodruff had died January 10, 1900, in good standing with the fraternity, with all fees, fines, and assessments against him fully paid; and upon this, and the certificate of insurance, plaintiff rested her case. Thereupon appellant put upon the witness stand Dr. McCalip, who had certified to the fraternity that Woodruff died January 10, 1900, of smallpox; and he testified that in January he had gone to the home of Woodruff to see some members of his family who were sick with smallpox, and that he then found Woodruff sick with smallpox. But he testified further that he did not know whether Woodruff was dead or not, and, of course, could not say that he died of smallpox. On cross-examination he stated that Woodruff, before the time he last saw him, had been successfully vaccinated. Appellant, upon the ground that it had been misled by the certificate of McCalip into the belief that Woodruff, to his knowledge, had died of smallpox, asked to withdraw the case from the jury, and to continue it until it could obtain the testimony of the physician who had attended Woodruff in his last illness, and by whom it averred it could prove that Woodruff actually died of smallpox. The court denied the application, and by a peremptory instruction the plaintiff below recovered a verdict. Whether the assured, Woodruff, died of smallpox, should have been submitted to the jury, if he forfeited his certificate by so dying; but the contention of appellee is that as Woodruff had, previously to his attack of smallpox, been successfully vaccinated, she was entitled to recover, notwithstanding he so died. On the contrary, the appellant insists that the peremptory instruction was wrong, because there was evidence before the jury supporting its contention that Woodruff died of smallpox; that the evidence that Woodruff had been successfully vaccinated was too thin for judicial cognizance, or at least insufficient to support a finding to that effect, or, if true, that it was of no value where death ensued from smallpox. The constitution and laws of a benefit society are binding upon it and upon all its members, and may be considered as written into contracts between it and its members; and all amendments or changes made in the constitution and laws of the order become at once the law of the order and of its members, and take the place and stead of the laws amended or changed, and thereafter govern the rights and liabilities of the order and of its members in relation to all contracts between them. *Thomp. Bldg. Ass'ns*, c. 5, § 4; *Bac. Ben. Soc.* § 304; *Rose v. Wilkins*, 78 Miss. 401, 29 South. 397. Woodruff, in his certificate of membership, obligates that he

would be bound by the "conditions, constitution, and laws and such by-laws as are in force or may hereafter be enacted by the sovereign camp of which he is a member at the date of his decease," and it is but a corollary that he should be entitled to all the benefits resulting therefrom. Indeed, we understand it to be a principle underlying all benefit societies, that their benefits and burdens should be common to all their members. There are people opposed to vaccination, and who would rather incur the risk of smallpox to that arising from vaccination; and such persons, of course, could never obtain the benefit of successful vaccination, under the changed by-laws of the order. The society was well aware that a conviction of hazard from vaccination existed in many minds, and therefore provided that, until successfully vaccinated, death from smallpox should forfeit the insurance. But as the society has, by a change of its by-laws, provided against loss of the insurance by death from smallpox where the insured has been successfully vaccinated, and as Woodruff complied with the condition, we see every reason why he should receive the benefits of the order, as stipulated for by its by-laws and contract with appellee. This view seems to be the plain meaning of the contract of insurance, as interpreted by the laws of the order in force at the death of Woodruff. Dr. McCalip testified that, before taking smallpox, Woodruff had been successfully vaccinated. This testimony was not questioned by any further examination as to that fact, nor was there any counter-vailing proof in respect to that point. The contention of appellant that "successful vaccination" means entire immunity from smallpox is, as we are inclined to believe, not sound. It is well known that many learned men of the medical profession believe that inoculation with vaccine matter will prevent smallpox, or greatly mitigate its virulence, but we are not aware that there is a concurrence of medical opinion that vaccination is an absolute preventive of smallpox. We think it plainly inferable from the terms of the application for insurance in this case that the association did not use the phrase "successful vaccination" in the sense of an entire immunity from smallpox; for, if so, the change in the by-laws would be valueless. "Successful vaccination" carries the idea merely of the production upon the person vaccinated of such symptoms or manifestations as are usually produced by such operation when considered effective. The eruption produced by the inoculation, with its accompanying characteristics, is the only certain evidence that vaccination has taken, or is successful. That "successful vaccination" only means that the virus has taken upon the person inoculated is supported by the *Century Dictionary* (word "Vaccination"). Though Woodruff died of smallpox, that was no bar to his recovery, if he had been successfully vaccinated; and that he had been

so vaccinated was fully proven, without suggestion that the fact was otherwise. The offer of appellant was to show that he died of smallpox, and that, under all the evidence in the case, was immaterial.

The plaintiff, however, had no right to recover the \$100 provided in the by-laws for the erection of a monument at the grave of Woodruff, and, unless that sum be remitted, the judgment will be reversed; if remitted, affirmed.

MATHIS v. STATE.

(Supreme Court of Mississippi. May 19, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—CONFESSIONS—ADMISSION—INSTRUCTIONS—REASONABLE DOUBT.

1. Objections to the admission of evidence not made at the trial will not be reviewed on appeal.

2. Where defendant on the night of the homicide went to witness, and, after waking him up, told witness that he was in trouble, and, after witness answered that he always did all he could for a friend, defendant told witness all the details of the crime, the confession so made was admissible.

3. Where the court charged that defendant is presumed to be innocent until he is proved guilty, and that his guilt must be established beyond a reasonable doubt, "by competent evidence," the use of the words "by competent evidence" could not be held to have rendered the instruction prejudicial to defendant.

4. Where the evidence of defendant's guilt was overwhelming, an instruction on reasonable doubt was not erroneous because it did not require guilt to be established beyond a reasonable doubt by competent evidence, "or the want of evidence."

Appeal from circuit court, Lafayette county; P. H. Lowry, Judge.

Will Mathis was convicted of murder, and he appeals. Affirmed.

In November, 1901, John A. and Hugh Montgomery, deputy United States marshals, went to the house of appellant, Mathis, with a warrant for his arrest for illicit distilling. They reached Mathis' house about sundown November 16, 1901, and were persuaded by Mathis to remain there that night. That night they were both murdered, and the house burned. Mathis and others were indicted for the murder. He was tried at a special term of the circuit court, convicted, and sentenced to be hung. One of the participants in the murder testified for the state on the trial of Mathis, and gave a complete history of the terrible tragedy; stating that Mathis and one Jackson shot them while in bed. George Jackson, a witness for the state, testified that Mathis went to his house before day on the night of the killing, and had him waked up, and told him what had been done. The letter referred to in the opinion of the court is one (a copy of which is in the record) written to his wife by Mathis while in jail. The opinion of the court contains a further statement of the facts.

J. G. McGowen, for appellant. W. L. East-
erling, Asst. Atty. Gen., for the State.

CALHOON, J. We decline the request to pass on objections to the admission of evidence not made below. We do not find that the letter complained of was ever read to the jury. If it was, the result would be the same in this case. The confession made to George Jackson was clearly competent. He sought Jackson after the crime, on the very night it was committed; had him waked up to tell him his trouble, in order to get him to befriend him and conceal evidences of the murder; asked him if he could do anything for him, after saying, "George, I am in trouble," to which George answered, "I always do all I can for a friend." Thereupon he gave the horrible details of his deed. No case in the books, known to us, warrants the exclusion of a confession made under such facts. The objections to the fourth charge given for the state are of no avail. The charge reads as if asked by the defendant, and is this: "The defendant is presumed to be innocent until he is proved to be guilty, and his guilt must be established beyond a reasonable doubt by competent evidence; and if the jury have a reasonable doubt, arising from the evidence, as to the defendant's guilt, they should acquit." The apprehension that the words "by competent evidence" could possibly have affected the jury, to defendant's detriment, in a case like this, is overstrained. Nor is the objection that it is vicious because it does not have the words "or the want of evidence" after the words "reasonable doubt, arising from the evidence," of any more force in this case, where the testimony as to defendant's guilt is simply overwhelming. There is no question here that, if the jury believed beyond reasonable doubt the competent testimony, there was ground for doubt from any lack of it, and it is only in cases where there is such ground that reversals will be ordered for the want of these words. *Herman v. State*, 75 Miss. 340, 22 South. 873.

Affirmed.

LUSBY et al. v. COBB et al.

(Supreme Court of Mississippi. May 19, 1902.)

WILLS—CONSTRUCTION—BENEFICIARIES—DESIGNATION.

Testator died, leaving as his only heirs two half-brothers and one nephew of the whole blood, residing in Louisiana, and certain other nephews and nieces and grandnephews and grandnieces living in Texas, and his will provided, "I give, devise, and bequeath all the property * * * to all my blood kind in Louisiana and Texas." *Held*, that the word "kind" should be construed to mean "kin," and, as testator only had one relative of the whole blood located in Louisiana, to which the word "all," if he had intended to exclude his two brothers of the half blood, would not have appropriately applied, the will must be construed to include such brothers of the half blood.

Appeal from chancery court, Washington county; A. McC. Kimbrough, Judge.

Action by C. S. Cobb and others against P. A. Lusby and others for the construction of a will. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Campbell & Starling, for appellants. W. S. & F. L. McCain and Leroy Percy, for appellees.

WHITFIELD, C. J. J. C. Lusby, a resident of Washington county, of this state, died therein on the 22d of October, 1900, possessed of an estate worth from \$75,000 to \$100,000. He was never married, and had neither father nor mother living at the time of his death, but during his life he had two sisters of the whole blood and two brothers of the half blood. His two sisters of the whole blood died before he did, each of them leaving five children. Two of these children afterwards married and had children, and then died, one of them leaving a child, and, the other, three children; so that at the time of his death he left surviving him nephews and nieces, grandnephews and grandnieces, as descendants of his sisters of the whole blood, who are the appellees in this case, and two brothers of the half blood, who are the appellants. The two half-brothers and one of the nephews resided in Louisiana, and all the rest resided in Texas. On the day of his death he made his last will and testament, disposing of his entire estate in the first item thereof, which is in the following language: "I give, devise, and bequeath all the property, real and personal, mixed and choses in action, I may own at my death, wherever located and situated, to all my blood kind in La. & Texas. Mr. Spink's children in Texas heirs I do not know." There are but two other items in his will, and they relate alone to the appointment of an executor and the payment of his debts. The will was probated in Washington county, and the nephews and nieces and grandnephews and grandnieces of the testator filed their bill in the chancery court of said county against the two half-brothers, claiming that they are entitled, under said will, to the whole of said estate to the exclusion of the half-brothers, and asked the court to construe said will, and to cancel the claim of the two half-brothers as a cloud on their title. The two half-brothers answered the bill, claiming that they were entitled to share per capita in said estate. Thereupon the case was heard on bill and answer, and the court decreed that the nephews and nieces and grandnephews and grandnieces of the whole blood were entitled to said estate to the exclusion of the two half-brothers, and from that decree the two half-brothers have appealed.

The question for solution here presented is this: What did the testator himself mean by the words "all my blood kind in La. & Texas"? Whom did he intend to take his estate? The word "kind" was, of course, used for "kin." It is doubtless true that the

word "kin" standing alone in a will, without anything else to show what kin the testator meant, has received an interpretation supported by innumerable decisions to the effect that the kin meant are such kin as could take under the statute of descent and distribution. This is crystallized, but it must be marked that it is operative alone in those wills where the testator has used no other words from which the court can determine what particular persons he meant by the mere word "kin." It is just as thoroughly settled as the rule itself that wherever there are other words in the will which disclose with reasonable certainty to the court what particular persons the testator meant by the word "kin," there, his intent being clear, and what he meant by use of the word "kin" being thus made clear, the court will, of course, give to the word "kin" the meaning the testator attached to it, whether that be the same as or different from the technical signification the courts have given the word "kin" when standing alone and wholly unexplained. The object always sought in construing a will is the ascertainment of the testator's intention. That intention must be ascertained from the words used in the will itself, since it is the function of courts merely to interpret, not to make, wills. It is, however, always competent to look to the situation of the testator with respect to his estate, his environment as related to his estate, or his devisees or legatees at the time of the making of the will. What was that environment in this case? Here was a testator having no father or mother nor wife or children, leaving an estate of about \$100,000 in value, and having nieces and nephews, grandnieces and grandnephews of the whole blood in the state of Texas, and having also one nephew of the whole blood and two brothers of the half blood in Louisiana, at the time of his death and of the execution of this will. He knew what estate he had. He was aware that the kin to whom he proposed to leave his estate were those living in Louisiana and Texas. He had in mind the fact that only one nephew of the whole blood and that two brothers of the half blood lived in Louisiana at the time. We must deal with him situated as he was, with the knowledge that he had, put ourselves as far as possible in his place, and, having done that, see if there be in the will language showing what he meant by the use of the words "all my blood kind in La. & Texas." The words "all my blood kind" apply as well to the phrase "in Louisiana" as the one "in Texas," and for the purposes of this case we may read the clause as if written "all my blood kin in La." It is true, "kin" are, of course, "blood kin," and that the same construction will obtain as if he had said "all my kin in La." But we cannot concur with counsel for appellees that there is no significance in the words "all my kin," in this connection. Considered in a purely abstract way, the phrase "all my kin"

is doubtless equivalent to the phrase "my kin." But when we take into consideration the fact that the testator, who used the phrase "all my blood kind in La.," knew that he had but one person of the whole blood kin to him in Louisiana, it is inconceivable that he would use the phrase "all my blood kind in La." to designate simply one person. There was more than one person of his kin in Louisiana. There were three,—two, indeed, of the half blood, but nevertheless "kin" and "blood kin." And it is inconceivable that the testator, with these facts in mind, should have made use of the words "all my blood kind in La." to designate just one of the three persons. "All" is a term of plural significance, and it is incongruous to apply it in this will as intended to designate but one. We think it is clear that this testator meant to embrace the two half-brothers within the scope of the words "all my kind in La." It would be useless to cite authorities on the one view or the other, in our opinion. They are admirably collected by the very learned counsel of the respective parties. If we were to write pages, we could not make the ground of our opinion any clearer; that ground being that this testator, knowing that he had two brothers of the half blood and only one nephew of the whole blood—three persons—in Louisiana, must have meant the word "all" to have its usual plural significance, and so to embrace the three, and cannot reasonably be held to have used this word "all" as designating just one person. It is true enough, if he had had but the one nephew of the whole blood in Louisiana, the use of the words "all of my blood kind in La." would have applied to such a one; but that is not the same thing when we come to the matter of ascertaining the intention of the testator as making the word "all"—a word of plural significance—designate one of the three, when three were known to fulfill the condition of residence in Louisiana, by the testator, when he made the will. It advances the argument no whit to state—that cannot be denied—that the mere word "kin," standing by itself, unexplained, is universally held to mean such kin as can take under the statute of descent and distribution, if the case be one in which the court, putting itself in the testator's place, can find from other words used in the will that his intention was that the word "kin" should have, not its technical signification, but a meaning which he gives to it himself by the use of such other words. This testator localizes and restricts the kin,—none but those who live in Louisiana and Texas can take. He then says that all such kin in Louisiana and in Texas shall take. He has in mind the purpose to exclude, and he uses apt words of locality to so exclude. If he had meant still further to shut out particular persons, would he not have used the very simple method of naming the one nephew of the whole blood in Louisiana? Nothing was eas-

ier. On the contrary, his purpose was to give to all his kin—those localized in these two states—his property, and we cannot adopt the construction which would shut out the two half-brothers by making the word "all," plural in its significance, and evidently used by him comprehensively, point singly to one person merely, where three fit the description. We think this is the natural, obvious, and reasonable interpretation of this will. As well said by Mr. Schouler in his work on Wills (section 463): "Authority in the mere verbal interpretation of wills carries no great weight, especially if the words and tenor of the whole will are not absolutely identical. The construction given to a verbal expression in one will is no positive criterion for all wills containing the same expression." We heartily approve the wisdom of Mr. Justice Miller's observations in *Clarke v. Boorman's Ex'rs*, 18 Wall. 502, 21 L. Ed. 904, where he says: "Of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms; the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under this state of the science of the law applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much more assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances concerning its execution, and connecting the parties and the property devised with the testator and with the instrument itself." We also approve of Mr. Justice Taney's remarks in *Bosley v. Wyatt*, 14 How. 390, 14 L. Ed. 468, where he says: "No two wills probably were ever written in precisely the same language throughout; nor any two testators died under the same circumstances in relation to their estate, family, and friends. And it would be very unsafe, as well as unjust, to expound the will of one man by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it." Here is a man evidently dealing most comprehensively. He devises a very large estate, of the value of \$100,000, in one sentence, with no particular directions. His whole will consists of this devise, in one sentence, and the direction that his debts should be paid, and a nomination of an executor. Manifestly, he dealt in a most sweeping and comprehensive way with his property, without particularizing; and just so he designated who should take. He has but two thoughts in view,—to exclude all his kin except those residing in Louisiana and Texas, and include all those thus grouped within his bounty. He knew that there were three in Louisiana, and so he does not name the one of the whole blood, which would have been easy to do, but uses

the broad, comprehensive word "all," of plural significance, meaning, as we think, clearly to apply it to the three, and not meaning to apply it illogically to but one.

Reversed and remanded.

YAZOO & M. V. R. CO. v. FAUST.

(Supreme Court of Mississippi. May 19, 1902.)
CARRIERS—FAILURE TO STOP—ACTION—PUNITIVE DAMAGES.

Where, in an action by a passenger for the failure of a railroad train to stop at a flag station, it appeared that the conductor did not see the passenger's signal, and that the engineer stopped a short distance beyond the station in response to a signal which had been given without his knowledge to enable a passenger to alight, and that he started the train, in obedience to the signal of the conductor, after such passenger had alighted, believing plaintiff had boarded the train, it was error to submit the question of punitive damages to the jury.

Appeal from circuit court, Wilkinson county; Jeff Truly, Judge.

Action by M. E. Faust against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Mrs. Faust brought this suit against appellant company to recover damages for injuries alleged to have been sustained by her by reason of the failure of a train to stop for her at Morgan station. This was a flag station. On the trial Mrs. Faust testified that she had been on a visit to some friends a mile and a half from Morgan station; that the mixed train on which she desired to take passage to her home was due at Morgan station at about 4 o'clock, but the train was late, and the carriage in which she went to the station went back, and she waited on the platform two hours before the train came. As the train approached, her brother flagged it with a handkerchief, and the engineer responded to the signal, but the train was running so fast it ran by the station, and stopped, and before she could get to it it left, and she was compelled to walk home several miles in the rain, and was made sick. There is no dispute as to the signal being given, or as to its being seen by the engineer, or that he stopped in response to it. The explanation of how it happened that the train left before Mrs. Faust reached it is this: There was a passenger on the train who desired to get off at Morgan station, and this the conductor of the train knew, and instructed a brakeman to signal the engineer to stop. The lamp of this brakeman went out, and he ran some distance to another brakeman, and requested him to signal the engineer to stop, which was done. The engineer stopped the train as soon as he could after seeing the two signals. After stopping, the conductor, who was ignorant of the fact that a passenger desired to board the train at Morgan station, signaled the engineer to go ahead as soon as

the disembarking passenger left the train, and the engineer, in obedience to this signal, started the train, thinking the party who had signaled him to stop had gotten on the train. The conductor stated that he did not back the train up because he did not know anybody was at the station to take passage, having received no signal to that effect, and the passenger getting off did not require him to back the train to the station. The opinion indicates the other facts sufficient for an understanding of the case. From a verdict and judgment for plaintiff, defendant appeals.

Mayes & Harris, for appellant. A. G. Shannon, for appellee.

WHITFIELD, C. J. It was error to submit the question of punitive damages to the jury on the facts of this case. The case presents merely, as counsel for appellant accurately puts it, "a chapter of accidents." There is an utter absence of any testimony showing willfulness or intentional wrong.

Reversed and remanded.

AMMONS v. STATE.

(Supreme Court of Mississippi. May 19, 1902.)
CRIMINAL LAW—CONFESSIONS—SWEAT BOX.

Where a prisoner was confined in an apartment five or six by eight feet, entirely dark, and blanketed, called a "sweat-box," and was allowed no communication whatever with human beings, and was visited occasionally by the officer, who would interrogate him about the crime charged, and who stated to him that it would be better for him to tell the truth, but did not warn him that any statement he might make would be used against him, and the prisoner, after several days of obstinate denial, made a confession, such confession was not voluntary, and was inadmissible against him.

Appeal from circuit court, Warren county, George Anderson, Judge.

Ed Ammons was convicted of burglary, and he appeals. Reversed.

On the trial, a Mr. Price, chief of police of the city of Vicksburg, testified to a confession made by the defendant to him while in jail, the particulars of which are set out in the opinion of the court. There was no other evidence connecting this defendant with the burglary except that a pistol belonging to the proprietor of the house burglarized was sold by defendant about a month and a half after the commission of the crime to a shop-keeper in the city.

T. D. Marshall and T. G. Burchett, for appellant. Monroe McClurg, Atty. Gen., for the State.

CALHOON, J. The chief of police testified that the accused made to him a "free and voluntary" statement. The circumstances under which he made it were these: There was what was known as a "sweat

box" in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had him put there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after "several days" of obstinate denial, accomplished the purpose of eliciting a "free and voluntary" confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession,—no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to do what was right," and that it "would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient Ammons, "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth,—that is, confess guilt of the crime,—they are let out of the sweat box. Speaking of this apartment, and the habit as to prisoners generally, this officer says, "We put them in there [the sweat box] when they don't tell me what I think they ought to." This is refreshing. The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. Law, p. 531, note 3; Id. p. 550, note 7; *Hamilton v. State*, 77 Miss. 675, 27 South. 606; *Simon v. State*, 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from this "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity, and

personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial.

Reversed and remanded.

CROSS v. ESSLINGER.

(Supreme Court of Alabama. April 24, 1902.)
APPEAL—PLEADING—PLEAS—STRIKING REPLICATION—FAILURE TO OFFER EVIDENCE
—REVIEW—HARMLESS ERROR.

Defendant pleaded the general issue and two special pleas. Plaintiff's demurrer to the pleas was overruled, and his replication to the second and third pleas stricken. He then took issue on the plea of general issue alone, and offered no evidence, and there was judgment for defendant. *Held* that, though plaintiff considered defendant would recover on the special pleas however fully plaintiff might make his case on the general issue, such fact not appearing on appeal, the court's action on the demurrer and replication could not be reviewed, since the presumption was that plaintiff had no cause of action, and was not harmed by the rulings on the demurrer and replication.

Appeal from circuit court, Madison county; O. Kyle, Judge.

Action by J. C. Cross against B. F. Esslinger. From a judgment for defendant, plaintiff appeals. Affirmed.

This suit was brought by the appellant, J. C. Cross, against the appellee, B. F. Esslinger, to recover the statutory penalty under section 1065 of the Code of 1896 for failure to mark "Partial Payment" on the margin of the record of a mortgage, after request in writing. The defendant pleaded the general issue and two special pleas, Nos. 2 and 3. The plaintiff demurred to these pleas, which demurrers were overruled. Thereupon the plaintiff filed several replications to the second and third pleas. The defendant moved the court to strike these replications from the file upon the ground that they present no facts that could arise on the joinder of issue upon the pleas to which the replications were filed, and because said replications were no answer to the said pleas. The court sustained this motion, and ordered the replication stricken from the file. The judgment entry recites: "Plaintiff declining to plead further, and no evidence being taken, issue being joined upon the plea of the general issue, thereupon comes a jury," etc. Judgment was rendered in favor of the defendant. The plaintiff appeals, and assigns as error the rulings of the court upon the evidence.

Jas. H. Ballentine, for appellant.

McCLELLAN, C. J. The appellant is in no plight to have this court review the rulings of the circuit court on his demurrer to

the special pleas and on the motion of defendant to strike his replications to said special pleas. The demurrer to the special pleas having been overruled, and the replications to said pleas having been stricken, there was left in the case defendant's pleas of the general issue and special pleas 2 and 3. Plaintiff then declined to take issue on the special pleas, and took issue on the plea of the general issue. Whereupon a jury came, but, as the judgment entry shows, the plaintiff offered no evidence in support of his complaint, and verdict, of course, went for the defendant on the plea of the general issue, and judgment was entered accordingly. The plaintiff should have taken issue not only on the plea of the general issue, but also on the special pleas, and should have proved his complaint under the general issue, and thereby put the defendant to proof of the special pleas. It is of no consequence that the plaintiff considered that the defendant would recover on the special pleas, however fully the case might be made out for plaintiff on the general issue. The circuit court could not know this, in the absence of evidence, nor can we. The case stands here essentially as if the plaintiff had declined to take issue on the plea of the general issue as well as upon the special pleas, and the legal presumption in both cases is that the plaintiff could not prove the cause of action laid in the complaint, that the defendant was entitled to judgment on his denial of that cause of action,—the general issue; and the conclusion is that, inasmuch as plaintiff had no cause of action, he was in no sense or degree injured by the rulings on the demurrer to the special pleas and the motion to strike the replications, be those rulings never so erroneous. *Andrews v. Hall* (Ala.) 81 South. 356, and cases there cited.

Upon the foregoing considerations, the judgment of the circuit court must be affirmed.

CHRISTOPHER v. STEWART.

(Supreme Court of Alabama. April 24, 1902.)

ADMINISTRATION OF ESTATES—OBJECTIONS TO CLAIMS—TIME FOR FILING—LIMITATIONS—APPEAL—MANDAMUS.

1. Code, § 313, provides that, "at any time within 9 months [12 months under the Code of 1896] after the declaration of insolvency, the administrator, or any creditor, heir, legatee, devisee, or distributee, may object to the allowance of any claim filed against the estate, filing objections thereto in writing." etc. *Held*, that where a claim has been properly filed a failure to file objections thereto within the prescribed time cuts off the right to contest it, except for defenses arising after that time has expired.

2. A statement accompanying objections filed after the expiration of the prescribed time, to the effect that the objection accrued after the claim was filed, did not bring the objection within the exception referred to.

3. Under the express provisions of Code, §§ 2817, 2818, the running of limitations as to

a claim against an insolvent estate is suspended at the time of its presentation.

4. An order striking out objections to claims against an insolvent estate, on the ground that the objections had not been filed within the prescribed time, is not within Code, § 453, subd. 6, providing for an appeal "upon any issue as to the allowance of any claim against insolvent's estate."

5. Under Code, § 3828, providing that the supreme court has original jurisdiction in the issue of writs of mandamus as to matters in which no other court has jurisdiction, mandamus cannot issue from the supreme to the probate court, the latter being subject to the writ from the circuit and other courts.

Appeal from probate court, Etowah county; J. H. Lovejoy, Judge.

Petition by R. L. Christopher, as guardian, etc., against A. H. Stewart. Decree dismissing the petition, and petitioner appeals. In the supreme court petitioner moved for a mandamus directed to the court below, requiring him to entertain and pass on the matter presented by the petitioner, in the event the decree appealed from would not support an appeal. Appeal dismissed, and motion for mandamus denied.

On August 14, 1900, R. L. Christopher, as guardian of Viva and Estella Stewart, who were the sole heirs and distributees of J. S. Stewart, deceased, filed a petition, addressed to the judge of probate of Etowah county, in which he averred that said J. S. Stewart died in Etowah county on February 14, 1892; that letters of administration were granted upon his estate on May 12, 1892; that on November 3, 1892, said estate was declared insolvent, and on December 18, 1893, the administrator of said insolvent estate was appointed and entered upon the discharge of his duties; that the administrator of said insolvent estate has never made any partial settlement of said estate, and that no order, decree, or action had been taken in said insolvent estate from December 18, 1893, up to the time of filing the petition; that said estate consists of personal and real estate; that many claims by alleged creditors were filed against said estate after the decree of insolvency; that these claims consisted of open accounts, stated accounts, notes, and judgments, but none of them were ever allowed by the court, and they are now barred by the statute or limitations of three and six years. It was further averred in the petition as follows: "That petitioner files objections to said accounts, which objections have accrued since the filing of said claims, which accounts and objections are hereto attached, and marked 'Exhibit A,' and prays that said exhibit be made a part of this petition; that said objections are such as have accrued after the 12 months allowed for filing objections to such claim under section 313, Code 1896 (section 2245, Code 1886)." The prayer of the petition was that, after due notice issued to each claimant, the court state an issue to be made up between each of said claimants and the peti-

tioner to try the correctness of said claim, and on final hearing that said claims be stricken from the file. To each of the claims set out in Exhibit A to the petition the petitioner filed several grounds of objection. Most of these grounds were that the respective claims were barred by the statute of nonclaims or by the statute of limitations of three and six years. To some of the claims the objection was interposed that they had never been presented to the administrator or filed in the probate court within nine months after the decree of insolvency. In many of the objections to the claims it was stated that "said objection has accrued since said claim was filed." The creditors set forth in said petition separately moved the court to strike said petition and the objection from the file, upon the following grounds: "(1) The petition shows on its face that the objections to said claims come too late. (2) The petition shows on its face that the estate was declared insolvent on November 3, 1893, and the objections were filed to the claims August 14, 1900. (3) The petition shows on its face that the objections to the claim were not made in twelve months after declaration of insolvency, and that said objections did not accrue after twelve months allowed by law for filing objections to said claims. (4) The statute of limitations is no defense to claims against insolvent estates unless raised by objections filed within time allowed by law. (5) The statute of nonclaim is no defense to claims filed against insolvent estates unless raised by objections thereto within time allowed by law. (6) It does not negative the fact that prior to declaration of insolvency the claims had been duly filed in office of judge of probate, as required by section 133 of Code 1896." Upon the submission of this motion, the court rendered a decree sustaining the motion, and struck the petition and objection from the file. From this decree the petitioner appeals, and assigns the rendition thereof as error. In this court the appellant made a motion for a mandamus in the event the decree appealed from would not support an appeal, the mandamus to be directed to the judge of probate, requiring him to entertain and pass upon the objections filed by the appellant.

P. E. Culli, for appellant. Dortch & Martin, for appellee.

SHARPE, J. Appellee advances the proposition that an appeal in this case is unauthorized, and we think it is correct. Appellant relies on subdivision 6 of section 458 of the Code, which provides, among other things, for an appeal "upon any issue as to the allowance of any claim against insolvent estates." The issues so mentioned are those which may be tried under section 313 of the Code, whereunder, "at any time within nine months [twelve months under the Code of 1886 here governing as to the limitation of

time] after the declaration of insolvency, the administrator, or any creditor, heir, legatee, devisee, or distributee may object to the allowance of any claim filed against the estate, by filing objections thereto in writing; and thereupon the court must cause an issue to be made up between the claimant and objector, in which issue the correctness of such claim must be tried as in an action at law, if required; and if it is found for the claimant to the whole amount thereof, the same must be allowed, and such claimant recover the costs of the trial of such issue; but if against the claimant, the claim must be rejected, and the party contesting recovers the costs of the trial of such issue." Objections which under this section must be filed within the prescribed time, and which may be litigated thereunder to a final determination, are those questioning the merits or validity of the particular claim for matters apart from its status in respect of its filing. *Carhart v. Clark's Adm'r*, 31 Ala. 396; *Bartol v. Calvert*, 21 Ala. 42. Those which go to defaults in filing may be made at any time, even on the settlement, for a claim not filed in due time is barred by force of the statute of nonclaims, and needs not to be contested on special issues in order to exclude it from participation in the estate. But where the claim has been properly filed a failure to file objections within the time allowed therefor cuts off the right to contest it, except for defenses arising after that time has expired. *Thornton v. Moore*, 61 Ala. 347; *Thames v. Herbert*, Id. 340.

The objections stricken by the order here complained of were filed more than six years after the alleged decree of insolvency. Each objection is accompanied by a statement to effect that it accrued after the claim was filed, but these statements do not bring the case within the exception recognized in the cases last referred to, since the exception applies only where the matter of objection arose, not merely after the claim is filed, but after the expiration of the time allowed in ordinary cases for filing objections. Of these objections, those based on the ground that claims, after being filed, became barred by the general statute of limitations, are without merit. As to claims against insolvent estates, the running of that statute is suspended at the time of their presentation. *Woodruff v. Winston*, 68 Ala. 412; Code, §§ 2817, 2818. Usually the place for the adjudication of such claims is in the probate court, to the jurisdiction of which they are drawn by the decree of insolvency and their filing.

What we have written is not by way of reviewing the probate court's action, but to show the objections were not such as issues ought to have been formed on, and that the order striking out the objections was not made in the trial of, or in prevention of, any issue of any claim within the meaning of the statute providing for appeals.

Appellant submits a motion to be acted on, if the order is held not appealable, for mandamus to require the probate court to entertain and pass on his objections. The power of this court to grant original applications for mandamus is confined to cases in which no other court has jurisdiction. Code, § 3826. The probate court is subject to mandamus from the circuit court and other courts of like jurisdiction, and for that reason, without regard to any other, the writ cannot be granted here. *State v. Hewlett*, 124 Ala. 471, 27 South. 18; *Ramagnano v. Crook*, 88 Ala. 450, 7 South. 247; *State v. Williams*, 69 Ala. 311; *Ex parte Pearson*, 76 Ala. 521; *Ex parte Russell*, 29 Ala. 717.

Let the attempted appeal be dismissed, and the motion for mandamus be overruled.

HAMILTON et al. v. MAXWELL.

(Supreme Court of Alabama. April 24, 1902.)

APPEAL—MOTIONS—BILL OF EXCEPTIONS—RECORD—WRONGFUL ATTACHMENT—SUIT ON BOND—EVIDENCE—DAMAGES—EXCESSIVE CHARACTER—QUESTION FOR JURY.

1. When a motion is not incorporated in the bill of exceptions, the ruling of the court on it will not be reviewed.

2. The decision of the trial court in overruling a motion will be affirmed, though the motion is incorporated in the bill of exceptions, when the record fails to set out the evidence introduced in support of it.

3. In an action for wrongful attachment, where it was shown that no writ of attachment was on file, the admission in evidence of motions by plaintiff in the original suit to substitute the writ of attachment, and for an order directing the sheriff to sell the property levied upon under the writ, and the order of the court thereon, was competent, as showing that plaintiff therein recognized the validity of the levy of the writ of attachment.

4. In an action for wrongful attachment, it was shown that no writ of venditioni exponas, issued in compliance with the judgment for the plaintiff in the original suit, was on file. The clerk of the circuit court, his deputy, and the clerk of the sheriff each testified that they had made diligent search for the writ in the places where such papers were usually kept, but had been unable to find it. *Held*, that the evidence authorized the introduction of secondary evidence of the contents of the writ.

5. It was also shown that the affidavit for the writ of attachment and the bond sued on were dated August 27, 1894; that the writ was issued by a justice of the peace, returnable to the fall term, 1894, of the circuit court. The motions by plaintiff in the attachment suit to substitute the writ of attachment, and for an order directing the sheriff to sell the property levied on, set forth the above facts. *Held*, that the evidence showed that the writ of venditioni exponas grew out of the attachment suit mentioned in the bond sued on.

6. A general objection to all of the testimony of a witness is properly overruled when a part of it is competent.

7. The motion for a new trial in an action for wrongful attachment should have been granted where defendant's uncontradicted evidence showed a set-off to the amount of \$275, and plaintiff's testimony showed actual damages of \$306, which was disputed, and the jury assessed the damages at \$258; the verdict being exorbitant.

8. In an action for wrongful attachment, the

question whether the attachment was wrongfully sued out is for the jury.

Appeal from circuit court, St. Clair county; John Pelham, Judge.

Action by M. L. Maxwell against Newton O. Hamilton and another. Judgment for plaintiff, and defendants appeal. Reversed.

This was an action brought by the appellee, M. L. Maxwell, against Newton O. Hamilton and J. W. Hamilton. The complaint counted upon the breach of an attachment bond, and sought to recover damages for the wrongful suing out of an attachment by the defendants, who executed the bond sued on. The defendants moved the court to require the plaintiff to pay the costs which had accrued on the former appeal in this cause, which had been decided by the supreme court against the present plaintiff, and that the plaintiff be required to reimburse the defendants for the payment of said costs, which they had been compelled to pay, before the plaintiff be allowed to further proceed in this suit. This motion appears as a part of the record copied in the transcript, and is not shown by the bill of exceptions, and there is no evidence relating to said motion shown in the transcript. This motion was overruled. The defendants pleaded the general issue and several pleas of set-off, in which they claimed that the plaintiff was indebted to them in the sum of \$275.22. Upon issue joined upon these pleas, the trial was had. Upon the trial the plaintiff offered in evidence the bond sued on. It being shown to the court that there was no writ of attachment on file, purporting to have been issued under deed by virtue of the attachment bond, the plaintiff offered in evidence a motion made by the defendant N. O. Hamilton, as plaintiff in the original attachment suit, in which he asked for an order allowing the plaintiff in said attachment suit to substitute the original attachment writ issued by the justice of the peace before whom the attachment was sued out, and made returnable to the circuit court, in favor of N. O. Hamilton and J. W. Hamilton, against the plaintiff in the present suit. The plaintiff then offered in evidence the motion made by the defendant in said attachment suit, in which he asked that the sheriff be ordered to take into his possession and sell the personal property which had been levied upon under the writ of attachment sued out by him against the plaintiff in the present suit. The defendants objected to the introduction in evidence of this motion upon the following grounds: (1) That it was illegal and incompetent evidence; (2) it was not shown that any writ of attachment was ever issued by virtue of said attachment bond; (3) it was not shown that said motion pertained to the same matter of objection as was expressed in said bond. The court overruled this objection, and permitted the motion to be introduced in evidence, and to this ruling the

defendants duly excepted. Thereupon the plaintiff offered in evidence the judgment entry of the court upon said motion asking for the sale of the property. This judgment ordered that the venditioni exponas be issued. The defendants objected to the introduction in evidence of this judgment entry upon the same grounds interposed to the introduction of the motion. The court overruled the motion, and the defendants duly excepted. It was then shown to the court that there was no writ of venditioni exponas or other appropriate writ on file, purporting to have been issued by virtue of, or in compliance with, the mandate of said judgment, and that, if any such writ had been issued, it was lost, and could not be found after diligent search therefor. The plaintiff introduced the clerk of the circuit court, the deputy clerk, and the sheriff of the court, each of whom testified that they had made diligent search for the writ of venditioni exponas issued upon said judgment in the places where such papers were usually kept, and where they would expect to find them, and that, after such diligent search, they had been unable to find them. The sheriff of said county testified to the fact that the writ of venditioni exponas in favor of the defendant N. O. Hamilton and against the plaintiff in the present suit was issued out of the circuit court, and was delivered to him for execution, and that under said writ he had made a sale of the property as ordered. He also testified substantially to the contents of said writ of venditioni exponas. Defendants moved to exclude from the jury the evidence of the witness and the sheriff relating to his having taken possession and sale of the property of the plaintiff under the writ of venditioni exponas upon the grounds (1) that it was not shown that said writ was in any way connected with or grew out of the attachment suit mentioned in the attachment bond sued; and (2) because such testimony was illegal and incompetent. The court overruled the objection, and the defendants duly excepted. The plaintiff, as a witness in his own behalf, testified that prior to the levy of the writ of attachment he was engaged in the sawmill business; that on the morning of August 27, 1894, he was operating a sawmill, when N. O. Hamilton, one of the plaintiffs, from whom he rented said sawmill, came to the plaintiff's place of business and demanded the payment of the rent; that he told Hamilton that he did not have the money, but would pay him in lumber; that Hamilton agreed to take the lumber, but that they could not agree as to the value of said lumber; and that thereupon it was agreed between them that it should be left to two persons to decide the value. The defendants objected to all of this testimony of the plaintiff upon the ground that it was illegal and incompetent and irrelevant. The court overruled the objection, and the defendants duly ex-

cepted. The plaintiff then introduced evidence tending to show the levy of the attachment upon this property, and that there was no ground for the levy as set forth in the affidavit, which recited that the plaintiff was fraudulently disposing of his property. The defendants introduced evidence tending to show that there was some ground for the defendants believing that the plaintiff was disposing of his property other than in the regular course of business. The defendants also introduced other evidence tending to support the pleas of set-off. The evidence relating to the pleas of set-off is sufficiently stated in the opinion. The defendants requested the court to give to the jury several written charges, among which was the general affirmative charge in favor of the defendants. The court refused to give each of these charges, and the defendants separately excepted. The opinion on the present appeal renders it unnecessary to set out the facts in detail. The jury returned a verdict in favor of the plaintiff, assessing his damages at \$258.33, and judgment was rendered accordingly. The defendants made a motion for a new trial, upon the grounds that the verdict of the jury was contrary to the law and the evidence, and upon the further ground that the verdict of the jury was exorbitant. This motion was overruled, and the defendants duly excepted. The defendants appeal, and assign as errors the several rulings of the trial court to which exceptions were reserved.

M. M. Smith, for appellants. Jas. A. Embury, for appellee.

TYSON, J. The motion to require plaintiff to pay certain costs, as a condition to a further prosecution of his action, is not incorporated in the bill of exceptions. The action of the court thereon is not, therefore, revisable. *Ewing v. Wofford*, 122 Ala. 439, 25 South. 251, and authorities cited. Besides, the record fails to set out the evidence introduced in support of the motion, if any was introduced. So if the motion appeared in the bill of exceptions, with no proof of the facts alleged in it appearing in the record, we would be compelled to sustain the rulings of the court overruling it.

The trial court committed no error in refusing to exclude the motion of defendants, made in the attachment suit, to substitute the writ of attachment, and for a writ of venditioni exponas directing the sheriff to sell the property levied upon, as shown by the writ of attachment, nor in refusing to exclude the order of the court thereon. These records were clearly competent to show the recognition by defendants of the validity of the levy of the writ of attachment by the constable, and to preclude them from attacking it for invalidity. Having represented to the court by motion that the attachment had been levied, and having procured from the court an order of sale for the

property, they cannot be allowed to avail themselves of the invalidity of that levy. *Hamilton v. Maxwell*, 119 Ala. 28, 24 South. 769.

We are clearly of the opinion that a sufficient predicate was laid for the introduction of secondary evidence of the contents of the venditioni exponas and of its levy. Nor was there any merit in the objection that the writ of venditioni exponas is not shown to have been in any way connected with, or to have grown out of, the attachment suit. On this point we need only refer to the fact that the affidavit for the writ of attachment and the bond upon which the suit is brought both bear date August 27, 1894, and show that the writ was issued by E. E. Clayton, J. P., returnable to the fall term, 1894, of the circuit court of St. Clair county, which facts are also shown by the motion, and the order of the court thereon granting the writ of venditioni exponas.

We are unable to determine from the objection and motion what portion of Maxwell's testimony was objected to. Clearly, a part of it was entirely competent. The court below was under no duty to separate the legal or competent from the illegal or incompetent; and the objection, failing in this respect, was properly overruled.

On former appeal in this case (*Hamilton v. Maxwell*, supra) it was held that no exemplary, vindictive, or punitive damages are recoverable under the complaint. So, then, the plaintiff can, of course, recover only actual damages. The defendants filed a plea of set-off, upon which issue was taken; and the evidence, without conflict, supports the plea, to the extent of \$275.22. The actual damages shown by plaintiff's testimony to have been sustained by him amount to \$366.90, about which there is serious dispute in the evidence. The verdict of the jury assessed the plaintiff's damages at \$258.38. The motion for a new trial, the overruling of which is assigned as error, should have been granted upon the ground, assigned in it, that the damages assessed by the jury were exorbitant.

We do not wish to be understood as committing ourselves to the meritoriousness of the defendants' plea of set-off. *Hundley v. Chadick*, 109 Ala. 575, 19 South. 845; *Painter v. Munn*, 117 Ala. 322, 23 South. 83, 67 Am. St. Rep. 170. We express no opinion on that point. It is not raised, since the plea was made material by issue having been taken upon it. We also entertain the opinion that whether the attachment was wrongfully sued out was a question of fact for the determination of the jury. The general affirmative charge requested by defendants was properly refused.

Reversed and remanded.

DOWDELL and SHARPE, JJ. If what is said in the opinion is to be construed as intimating that the plea of set-off is not a

proper one in this action, we wish to be understood as not concurring in such intimation. The question not being raised, any expression of opinion concerning the merits or demerits of the plea would be mere dictum.

PIONEER MIN. & MFG. CO. v. THOMAS. (Supreme Court of Alabama. April 24, 1902.)

MASTER AND SERVANT—COAL MINE—UNSAFE WORKING PLACE—ASSUMPTION OF RISK—DUTIES UNDERTAKEN BY SERVANT—NEGLIGENCE.

1. Plaintiff was engaged in driving a headway in defendant's coal mine, and was charged with the duty of pulling down or bracing up loose rocks in the ceiling of such heading. There were employes with superior authority over plaintiff, charged with general superintendence of the work, but plaintiff was primarily charged with the duty of seeing that the roof of the heading was safe, and about an hour before he was injured one of his superiors warned him that the ceiling of the heading was unsafe, and directed him to secure it, which he expressly promised to do. Having failed, however, to regard this warning, a rock fell and injured him. *Held*, that plaintiff could not recover.

2. Plaintiff and another were driving a heading in defendant's mine, and were charged with the duty of pulling down or timbering up loose rocks. After driving the heading several feet and timbering up one rock, they drove it a few feet past the timbering, thus partly uncovering another rock. Plaintiff was then ordered to cut off a corner several feet short of the last rock, and his fellow worker continued to drive the heading, thus further uncovering the rock, and, while plaintiff was passing under it to get a sledge from his fellow worker, it fell and injured him. *Held*, that it was as much plaintiff's duty as that of his fellow worker to see that the rock was safe, and in failing to perform such duty he was guilty of such negligence as would preclude a recovery.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Herbert A. Thomas against the Pioneer Mining & Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff on account of alleged defects in the condition of the ways, works, machinery, or plant of the defendant, said injuries being sustained by the plaintiff while engaged in the defendant's coal mines. The damages claimed in the complaint were \$15,000, and it was alleged in the complaint that the injuries were inflicted by reason of a rock falling from the roof of the mine upon the plaintiff. The allegations of negligence contained in the complaint were as follows: "Plaintiff alleges that said part of said top or roof fell as aforesaid, and plaintiff suffered said injuries and damages by reason and as a proximate consequence of a defect in the condition of the ways, works, machinery, or plant connected with or used in the said business of defendant, which said defect arose from or had not

been discovered or remedied owing to the negligence of defendant, or of some person in the service or employment of defendant, and intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition, viz., the roof or top of said mine, or the part thereof which fell as aforesaid was loose or otherwise in danger of falling." The defendant pleaded the general issue and several special pleas, setting up the plaintiff's contributory negligence. The facts are sufficiently stated in the opinion. Among the charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, was the general affirmative charge in its behalf. There were verdict and judgment in favor of the plaintiff, assessing the damages at \$2,500. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant. Bowman & Horsh, for appellee.

McCLELLAN, C. J. Action by Thomas against the Pioneer Mining & Manufacturing Company, sounding in damages, for personal injuries sustained by plaintiff, an employé of the defendant, through an alleged defect in the condition of the ways, works, etc., of the defendant. The defect counted on and from which the injuries resulted was in the roof of a "heading" leading off from the main slope in defendant's coal mine. The plaintiff and one Lambie, hirelings of defendant, had been set by the company to drive this heading, and they were at work upon it when rock fell from its roof onto plaintiff and injured him. We state the matter thus advisedly. We find no conflict in the evidence to the establishment of the facts we have stated. Not only had plaintiff, along with Lambie, been set to do this work, but all the time up to the falling of the roof they had each been engaged upon it; and at the very moment of the fall of the roof the plaintiff was immediately under the falling rock, engaged in an act which was as much a part of the work he had been put to do and was engaged in doing as anything else he or Lambie had done in carrying out their orders to drive this heading. The evidence is also undisputed that it was the duty of both Lambie and plaintiff in driving that heading to constantly test the roof left above the entry for loose or dangerous rocks or other substances liable to fall from the roof—or ceiling, perhaps more accurately—to the floor, and, upon finding any such rock or other substance, their further duty was to pull down the same, or to brace it up by timbers which would securely hold it in place. And while there were persons in the employment of the company superior in authority to these men, whose duty it was in a general way to superintend the

work and see that it was properly done, these two men (plaintiff and Lambie) were the persons primarily charged by the company with the duty of seeing to it that the roof of this heading was kept in proper and safe condition. This duty was as much upon plaintiff as upon Lambie. Both plaintiff and Lambie within the hour had been specially warned by a superior employé of defendant, and charged to look well to the security of the roof of the heading,—the roof which was then dangerous, and this to common observation, and a part of which subsequently fell upon and injured the plaintiff; and not only so, but the plaintiff had then expressly recognized and accepted this warning and direction as being addressed to him, and promised to act in line with it. Yet notwithstanding the duty of plaintiff as well as Lambie to constantly see that the roof of the heading was in proper and safe condition, and notwithstanding they had both been specially charged anew to a diligent performance of this duty less than an hour before the roof fell, both the plaintiff and Lambie negligently failed to perform and discharge this plain duty imposed upon them and undertaken by them primarily for their own protection, and in direct consequence of this failure of duty on the part of plaintiff a large flake of rock fell from the roof on him, and inflicted the injuries of which he now complains.

That the plaintiff cannot recover on the state of facts we have set forth is altogether clear, and is admitted by counsel for appellee, who in their brief say: "We recognize the rule that if the injured employé is himself the agent through whom the employé undertakes to see that the ways, works, etc., are in proper condition, and the employé undertakes that responsibility, he cannot complain." But it is insisted for appellee that the facts are not as we have stated them, and reliance is had upon the testimony of plaintiff to the effect that it was Lambie's, and not his, duty to see that the roof of the heading at the particular place from which the rock fell was in proper condition. All this testimony of the plaintiff, however, is patently a mere conclusion of his from his gratuitous and unfounded assumption that he and Lambie were not working together in this heading at the time the rock fell, and that he did not cut the coal from beneath this part of the roof, and hence that it was not his duty to knock down or timber up the rock. The evidence was that when plaintiff and Lambie were put to work at that place they jointly began to drive the heading at right angles to the slope; that after driving it thus four or five feet plaintiff discovered a threatening condition of the roof, and at that point inserted a timber brace under it; that afterwards they continued to drive this heading two or three feet beyond this timber, thus uncovering the faulty roof for that distance beyond the brace. Then plain-

tiff was directed to cut off the upper corner of this right-angle entry, so as to make room for a tramway to curve into the entry from the main slope. He had been upon this part of the heading probably a day when he was injured. Meantime Lambie had continued driving the entry, and had cut out the coal from under the rock roof to a distance of eight or ten feet beyond the timber brace above referred to, further uncovering the rock that fell. Neither he nor plaintiff had put in any additional timber, and neither of them had tested the roof, which the evidence shows was easy to be done by striking against it with a pick or hammer. Just before and at the time the rock fell Lambie was working several feet beyond it. Just before it fell plaintiff was working several feet short of it,—between it and the slope. Each of them occasionally required a sledge hammer in their work. One such hammer had been provided by the company. This was last used by Lambie, and was in that part of the entry where he was working. Plaintiff having occasion for the hammer, it was a part of his work in the heading to go and get it. He was engaged in this particular work, going to fetch the hammer, when the rock fell upon him from the roof. These facts are uncontroverted. It is entirely clear, we think, that they furnish no sort of basis for the deduction and conclusion of the plaintiff as a witness that it was not his duty to see that the roof was in proper condition. He was working immediately under the rock at the moment of its fall. Just before its fall he was working several feet from it. So was Lambie. Both he and Lambie had, each in part, cut the coal from under this rock. There is just as much room to say that it was not Lambie's duty to pull down or brace this rock as there is to say that it was not plaintiff's. There is no room to say that it was not the duty of each and both. We conclude, therefore, that the plaintiff's injuries were due to his own negligence, on the uncontroverted proof in the case, and that the court should have given the affirmative charge requested by the defendant.

Reversed and remanded.

(107 La.)

BILLET v. TIMES-DEMOCRAT PUB. CO.
(No. 13,733.)¹

(Supreme Court of Louisiana. Jan. 20, 1902.)
LIBEL — PRIVILEGED COMMUNICATION — EVIDENCE — PLEADING — AMENDMENT — REPORTS OF POLICE OFFICERS.

1. In an action for damages for libel, where "privilege" is set up as a defense, the evidence should be confined to the question of privilege vel non, save in so far as it may be admissible in mitigation of damages.

2. In such a case, an amendment setting up the truth of the alleged libel in justification may be allowed, if the offer to amend be rea-

sonable as to time. The defense is not inconsistent with that of "privilege," and there is no change of issue in the sense of substituting one issue for another.

3. Reports made by police and detective officers to their superiors, and inscribed in books kept for that purpose, are not judicial proceedings, and no privilege protects their publication. Nor does any privilege protect the publication of the opinions, suspicions, or deductions, of such officers, otherwise imparted, whether to their superiors or to other persons.

Breaux, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by E. A. Billet against the Times-Democrat Publishing Company. Judgment for defendant. Plaintiff appeals. Reversed.

D. M. and Allan Sholars, for appellant. Lawrence O'Donnell (Denègre, Blair & Denègre, of counsel), for appellee.

Statement.

MONROE, J. Plaintiff sues for damages for injury alleged to have been sustained by reason of the publication in the Times-Democrat, a newspaper owned and controlled by the defendant, of the following article, which he alleges is malicious, wanton, and defamatory, to wit: "Lost Money Found—The \$500 Which Mysteriously Disappeared from Mrs. Behm's Safe Strangely Recovered. A case where great protestations of love and breach of trust figured was developed last Sunday, when the local police authorities, especially the detectives, were communicated with by Emile A. Billet, who, in partnership with Mrs. Louis J. Behm, conducts a grocery establishment at the corner of First and Dryades streets. Billet telephoned to the police headquarters that a safe, which had, he alleges, carelessly been left open, was rifled of a sum aggregating \$500. The mysterious manner in which the sum had been stolen, and the very unsatisfactory way he went about explaining the matter to Detectives Stubbs and De Rance, aroused their suspicions as to the real thief, and it was not very long before they became convinced of the fact that Billet was the one who had appropriated the \$500. Billet, in explaining the robbery to the detectives, said that Mrs. Behm, as was her custom, went to the market, and a short while subsequent to her return home the loss of the money was discovered. Billet alleges that he was under the impression that the safe was locked, and felt assured of the safety of the money, and he impressed Mrs. Behm with the same idea. In notifying the police, Billet requested that an investigation of the matter be held, and the above-named detectives lost no time in arriving on the scene of the alleged robbery. They were shown the safe wherefrom the \$500 was supposed to have been stolen. Upon an investigation of the premises and of the circumstances surrounding the robbery, the officers said that they were firmly convinced

¹ Rehearing denied April 23, 1902.

of Billet's guilt. In substantiating their allegation, they claim that it was next to an impossibility for any one to have stolen the money except whosoever may have had immediate access to the premises, such as Billet possessed. They did not hesitate to impress Billet with the idea that they believed him guilty. Accordingly they approached him, and, so the detectives allege, said that if he (Billet) did not replace the \$500 by 8 o'clock, they would place him under arrest on the charge of theft. Of course Billet made protestations, in which he maintained his innocence, but it was of no avail. After speaking thus to Billet, the officers left the grocery, saying that they would return at the aforesaid hour. About 6:30, or 7 o'clock, Mrs. Behm, acting on Billet's suggestion, decided to make another investigation of the safe. She summoned her mother and Billet, and they opened the safe. Mrs. Behm, in her examination, pulled out one of the drawers of the safe, wherein it was the custom to keep whatever paper money she had in the house. Finding this empty, as far as the \$500 was concerned, she extracted the second and last drawer, little expecting to find the money there. Much to her astonishment, and, apparently, to Billet's, the package of bills which had been missing was found. When this discovery was made, there remained about an hour of the time allowed Billet by the officers to 'find' or restore the money. The detectives maintain that they had made a thorough examination of the safe and of its contents. However, Billet alleges that they were mistaken, and denies that they looked into the safe at all. It is said that Billet and Mrs. Behm are engaged to be married. The latter is at present suing her husband for a divorce, but, in the meanwhile, is living with Billet. He has had considerable experience in the grocery business, and has been robbed on several occasions."

The defendant answered as follows: "Now into court comes the Times-Democrat Publishing Company, and for answer to plaintiff's demand admits that the words complained of were published in the newspaper as aforesaid, but denies that it was done maliciously, but are bona fide comments on matters that became, and were, matters of public notoriety, etc., discussion, and were published in the course of conducting a newspaper, and are therefore privileged." And there is a prayer for judgment. The counsel in the case began the taking of testimony on behalf of the defendant out of court, but the counsel for plaintiff objected that such testimony was irrelevant, for the reason that the answer admitted the publication and claimed that it was privileged, without affirming the truth of the statements therein contained. And this objection was reserved to be passed on by the court. Some days later, and whilst the taking of testimony in its be-

half was still going on, the defendant filed an amended answer, reiterating the defense originally set up, and containing the following additional averments, to wit: "Defendant avers that said publication was made in good faith, and upon reliance on the official public reports of the police authorities of the city of New Orleans, and was substantially true and correct as to all the facts stated; that, in making the said publication, the defendant was carrying out its purpose of publishing legitimate news, upholding morality, and that it was not actuated by any other purpose." Objections to testimony offered in support of these averments were also referred to the court, and they, together with the objections previously mentioned, were overruled, and there was judgment for the defendant.

The facts disclosed by the record are as follows, to wit: The plaintiff and Mrs. Behm are the proprietors of a grocery on the corner of First and Dryades streets in this city, which is conducted mainly in the name of Mrs. Behm, though the parties are equally interested; the purchases for the business being made indifferently in the name of either, and the financial management being, practically, under the exclusive control of the plaintiff. In a room occupied as a sleeping apartment, immediately adjoining the store, there was an iron safe, in which, at the time of the occurrence out of which this suit arose, there were \$600 or \$700 in money, together with some books and papers and a few articles of value other than money. Inside of the safe there were four compartments, or pigeon holes, one above the other. In the upper compartment or pigeon hole was an iron drawer, secured by a lock. In the next compartment below, which measured, approximately, 8½ by 5½ inches in height and width, by about 6 or 8 inches in depth from front to rear, was a wooden drawer, without a lock, and below the compartment containing the wooden drawer were two other compartments of the same size, so that the wooden drawer would as readily fit in the one as in the other. In the wooden drawer, upon the occasion in question, there were \$35 or \$40 in nickels. In the compartment next below there was a roll of bills amounting to \$500, and consisting of two or three \$100 bills, and the rest in bills of the denominations of \$20, \$10, and \$5, and in the lowest compartment there was a bag of silver coin. On Sunday morning, February 11, 1900, the plaintiff arose early and opened the store, but shortly afterwards, wishing to get change for a \$2 bill, he went to the safe for that purpose. The morning was dark and rainy, and the safe was unfavorably situated with respect even to the little light that penetrated the room. He therefore held a lamp in one hand, while he adjusted the combination and opened the safe door with the other. When he had opened the door, he placed the lamp on the safe, took out the drawer containing the nickels,

and put it on the bed, and, after taking from it the change that he needed, replaced the drawer, as he supposed, in the compartment from which he had taken it, closed the door of the safe, and returned into the store. As a matter of fact, however, he had, by reason of the obscurity, mistaken the compartment and had put the drawer into the one which contained the \$500 in bills, so that, when the drawer was pushed in and the door of the safe closed, some of the bills were shoved back and occupied the space between the rear end of the drawer and the rear end of the compartment, and some of them were pressed down underneath the drawer. Later in the morning, about 8 o'clock, it being then lighter, the plaintiff had occasion to go again to the safe, and, upon opening it, he missed the roll of paper money, and, the fact that he had made the mistake as described not suggesting itself to his mind, he concluded that he had been robbed, which conclusion he at once communicated to Mrs. Behm, asking her, at the same time, whether she had taken the money. Upon her replying in the negative, he immediately telephoned to the police department, and, after he had waited several hours and made several efforts in that direction, two detectives, Stubbs and De Rance, appeared upon the scene. Those officers inquired who had the combination of the safe, and who had access to the premises, and, probably, made other pertinent inquiries, and the safe was opened and exhibited to them; but, whilst the wooden drawer was pulled partly out, so that they could see its contents, it did not occur to any one to take it entirely out of the compartment and look behind or underneath it. Officer Stubbs, in view of the fact that the plaintiff alone knew the combination by which the safe could be unlocked, and of such other information as he obtained, reached the conclusion that the money was in the possession of the plaintiff, and he so stated to Mrs. Behm. Officer De Rance does not seem to have shared that opinion, and it is not pretended that the plaintiff, who is shown to be very deaf, heard the statement made by Stubbs, though both officers testify that it was communicated to him by Mrs. Behm. Upon the other hand, Mrs. Behm testifies that she did not, for a moment, consider the statement as having been seriously made, and that the idea seemed to her preposterous, since most of the missing money belonged to the plaintiff, who could, without objection from her, at any time, have disposed of the whole of it. The officer who made the statement referred to testifies that before leaving he said to Billet, "You put that money back, because I am coming back here again. I will be back here again to-night or to-morrow morning." The other officer testifies that his companion said to Mrs. Behm, "We will be back in a day or two, or something like that, and we want the money placed back." No witness intimates that anything was said about the

officers returning at 8 o'clock that night, or that any threat was made that Billet would be placed under arrest on the charge of theft. Upon the whole, we are satisfied that the plaintiff was not made aware that either of the officers had seriously charged him with having taken the money, and he could not have been aware that he was threatened with arrest, since no such threat was made. During the day, probably just after the departure of the detectives, the plaintiff and Mrs. Behm were interviewed by the corporal of police who was in command of the precinct in which their store was situated, and he reported to his captain, who, in turn, handed in the following written report to the superintendent of police, to wit: "6th Precinct. Department of Police. City of New Orleans, Feby. 11, 1900. To the Superintendent of Police—Sir: On the 11th day of February, 1900, at 12:30 m., Corporal Perez reported the following: Name and place of party suffering loss: Mrs. Louis J. Behm, Dryades, Cor. First St. When and how loss occurred: Enter, daytime, and grand larceny. Where it occurred: Dryades, Cor. First St. List, description, and value of each article stolen: Cash money, U. S. currency, \$500." Corporal Perez reports between 7:30 and 8 a. m., this date, some unknown person entered the bedroom of Mrs. Lizzie J. Behm, in the rear of her grocery, corner of Dryades and First streets, while she was absent at market, and stole from an iron safe, which had been left unlocked, \$500 of United States currency, of the denominations of \$5, \$10, and \$20 bills. There was also \$20 in silver money and two diamond rings, valued at \$100, in the safe, which were not stolen. The corporal interviewed Mr. Emile J. Billet, the manager for Mrs. Behm, who, with Bertha Dennis, the colored cook, were the only ones in the house at the time of the robbery, and he says he saw the money when he was last at the safe, at 7 this a. m., and missed the money when he went there again at 11 a. m. The colored servant saw no strange person about the place, and could form no idea as to how the robbery occurred. On the night of the same day, about half past 10 o'clock, after the store had been closed, Mrs. Behm and her mother made a search of the entire room containing the safe, and, being unsuccessful, Mrs. Behm finally suggested to Billet that they should once more examine the safe, and take everything out, and she thus describes their proceedings: "I sat on the bed while he pulled things out,—books, papers, receipts, and other valuable things that were in the safe. Now we had pulled it all out except this drawer, and I said to him, 'Pull the drawer out, too, and give it to me, here,' and, as he pulled the drawer out, I saw some bills lying flat down, and I ran my hand there, and there was the roll of money, crammed behind the drawer, some at the bottom, some at the back, like you would jam something in a

hole." The discovery thus made was communicated to the police officers on the beat early the next morning, and they informed Mrs. Behm that they would convey the information to headquarters, and, during the day, the following report appears to have been made by the detectives, who did not, however, again visit the store, to wit: "Department of Police, City of New Orleans. Detective Office, New Orleans, La., Febry. 12, 1900. Detectives on case: Stubbs & De Rance. Case No. 921. Residence: Dryades & First Sts. Location of offense: Dryades & First Sts. Date committed: Feb. 11, between 7 and 8 a. m. Character of offense: Grand larceny. \$500. Date reported: Feb. 11. Parties arrested: —. Detailed report: We investigated said case, and was satisfied in our own minds that there was no robbery committed by any outsider, and made it known to Billet. The money was placed back in the safe, and found by Mrs. I. J. Behm, who lives in the house with Billet." Upon the morning of the day upon which this report was made, there had appeared in the Times-Democrat an article referring to the subject under consideration, entitled "A Strange Robbery," concerning which, and concerning the further action taken, the then city editor of the defendant's paper testifies as follows, to wit: "Inasmuch as the facts contained in the article are purported to be based on the official police report, and inasmuch as the tenor of the article led me to believe that there was something else in the story, I proposed to look into the matter further." He also states that a member of the local staff of the paper told him, during the day, that Detective Stubbs had told him (the reporter) of some man who had robbed himself; "I think that was the way he put it;" that he telephoned to another reporter to see the detective, but that the other reporter was too busy, and that he then instructed still another attaché of the paper, who had done some "space work," to investigate the case, and write it up, giving the parties in interest the benefit of their own statements; but that, before publishing the article, which was written up under the instructions so given, being the article here complained of, he had a conversation with Detective Stubbs, through the telephone, in which that officer confirmed what he had heard from his reporter, and told him that there was no possible chance that the money was in the safe upon the occasion of his visit to the defendant's store, and also told him something about the relations existing between the plaintiff and Mrs. Behm, and about a divorce, or pending suit for divorce, between Mrs. Behm and her husband. The space writer by whom the offending article was prepared interviewed the plaintiff and Mrs. Behm on the morning after the discovery of the money, and was shown the safe, and given a full explana-

tion of the whole matter. He had access to the reports which by that time had been handed in at headquarters, but does not appear to have consulted them, or even to have interviewed the officers by whom they were made. It is not suggested that the defendant has ever offered any reparation to the plaintiff, but, as we have seen, even now affirms that the publication complained of was "substantially true and correct."

Opinion.

The original answer rested the defense solely on the ground that the publication was privileged, and the evidence should have been confined to the question of privilege vel non, save in so far as it may have been admissible in mitigation of damages. The supplemental answer affirms the truth of the statement published, and thus presents an additional defense, and introduces a new issue. But the defense thus presented is not inconsistent with the original defense, and there is no change of issue in the sense of substituting one issue for another. Under the circumstances, and as the amendment was offered before the case was put on trial, we are not prepared to say that it was improperly allowed. Code Prac. art. 420. The justification set up in the supplemental answer has not, however, been sustained by the evidence. "In giving currency to libelous or slanderous reports and publications, a party is as much responsible, civilly and criminally, as if he had originated the defamation." *Staub v. Van Benthuyssen*, 30 La. Ann. 467. "Tale bearers are as bad as tale makers." *Harris v. Minvielle*, 48 La. Ann. 908, 19 South. 925. In undertaking, therefore, to justify by proving the truth of the facts stated, the defendant not only assumed the burden of proving that the detectives made the statement attributed to them, but of proving that those statements were true. And it has not met the requirements of the case in either respect. It has not been proved that the plaintiff was the real thief, or that he took or intentionally concealed the money which was supposed to have been stolen. On the contrary, it is shown, conclusively, that, before the publication of the article in which that language was applied to him, an explanation had been made, which should have satisfied any reasonable mind that the money had not been stolen or intentionally concealed by any one, and which made it plain that if the plaintiff had taken it and had appropriated it to his own use he would have been guilty of no crime. It has not been proved that the detectives were convinced that the plaintiff had appropriated the money, for one of them, De Rance, testifies that he was not of that opinion. It has not been proved that the detectives impressed the plaintiff with the idea that they believed him guilty, since the evidence shows that that suggestion was only made by Stubbs to Mrs. Behm, who did not take it seriously, and hence did not com-

municate it, as a serious charge, if at all, to the plaintiff. It is not pretended by any witness that the detectives, on leaving the house, notified the plaintiff that they would return at 8 o'clock and would place him under arrest on the charge of theft unless the money was replaced in the meanwhile. And it is shown that the money was not found in the last remaining hour of the delay thus said to have been allowed, and as the result of a search suggested by the plaintiff, but that it was found some hours later, during a search suggested by Mrs. Behm.

The only question, then, is whether the publication as true of the injurious statements in question is protected by any privilege? We know of no law to that effect. There would have been no privilege, whether absolute or conditional, even if the defendant had confined itself to the publication of the reports as made by the corporal of police and the detectives, and as entered upon the books kept by the superintendent of police or the chief of detectives for that purpose, since neither common convenience nor the interests of society require that the opinions, suspicions, and deductions of police and detective officers, whether reported in writing to their superior officers, or through the telephone to the newspapers, should be published to the world. Such reports are in no sense judicial proceedings, and their publication is entitled to no greater privilege than that of reports emanating from private individuals. Where a proceeding in the nature of a criminal prosecution, or in a civil suit, has actually been filed, in a properly constituted tribunal, and there has been a judicial hearing of some kind, the publication, without malice, of a fair and accurate report of what has taken place before such tribunal is privileged, though whether the privilege attaches where the proceedings are merely preliminary and *ex parte* is not so well settled. An author of recognized authority says, upon the latter point: "The right to publish reports of *ex parte* proceedings and preliminary examinations, and the like, does not seem to be fully conceded by the law. The weight of authority is in favor of extending the privilege to report of arrests, on information gained from papers on file, so long as such reports do not assume the guilt of the accused person and are not otherwise defamatory." Newell, Defam. p. 549. So it has been held that a newspaper may report the fact that a person has been arrested and held for examination on a particular charge, but that it has no right to go beyond this and assume the guilt of the person charged. *Tresca v. Maddox*, 11 La. Ann. 206, 66 Am. Dec. 198; *Usher v. Severance*, 20 Me. 9, 37 Am. Dec. 83. Upon the other hand, it has been held that the publication of a statement made by a justice of what

had been said by persons applying to him for a warrant, which statement, not appearing in any affidavit, was made as part of a hearing, was not privileged. *McDermott v. Association*, 43 N. J. Law, 488, 89 Am. Rep. 806; that reports made to police officers charging persons with crime are not judicial proceedings, the publication of which is privileged (*Jastrzembski v. Marxhausen*, 120 Mich. 677, 79 N. W. 935; *McAllister v. Press Co.*, 76 Mich. 343, 43 N. W. 431, 15 Am. St. Rep. 318); and that entries in books kept by detectives are not judicial proceedings, and no privilege protects their publication (*Fullerton v. Berthiaume*, 6 Rap. Jud. Que. C. S. 342). "It is well settled that, in the absence of statute, newspapers, as such, have no peculiar privilege, but are liable for what they publish in the same manner as the rest of the community, and this, whether the publication is in the form of an item of news, an advertisement, or correspondence." 18 Am. & Eng. Enc. Law (2d Ed.) p. 1051. *Fitzpatrick v. Publishing Co.*, 48 La. Ann. 1116, 20 South. 173.

No special damages have been proved, nor was it necessary that they should have been. "Damages, or injury, may be inferred from the nature of the words written, and from the circumstances under which they were written, without specific proof." *Warner v. Clark*, 45 La. Ann. 863, 13 South. 203, 21 L. R. A. 502.

In *Tresca v. Maddox*, 11 La. Ann. 206, 66 Am. Dec. 198, the court found that the publication of the libel was followed, upon the next day, by a recantation, and that the reputation of the plaintiff was vindicated by articles written by the employé by whom the libel had been penned and subsequently published in the same paper. Nevertheless, it was said, "The injury had been done,—*vox semel missa non revertit*. The slander circulated by one issue of the paper could not be wholly obliterated by recantation in another." In the case at bar there has been no recantation, nor reparation of any kind. On the contrary, the defendant has affirmed the truth of the libel complained of by averments in its pleadings which it has failed to sustain by proof.

For the reasons thus assigned, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiff, E. A. Billet, and against the defendant, the Times-Democrat Publishing Company, in the sum of \$500, with legal interest thereon from judicial demand, and costs in both courts.

BREAUX, J., believing the amount allowed should be, at most, nominal, dissents in this case.

(107 La.)

STATE ex rel. McMAHON v. CITY COUNCIL OF NEW ORLEANS. (No. 14,203.)

(Supreme Court of Louisiana. April 14, 1902.)

MUNICIPAL CORPORATIONS — REMOVAL OF CORPORATE OFFICERS — HEARING — MANDAMUS — COUNCIL — EXPULSION OF MEMBER — PRIVILEGED COMMUNICATION.

1. In the absence of either express grant or of express or implied limitation of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, for cause, to remove corporate officers, whether elected by it or by the people. If an officer has no franchise in his office (that is to say, if the nature of his office is a mere employment), he may be removed without notice, subject to the liability of the corporation for damages for breach of contract if by such removal a contract is violated. But where there is a franchise in the office, resulting from an election or appointment for a term fixed by law, there must be a charge against the officer to be removed, stated with substantial certainty; notice must be given of the time and place fixed for the hearing; reasonable opportunity must be afforded to defend, in person or by counsel; and where the charge is insufficient, if proved, to justify the motion, or where, being sufficient, there is no evidence to sustain it, the officer is entitled to a mandamus to restore him.

2. The rule as thus stated is subject to the exception that notice may be dispensed with (1) when the officer appears and answers; (2) when he has permanently left the municipality; (3) in certain cases where it is apparent that the motion was for good cause, and that the order to restore would be without practical and useful effect.

3. The power of motion conferred upon the city of New Orleans by section 12 of its charter is neither greater nor less than the city would have had if that instrument had been silent upon the subject; the effect of the grant, as contained in the charter, being merely to set at rest any doubt which might have existed if the matter had been left to implication.

4. The authority conferred upon the council to "expel one of its members by a two thirds vote of all the members elected to such council, five days' notice and an opportunity of being heard in his defence having previously been given such member," presupposes a charge sufficiently grave to justify expulsion, for the hearing of which time and place are fixed; for, if there be no such charge, and no time and place fixed for the hearing, there can be no defense, and nothing of which to give notice.

5. Whether the charge is sufficient, if proved, is for the ultimate determination of the courts; but where the notice and the opportunity to defend have been given, and evidence has been adduced in support of the charge, the courts will not ordinarily go behind the judgment for the purpose of inquiring, "into the amount or the balance of evidence."

6. A statement made in confidence by a member of the New Orleans city council to the mayor, that he had heard rumors reflecting upon the official integrity of the other members of the council, is a privileged communication, and furnishes no ground for the expulsion of the member making it, even though the informant upon whom he relies fails to substantiate his statement.

7. The courts are disinclined to hold the speaking of slanderous words a ground for motion from a public office.

8. Where it appears that a charge for which a member of the New Orleans city council was expelled was not formulated or made known to him with substantial certainty, and

that he objected to being tried on that ground; that his demand to be allowed the assistance of an attorney was ignored or denied, whilst able counsel conducted the prosecution; and that he was so expelled after a trial in which he was without witnesses, wholly unprepared, and wholly incompetent to cope with the professional ability arrayed against him,—he will be restored to his office by mandamus, upon timely application.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Application by the state, on the relation of P. J. McMahon, for a writ of mandamus to the city council of New Orleans. From a judgment denying the writ, plaintiff appeals. Reversed.

Robert J. Maloney, Hugh M. Anale, and Lazarus & Luce, for appellant. Samuel L. Gilmore, City Atty., and Arthur McGuirk, Asst. City Atty., for appellee.

Statement of the Case.

MONROE, J. Relator, having been elected a member of the city council of New Orleans, was expelled from that body, and he prays to be restored to membership by means of a writ of mandamus. The council and its members, for cause why the alternative writ should not be made peremptory, show that by section 12 of the city charter the council is authorized to "expel any of its members by a two thirds vote of all members elected to such council, five days' notice and an opportunity of being heard in his defense having previously been given to such member" (Acts 1896, No. 45); that the notice thus required was given to relator, as also the opportunity of being heard, but that, even had such notice not been given, it would, by relator's appearing, pleading, testifying, and cross-examining witnesses, have been waived. And they allege that the "discretionary right to determine what causes are sufficient to justify expulsion is not subject to judicial review." Wherefore they pray that the application of relator be denied.

The evidence and admissions in the record establish the following facts, to wit:

Relator was elected to the council as the representative of one of the most populous wards in the city, and was in the active discharge of his duty up to the moment of his expulsion. Early in October, 1901, he stated to the mayor that he had received information tending to show dishonest practices on the part of certain members of the council, and he requested that officer to consider the statement as confidential for a few days, when, as he said, he would produce his informants; and the mayor acceded to his request. Very shortly afterwards, without any fault on the part of the mayor, a publication on the subject appeared in one of the daily papers. Whether relator was in any wise responsible for this publication is a question which we are not called upon to determine,

though we do not wish to be understood as conveying any intimation to his prejudice. However it happened, some version of the matter became public, and the mayor promptly arranged an interview, in his presence, between the relator and a gentleman whose name had been mentioned as one of the latter's informants, with a view to determine what further action he should take; and, finding that the statements of the parties conflicted, he referred the whole matter to the council. The council thereupon appointed a special committee to wait upon the relator, and request him "to furnish all information in his possession in connection with any accusations" against its members; and the committee so appointed called upon the relator, and upon October 22d reported to the council, then in session, as follows: "Committee called on the councilman October 21st, and he declared: (1) That he had never made accusations against any member of the city council. (2) That all information in his possession were only rumors he had heard, which he was not able to substantiate, as to any wrong action of any member of the council. (3) That the parties on whom he relied to substantiate these rumors had utterly failed to do so. (4) That if he could have substantiated these rumors, he would have at once laid the matter before the grand jury. (5) That he sincerely regretted to have given circulation to these rumors. (6) That as a citizen of the community in which he had lived so long, and in the welfare of which he was so notably interested, and as a member of this community, he regretted very much the publicity given to rumors which at first he was led to believe had some foundation, but which consequently [subsequently] he found out to be vague, and could not be substantiated in any form whatever." Relator, being present, stated that he approved the report as made, and it was received, and its further consideration postponed until the next meeting of the council. Upon October 29th, the council having again assembled, the report of the special committee was read, and the following motion was offered by the chairman: "Be it moved by the city council of New Orleans that this council, taking cognizance of the report of the special committee appointed to wait on Councilman P. J. McMahon, and to request him to furnish all information in his possession in connection with any accusation against members of this body, and also of the councilman's affirmation at the session of October 22, 1901, of the correctness of said report, accepts the expressions of his regret for the statements made or repeated. Be it further moved that this council desires to record its disapprobation of a member of this council giving circulation to derogatory and unsubstantiated rumors, which acquire weight before the public when coming from a member, and which are incompatible with the dignity and responsibility of a public official. Be it further moved, etc., that this council,

now having put on record the apology of Councilman P. J. McMahon, and disapproval of his conduct, and its disapprobation of the circulation of unsubstantiated rumors, especially by a member of this body, considers the incident closed." To this the relator objected, saying: "Mr. Chairman, before adopting that motion, I certainly will not accept section 5 of the report. I did not understand it when it was being stated by Mr. Zacharie, and I certainly will not stand by that. I did not circulate that. * * * On my sacred word, I had no idea that section five had any such wording. I have no objection to the balance of the report, but to section 5 I have, decidedly. * * * I would be the last man, if I thought that I had done anything wrong, to refuse to apologize; but, in my estimation, I have done nothing wrong, and I don't think I can apologize at this time. I simply went to the mayor and told him these things, in a confidential way, and, if they got out, am I to be blamed?" The position of the relator, then, was that he had not circulated the objectionable rumors, and could not place himself in the position of apologizing for something that he had not done. Evidently, however, it was thought that his statement to the mayor was in itself a "circulation." Thus the chair asked: "Wasn't that a circulation, Mr. McMahon? Mr. McMahon: No, sir; not in my estimation. At this moment I don't think that I have done anything wrong. A Member of the Council: It strikes me that whatever private conversation has taken place between Councilman McMahon and the honorable mayor, the whole thing recalls squarely against the dignity of this body, and nobody else, and there is no use to try to get around it. There it is at our very door,—right at the door of this body,—and you cannot take it off unless it is purged some way or another. Unhappily for the gentleman, if he continues in the line he has adopted, although we have shown him all sympathy in the matter, if he proposes to continue as he has started tonight, of course he is like every man; he must take the consequences. By Another Member: Now, I move that, in view of the odium cast upon this council— It matters not by whom, but the circulation of these rumors has cast a stigma upon us that never will be wiped out during the life of this administration. I, for one, don't care to use any drastic measures, but the council must be vindicated, or the charges made must be substantiated. And now, in order to give to the gentleman an opportunity of saying to this body whether he is right or wrong, I move that the chair request the gentleman to tender the necessary apology, and one fitting to the cause of all this scandal. The Chair: Mr. McMahon, are you prepared to make an apology at all? McMahon: No, sir; I am not prepared. I can't make any apology. The Chair: None at all? McMahon: I haven't done anything wrong, that I know of. The Chair: The remarks you have circulated?

McMahon: I never circulated them. Another Member: I make this substitute: That the gentleman be called upon at the next meeting to substantiate the charges made, or to apologize, or to accept this as a legal notice, under the charter, that a motion will be made for his expulsion." This suggestion was reduced to the form of a motion, as follows: "Be it moved that, in view of the statement made on the floor of this council at this meeting by Councilman McMahon that he does not consider that he has committed any offense against the dignity of this council, or any member thereof, that should cause him to apologize, that this council demands that Councilman McMahon shall substantiate the charges made by him, or apologize before this body at its next meeting, and, in default thereof, to take this as a notice, under the city charter, to answer why he should not be expelled from this body."

This motion was then adopted, and the council adjourned until November 5th. Upon that day, however, relator presented a petition to the civil district court, setting forth what had taken place, and praying that the council be enjoined from proceeding further in the matter of said motion; and as a rule nisi was issued, ordering the council to show cause on November 8th why the injunction should not issue, no further action was taken until the evening of November 8th, when the rule nisi having been discharged, and an application to this court for prohibition, mandamus, and certiorari, as against the district court, having been denied, the matter was again taken up, and proceeded with as follows: The clerk reported that a copy of the motion of October 29th had been sent to Mr. McMahon, and the latter admitted that he had received it, and, being called upon for his answer, offered the following: "I object to the adoption of the resolution passed October 29, 1901, and any action which may be had thereunder, for the following reasons: First. That no specific charges have ever been formulated against me. Second. That no notice of any charges has even been served upon me. Third. That no copy of any charges has ever been served upon me. Fourth. That no time and place have been fixed for the hearing of any charges. Fifth. That no opportunity has been given to make a proper defense. In conclusion, I desire to state that my purpose in making the above objections is to properly meet and defend any charges that may be made against me, and I further desire a complete, full, and public investigation. Respectfully yours, [signed] P. J. McMahon." The objections thus offered were overruled without debate. The original motion and the report of the special committee were each read twice, and thereupon the following was offered by one of the members: "I move that we proceed to prove up the statements made in that report, that Councilman McMahon gave utterance to the slanderous charges stated therein." Section 12 of the

city charter was then read, after which the suggestion was made by a member and by the chair: "Mr. McMahon you have an opportunity of explaining * * * why you should not be expelled." And no further explanation being offered, a witness was sworn on behalf of the prosecution, to whom the question was put: "Will you kindly state what took place in the mayor's parlor, when Mr. McMahon, certain members of the council, and yourself were present, in relation to this subject-matter, and wherein certain charges were made by Councilman McMahon; also when Dr. Pratt was present, and what he said, and what Mr. McMahon said? Mr. McMahon: Do I understand that Dr. Pratt was there, Mr. Stanley? A Member: One question. The Chair: You are out of order. Mr. Stanley: Hold on. Give me a chance. The Chair: Out of order. Mr. Frantz (a member): If he will be short and brief, I will ask that he be heard. The Chair: You are out of order, I rule. Mr. Stanley: I put one question. Is Mr. McMahon entitled to an attorney, or not? The Chair: Out of order. Mr. Stanley: Answer 'Yes' or 'No.'" No answer to this question was given, and the council, through one of its members, proceeded with the examination of the witness, in which McMahon, from time to time, participated, and in the course of which he now and then made a statement on his own account, and was in turn questioned by the members of the council; the proceedings, judged by the standard of rules established for trials in judicial tribunals, being conducted irregularly. On more than one occasion the accused complained that he was unprotected, meaning that he was without legal advice, whilst the prosecution was being conducted by a member of the council, who was also a member of the bar, and with the aid of one of the legal advisers of the city. At one time relator asked, "Would you object to my being protected by a lawyer?" to which the reply was given by the member who was conducting the prosecution, "It is not for me to answer that. I am not the council." The relator then said: "I ask of the council— I pray that you give me a fair and square hearing. I am simply and purely a business man, and not a politician, and not a lawyer. Give me some time to prepare myself, and I will give you everything I know." It seemed to be the sense of the council, however, that he had had sufficient time and notice, and the trial went on, with the result that the following resolution was adopted: "That Councilman P. J. McMahon having defamed the good name of the council by uttering and circulating slanderous charges against certain members of the body, whose names he has not given, and having failed either to substantiate his assertions, or to express regret or retraction therefor, although given ample notice and opportunity so to do, and whose conduct in the premises is deemed a reproach and a stigma on the council, through which

he has forfeited the esteem of that body, be it moved that said Councilman P. J. McMahon be, and he is hereby, expelled from the council of the city of New Orleans." And thereafter, within a fortnight, the application which we are now considering was presented to the district court, and, after hearing, denied. And from the judgment so rendered relator prosecutes this appeal. It may be further stated that, as matter of fact, the relator had summoned no witnesses, and none were examined on his behalf; nor does it otherwise appear that he had prepared for a trial on the merits of any charge which it might have been the intention of the council to prefer against him. On the contrary, he did not seem to realize that he was being tried, but was evidently under the impression, until the contrary appeared, that the council would do no more, for the time being, than dispose of the exceptions which he had offered, and that the trial upon the merits could not take place until that had been done, and the case had been again fixed.

Opinion.

In the absence of either express grant or express or implied limitation of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, for cause, to remove corporate officers, whether elected by it or by the people. If an officer has no franchise in his office (that is to say, if the nature of his office is a mere employment), the power to remove may be exercised without notice or hearing, subject to the liability of the corporation to an action in damages for breach of contract if by removing or discharging him a contract has been violated. But where there has been a franchise in the office resulting from an election or appointment for a term established by law, there must be a charge against him, stated with substantial certainty, though not necessarily with the technical precision required in indictments; notice must be given of the time and place fixed for the hearing of such charge; reasonable opportunity must be afforded to answer the same and to produce testimony; and the officer is entitled to be heard and defended by counsel, to cross-examine witnesses, and to except to the proof against him. If the charge be not denied, still it must, if not admitted, be examined and proved. And where the specific charge stated is insufficient to justify removal, or where, being sufficient, there is no evidence to sustain it, the officer is entitled to a mandamus to restore him. 1 Dill. Mun. Corp. 242, 250, 253, 255; 1 Thomp. Corp. 820, 882. "The analogies of the ordinary procedure in the courts of the state, in the absence of statute or by-law, may be followed respecting such details as the notice, or summons, mode of service, etc. Notice may be dispensed with: (1) By appearance and answer to the charges. (2) By a total desertion of the place, so that it is not practicable to give the notice, as where the of-

ficer has permanently, not temporarily, left the municipality, and resides elsewhere constantly, with his family. Though he may have been absent or left the borough, yet if he return, and be in the place at the time of the motion, he is entitled to notice. If the motion be for good cause, such as the conviction of an infamous crime, or the repeated declaration of the officer that he would not discharge the duties of his office, while it would be more regular to give the notice, yet its omission will not entitle him to a mandamus to be restored; for, if restored, he could be removed again, and the courts will not order a restoration where they can see that there is good ground for an motion, and that the order to restore would be without practical and useful effect. With these exceptions, the party is entitled to notice of the intention to remove, so that he may have full and fair opportunity to be heard in his defense." 1 Dill. Mun. Corp. 254.

The power of motion conferred upon the city of New Orleans by its charter is neither greater nor less, in so far as the members of the council are concerned, than it would have been had that instrument been silent upon the subject. The only thing that can be said of it is that, having been conferred by express grant, it relieves the situation of the doubt which at times has been suggested, as to whether such power is incidental, or may be implied, in a municipal corporation. Section 12 of the charter, upon which the respondents rely, authorizes the council to "expel one of its members by a two-thirds vote of all the members elected to such council, five days' notice and an opportunity of being heard in his own defence having previously been given such members." Acts 1896, No. 45. This language necessarily presupposes a charge sufficiently grave to justify expulsion, for the hearing of which time and place are fixed; for if there be no such charge, and no time and place fixed for the hearing, there can be no defense, and nothing of which to give notice. This provision of law must also be construed with those which, referring to the writ of mandamus, read: "It may be directed to all corporations established by law: * * * (2) To compel them to receive and restore to their functions such of their members as they shall have refused to receive, although legally chosen, or whom they shall have removed without sufficient cause." Code Prac. art. 835. "The sufficiency and reasonableness of the cause of removal," says Mr. Dillon, "are questions for the courts." 1 Dill. Mun. Corp. 252. This language is applied by the author to cases in which the power of motion is implied. But we can find no reason for holding it to be inapplicable in the instant case, since, as we have seen, the only express authority conferred upon the respondent council with respect to the motion of its members contemplates that such action shall be predicated upon "charges"; and it would be unreasonable to

suppose that the lawmaker intended that charges having no relevancy to the subject, or which, being relevant, are sustained by no proof, can afford a basis for legal expulsion. True it is that where, in such a case, a charge sufficiently grave to justify expulsion has been preferred, and the accused has received the notice, and has been afforded the opportunities for defense, to which he is entitled, and there has been evidence adduced in support of such charge, the courts will not ordinarily go behind the judgment rendered, for the purpose of inquiring "into the amount, or the balance, of evidence."

The soundness of the two propositions thus stated, and the distinction between them, have been heretofore recognized by this court in an opinion from which we quote as follows (beginning with the concluding paragraph of an excerpt from a text-book of recognized authority), to wit:

"While the judgment of inferior boards or tribunals upon matters which properly rest in their discretion will not be controlled or interfered with by mandamus, their judgment as to what the law allows them to determine, as to the extent of their jurisdiction, may be so controlled." High, Extr. Rem. § 69.

"But," said the court, "in order to escape the consequences of this universally recognized principle, the learned counsel for the respondent takes the position that, under the powers conferred by the police statute, the right of removal is discretionary with the mayor. We do not think so. The statute gives the mayor power to remove, it is true, but he can proceed only upon 'charges preferred,' and 'in all cases the commissioners shall have an opportunity to present evidence on their behalf.' Or, in other words, there must be charges preferred, a trial had, evidence adduced, and a judgment rendered. These proceedings are limitations which are placed on the mayor's power of removal, and the determination of what is just cause for removal is deemed a question of law, says Mr. High, whose ultimate determination rests, not with the officers empowered to remove, but with the courts." State v. Mayor, 43 La. Ann. 106, 107, 8 South. 893.

The questions with which we are at present concerned are: What was the charge preferred against the relator? Was he informed of it? Was it sufficient, if proved, to justify his expulsion? Was he afforded the opportunity to be heard to which he was entitled?

The charge of which he received notice was embodied in the resolution of October 29th, which reads: "Be it moved that in view of the statement made on the floor of this council at this meeting by Councilman McMahon, that he does not consider that he has committed any offense against the dignity of the council, or any member thereof, that should cause him to apologize, that the council demands that Councilman McMahon shall substantiate the charges made by him, or

apologize before this body at its next meeting, and, in default thereof, to take this as notice, under the city charter, to answer why he should not be expelled from this body." The resolution of expulsion reads as follows: "That Councilman P. J. McMahon having defamed the good name of the council by uttering and circulating slanderous charges against certain members of that body, whose names he has not given, and having failed either to substantiate his assertions, or to express regret or retraction therefor, although given ample notice, and whose conduct in the premises is deemed a reproach and a stigma on the council, through which he has forfeited the confidence of this body, be it moved that said Councilman P. J. McMahon be, and he is hereby, expelled from the city council of New Orleans." It is not easy, in the light of what has transpired, or in any light, to determine the exact nature of the charge intended to be preferred by the first of these resolutions. And this emphasizes the propriety of the rule which requires that such charges shall be stated plainly, if not with technical precision. From the proceedings which took place at the time, a portion of which we have reproduced, it appears that the relator denied that he had ever made the statements which were considered as constituting his offense to any one except the mayor, and perhaps a brother member of the council, and to them under the seal of secrecy; and it also appears that it was the opinion of some, if not all, the members of the council by whom the resolution was adopted, that for him to have repeated to the mayor or to another member a charge which had come to his ears affecting the honesty of the council as a body, or of its members individually, was an offense worthy of expulsion, unless he stood prepared to substantiate such charge, or to apologize for having so repeated it. It is impossible, therefore, either from the language of the resolution, or from the evidence in the record, to determine whether the statements which the relator was called upon to substantiate or apologize for, under penalty of expulsion, were those which, on information received, he had made to the mayor, or whether they were statements which it was the purpose of the resolution to charge him with having circulated in public. In so far as his communication was confined to the mayor, it was privileged, and did not constitute the "uttering or circulating of slanderous charges," etc., for which, by the resolution of November 8th, he was expelled, since he was a member of the council, and had the right, in his own interest, and in the interest of the government, of which the council and the mayor formed part, to bring to the knowledge of the latter any rumor affecting the reputation of that government or its members of which he may have been informed. Upon the other hand, if it was the purpose of the resolution to charge that he had given public circulation to slanderous

rumors, there ought to have been some sort of specification, though even then the proposition that one member of a municipal council will be expelled because he has slandered or libeled another member is not supported by authority. In fact, it is said, by Mr. Dillon to have been held in most cases that insulting language or libel by one member of such body to or upon another is to be punished by law, and not by the corporation (1 Dill. Mun. Corp. 252, note 1), and by Mr. Thompson that "an analysis of the cases shows a strong disinclination on the part of the courts to hold the speaking of slanderous words as a ground of amotion" (1 Thomp. Corp. 810).

Beyond this, it appears in the instant case that the proceedings against the relator were conducted with the aid of one of the city's legal advisers, there present, and by a member of the council who is also a member of the bar, and that the request that the relator should be allowed the assistance of an attorney was ignored, and in effect denied. That, as a matter of fact, the relator was wholly unprepared for a trial on the merits, and that he was wholly incompetent to cope with the professional ability arrayed against him, is abundantly manifest. We infer that the exceptions offered by him were prepared by legal advice, and this was, no doubt, done with the expectation that, whether they were sustained or overruled, another day would be fixed for the hearing on the merits. When, therefore, he had offered them, and they were overruled, and the council ordered that the trial should proceed, he found himself without advice or witnesses, and practically helpless; and, in view of his application for relief, we do not think that he should be held to have waived his rights. There is no doubt that a good deal had taken place to arouse the just indignation of the council, and believing, as the members did, that the proceedings against the relator were regular, and that, in any aspect of the case, they had the right to expel him, it is fair to say that they acted not only without prejudice or passion, but with forbearance, since they endeavored to persuade the relator to accord that which they believed they had the right to demand. For the reasons which have been stated, however, our conclusion is that the relator was not sufficiently informed of the charge against him, and that he was not afforded the opportunity for defense to which he was entitled.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the relator, and against the respondents, the city council of New Orleans, and the members thereof, ordering and commanding said respondents to repeal and annul the resolution whereby relator was expelled from said city council, and to restore him to membership, and to the full discharge of his functions as

a member. It is further ordered that respondents pay all costs.

BLANCHARD, J., took no part, being absent.

(107 La.)

RICHARD v. CYPREMORT DRAINAGE DIST. (No. 14,195.)

(Supreme Court of Louisiana. Dec. 16, 1901.)

DRAINAGE DISTRICTS—REORGANIZATION—ISSUE OF BONDS—LIMITS OF TAXING DISTRICT—OPENING NEW DRAINS—POLICE JURY—BOUNDARIES—CERTAINTY.

1. Drainage districts established under laws existing at the time of the passage of Act No. 12 of 1900 cannot take advantage of the act without first reorganizing under its provisions.

2. Drainage districts established under laws in existence at the time of the adoption of article 281 of the constitution may take advantage of the provisions of this article without reorganizing under Act No. 12 of 1900.

3. Drainage districts organized under act No. 37 of 1894 may levy the tax and issue the bonds authorized by article 281 of the constitution without having recourse to the provision of Act No. 12 of 1900, passed for the purpose of carrying said article 281 into operation; that is to say, such districts may levy said tax and issue said bonds under the combined provisions of said Act No. 37 and said article 281, and irrespective of the said enabling act.

4. The limits of a taxing district must be fixed with certainty, especially where such district is authorized to impose a property tax, and still more especially where such tax must be voted for. Uncertainty in respect to the limits of such a district invalidates its organization, and, as a consequence, all taxes it may propose to levy, and all bonds it may propose to issue. Any taxpayer of the district may urge such invalidity in resistance of the tax or in prevention of the issuance of the bonds.

5. Drainage districts organized under Act No. 37 of 1894 cannot cut or open new drains without consulting the taxpayers of the district.

On Rehearing.

1. The police jury has the power to divide the parish into drainage districts.

2. Boundaries given by this body in its ordinance are set out with certainty enough to enable a surveyor properly to trace the lines.

3. The southern boundary was not specially contested. It is sustained as sufficient as set out in the ordinance of the police jury, and afterward by a map deposited at the court house, of which it is conceded the voters of the district had notice. The notice of election referred to this map, and the ballots also.

4. The canal which was to form part of the southern line was a canal proposed at the time that the ordinance was adopted, and its course was well known, and it, as well as the limits of the arable land, are indicia enough of the boundaries to prevent uncertainty as to the limits of the drainage district.

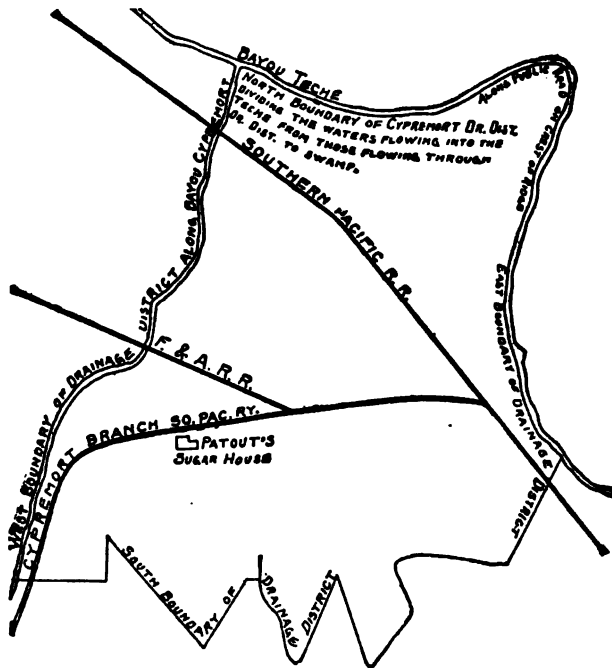
Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

Action by Arthur Richard against the Cypremort drainage district. Judgment for defendant, and plaintiff appeals. Action dismissed.

The following is the map referred to in the opinion:



D. Caffery & Son, for appellant. Mentz & Borah, for appellee.

PROVOSTY, J. The plaintiff, an owner of property within the limits of the defendant drainage district, enjoins said district from levying a tax and from issuing bonds.

The two first grounds of injunction may be stated together. They are to the effect that the tax which defendant has undertaken to levy and the bonds which defendant has undertaken to issue are those provided for in article 281 of the constitution, and that, this article not being self-operative, its provisions can be taken advantage of only by following the provisions of Act No. 12 of 1900, passed to make it operative, and that defendant has not even attempted to follow the provisions of said act. It is true that defendant has not pretended to follow the provisions of said enabling act, but we do not think it was necessary to do so. Act No. 37 of 1894, under which defendant is organized, contains provisions for the holding of such an election as is required by article 281, and the article itself, after conferring directly the authority to levy the tax and to issue the bonds, goes on to make provision on all essential points. Act No. 37 makes no mention of bonds, and in a certain sense, therefore, it makes no provision for holding an election to consult the taxpayers on the issuance of bonds; but article 281 evidently contemplates that the machinery for the issuance of the bonds shall be the same as for the imposition of the tax, and for the latter Act No. 37 does make provision.

The third ground of injunction is that the

limits of the district are not fixed with sufficient certainty. The necessity for fixing with certainty and precision the limits of a district empowered to levy a property tax, especially when the tax must be voted for, needs but to be mentioned to be recognized. Unless the limits are thus fixed, it is not possible to know with certainty what property is taxable, and what persons may participate in the elections, and certainty on these points is as essential as on the rate of the tax, or on any other feature of the taxing scheme. The authorities cited by plaintiff are conclusive to the effect that the limits of a municipality must be fixed with certainty and precision. Dill. Mun. Corp. (4th Ed.) § 182; 15 Am. & Eng. Enc. Law (1st Ed.) p. 1001; Cutting v. Stone, 7 Vt. 471. It is not true to say that because these authorities have reference to municipalities they are not applicable. The reason why the limits of a municipality must be fixed with certainty is that a municipality is called upon to exercise the governmental powers of taxation and police; and of these two powers the one most liable to abuse, and most needing to be hedged in by metes and bounds, is the very one that defendant is empowered to exercise, namely, that of taxation. The authorities, therefore, apply with full force to defendant. The ordinance fixing the limits of the defendant drainage district reads as follows: "The said district to embrace and comprise that part of the parish of St. Mary described as follows, to wit: North by a line on the south side of Bayou Teche, located on the summit of the ridge which divides the waters that flow into the Teche from those that flow back from the various

small sloughs to the swamp on the south; east by a line on the east side of Bayou Choupique (not Yokely), situated on the summit of the ridge which divides the waters that flow into Bayou Choupique from those that flow into Bayou Yokely; south by the proposed canal itself, or, where the canal does not extend, by the limit of the arable lands; west by a line on the east side of Bayou Cypremort on the summit of the ridge which divides the waters that flow into Bayou Cypremort from those that flow back through the various small sloughs to the swamp on the south. These lines are to be drawn so as to comprise all the lands whose waters will naturally flow into the proposed canal, and no other. The approximate location of the canal will be from a point in Bayou Choupique near Sabin Rodriguez's plantation running in a westerly direction through the marsh and swamp, connecting with all the slough and drainage ditches from the high lands on the north, until what is known as the Bodin Canal on the west boundary of L. P. Patout's property is reached. Then on some point on this canal, to be determined later on, an outlet will be cut into the most feasible one of the several marsh bayous which lead to the Gulf. At the point where the canal crosses the right of way for water left open by L. P. Patout, a branch canal is proposed to be dug in a northerly direction, crossing the Cypremort Branch of the Southern Pacific Railway, and extending across the public road at Arnold's Lane, and leading into the low land north of the road." Under the maxim, "*Id certum est quod certum reddi potest*," the north, the east, and the west boundaries of the district may be held to be fixed with sufficient certainty by this ordinance. We have to assume that the ridges in question are continuous, and that the location of the line of their summit is a matter of mere engineering skill. But the southern boundary is fixed neither by reference to landmarks nor by the adoption of a line such as would need only to be located by a civil engineer. It is stated that the line is "to be drawn," and that its starting point shall be "near Sabin Rodriguez's plantation," and that its course shall run in a westerly direction until the canal on the west boundary of L. P. Patout's plantation is reached, and that the line in the parts not thus marked shall be along the limit of the arable lands. That this prescription of limits is too vague is perfectly plain. The discretion confided to the police jury for the fixing of this boundary has to be exercised by the police jury itself, and cannot be delegated by it to some other functionary. This is elementary.

Defendant contends that plaintiff has no interest in raising this question of the indefiniteness of the boundary, because his land is admitted to be within the district. We cannot see the force of this contention.

Plaintiff is not trying to exclude his property from the district, but is objecting to an illegal tax. He has a direct interest. The proposed tax and the proposed bond issue, if illegal, operate as a cloud upon his title, which he has a right to remove. The fixing of this boundary will determine legally what property must share with his in the expenses of the district. It may determine also whether certain voters are inside or outside of the district, and have or not a right to participate in the elections, etc. For these reasons, and probably for others, he has an interest in contesting this question.

As to the fourth ground, all we need say is that a drainage district created under Act No. 37 of 1894 must conform to section 3 of that act in respect to the necessity of consulting the taxpayers when new drains are to be cut and opened. Act No. 12 of 1900 dispensed from that necessity only the districts organized under its own provisions. By its express terms (section 16) its provisions are not to affect drainage districts not organized under itself. The prescription pleaded by defendant is inapplicable to the irregularities on the score of which the injunction is maintained.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be set aside, and that the defendant herein be enjoined and prohibited from levying the tax and issuing the bonds provided for in the ordinance recited in the plaintiff's petition herein, and that the said defendant pay the costs of this suit.

On Rehearing.

(April 28, 1902.)

BREAUX, J. We, on the rehearing, take up for decision the point of disagreement between plaintiff and defendant regarding the southern boundary of the drainage district. All the issues heretofore were decided adversely to the plaintiff, except the one relating to the south line of the Cypremort drainage district. This line, on examination, does not seem uncertain to an extent that it cannot be traced and made sufficiently certain and enable interested parties to determine the extent of the lands in the district. A map before us greatly assists in our reconsideration of the question. It (this map), construed with the ordinance fixing the boundaries, warrants the conclusion that the south line is capable of being made certain. The statute has delegated to the police juries the power to divide their respective parishes into districts, and to fix their limits. In the exercise of that power the police jury in this case has designated the boundaries. The court, in the opinion handed down, found the north, east, and west boundaries sufficiently certain. With the assistance of the map, the southern boundary appears to us as certain as those first mentioned above. If the design-

nated ridges and other natural marks along the front and two sides are boundaries enough, the rear line has as many points to sustain it. This line must be drawn to include the lands, to quote from the ordinance, "whose waters will naturally flow in the proposed canal, and none others." This condition secures to each landowner the assurance that his land is to be drained by the projected canal. The landowner can compel the enforcement of the laws so as to share in the proportionate benefit of the drainage. If this condition is carried out in all the drainage districts, the law will not fail in its purpose, and great good will be accomplished. But this assurance to each owner of benefit to be received in return for the taxes paid of itself would not be a sufficient compliance, as there must be boundary lines in addition. The ordinance orders that the limits of the arable lands are to be taken as the basis for the south line where the canal does not extend. We notice that the rear line is anything but straight; a fact due, we infer, to the necessity of avoiding the very low marshes near the coast of the Gulf and of draining the higher lands. The principal drains, as we understand, are to be opened from the north to the south line. This line is to touch the western terminus of the drain, and where it does not extend as far south as needed to effect the drainage intended there it is to follow the limit of the arable lands. This is not as clear as it might have been, yet it can, we think, be located with reasonable certainty. There are other descriptions in the ordinance that are confusing. We have sought to find the meaning of the ordinance as relates to the south line by interpreting only the phrase "south by the proposed canal itself, or where the canal does not extend by the limits of the arable lands," and, construing it with the whole evidence, we have concluded not to set aside the ordinances as null and void.

The evidence shows that the voter knew of the map to which we have before referred. In the election notice, which was published for 30 days, it was stated that bonds were to be issued and the proceeds applied in constructing a system of drainage in the district to be delineated in accordance with the map which was circulated in the district and made known to the voters. The plaintiff's contention is that, although, as he concedes, the taxpayers, by voting the tax, countenanced the system of drainage advertised as before mentioned, and sanctioned, to some extent at least, the method followed by the use of a map to indicate lines, yet that this is not to be considered in the light of a ratification, for the statute contemplates form to be followed from which there should not be any material deviation; that the manner of opening the drains had not been matured, nor the location of the drain fixed, as required. As a condition precedent, it was necessary to fix the limits. We think this was done to

an extent sufficient to make all parties concerned aware of the lines, as well as of the location, of the drains; that this information was given by the ordinance, the advertisements, and the maps. Besides, the evidence discloses that it was impossible to describe the location and extent of the drain in a printed ballot, but that they were minutely described on a map, made by the secretary of the drainage board, who is a surveyor by profession. This is sufficient compliance with the law as relates to description of location of districts and drains. We are warranted in concluding that every voter was notified of the location of the canal, the drains to it, and of the limits of the district. In leaving the subject, we must say that, while there was not a map-like distinctness of trace in the ordinance in question of the police jury, there is sufficient description of the district to sustain the boundaries as described. We annex a skeleton sketch of the district for reference.

It is therefore ordered, adjudged, and decreed that plaintiff's action be, and the same is hereby, dismissed, the injunction dissolved, and plaintiff's demand rejected. It is further ordered, adjudged, and decreed that the legality of the defendant organization is hereby recognized, and that it was organized in accordance with the laws and the constitution, and that it has the right and authority conferred on drainage district organizations.

PROVOSTY, J., dissents, holding that the boundaries of a taxing district must be fixed by the ordinance itself creating the district.

(107 La.)

HUGHES et al. v. BIRNEY'S HEIRS et al.
(No. 13,973.)¹

(Supreme Court of Louisiana. March 17, 1902.)

SUBMERGENCE OF LAND—REAPPEARANCE—OWNERSHIP.

1. It is held that the doctrine of reappearance of land after submergence is the one that controls the case, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy, though having a bearing upon the same.

2. If, after submergence, the water disappears from the land, either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner.

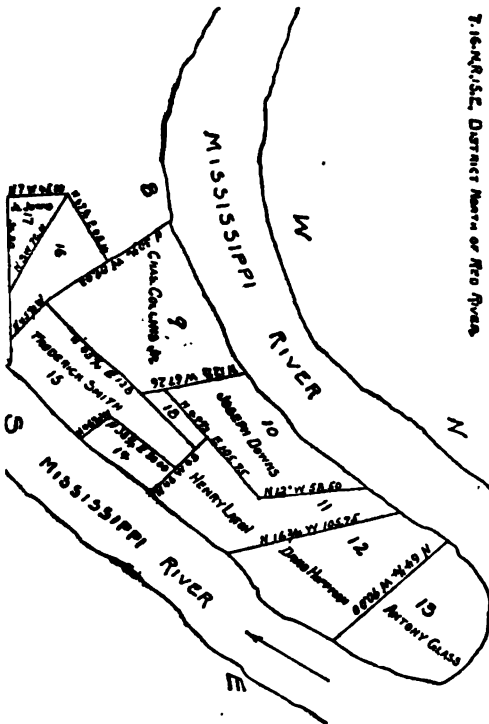
(Syllabus by the Court.)

Action by Mary E. Hughes and husband against the heirs of Birney and others. Judgment for defendants was affirmed by the court of appeals, and plaintiffs bring certiorari. Reversed.

Wade R. Young, for applicants. Dabney & McCabe, A. L. Slack, and William M. Murphy, for respondents.

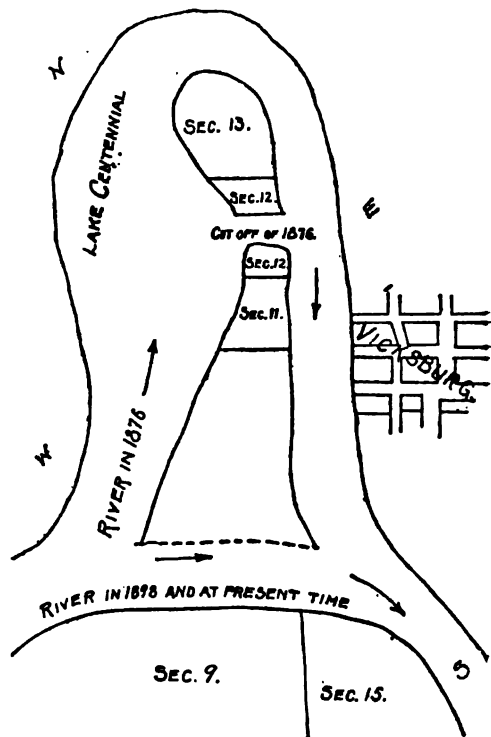
¹ Rehearing denied April 28, 1902.

BLANCHARD, J. What is known as "De Soto Point," on the Mississippi river, in Louisiana, was a long, narrow tongue of land opposite and across the river from the town of Vicksburg in Mississippi. The river flowed around this tongue in a serpentine course, making a great bend somewhat like an ox-bow, and coming down past Vicksburg, as shown by the appended sketch, taken from a government survey made in the early days.



This tongue of land was included in township 16 north, range 15 east, and was subdivided (presumably at the time of the government survey alluded to) into fractional sections as shown on the sketch. The authors of plaintiff's title appear to have acquired sections 10 and 12, containing, respectively, at the time of the survey, 502.25 and 459.50 acres, and the authors of defendant's title sections 11, 14, 15, and 18, containing, respectively, 524.14, 94.88, 453.69, and 38.25 acres. The river, by erosion, in the course of time, encroached upon the upper side of the point, gradually wearing it away, until, practically, all of section 10 had caved into the river and disappeared, and of sections 11 and 12 all had gone into the river except a narrow strip on the lower side of the point. There had been little or no change in the river line of sections 11 and 12 on the east or lower side of the point. This was the situation at the beginning of the year 1876. In the spring of that year the river broke through the narrow strip of land, and made for itself what is called a "cut-off." It broke through about the cen-

ter of section 12, as shown on the accompanying sketch, which roughly delineates De Soto Point as it appeared in 1876:



The river thus made for itself a new channel, and its old bed became "Lake Centennial." Having made this new channel, it proceeded to widen the same by caving away the land on the south or lower side of the cut-off. In this way all that remained of section 12 south of the cut-off, all of section 11 not previously lost by the erosion which had taken place on its upper side, probably all of fractional sections 14 and 18, and the northern portion of section 15, were washed away. That is to say, the surface of said tracts were washed away; the river went over them; they became submerged. The tendency of the river was southward. It did not remain in the channel at the cut-off, where it first went through the strip of land forming De Soto Point. It seemed to be making an effort to straighten itself at that locality. Pursuing this object, it wore away all the land south of the cut-off to or near the foot of the point, and then established its permanent channel across the lower portion of the point, as shown on the sketch last above. Thus was a large part of the center and lower portion of what had once been De Soto Point covered by the river, and what remained of that point above water was: (1) The extreme upper or northern part thereof, now became an island, and embracing fractional section 13 and a narrow strip of section 12 adjoining section 18; (2) the extreme lower or

southern part thereof, embracing section 9 and the southern two-thirds of section 15, which now had a front on the river on the west side thereof. The evidence shows it took the river approximately eight months from the time it made the cut-off to erode its way from that point to what was its position in 1898, when this suit was tried in the district court. Having established its permanent channel, as shown, across the lower part of De Soto Point, the river began to fill with its silt the stretch of water lying between its channel and the place where it had first broken through the strip of land. This was, in point of distance, about one mile. This filling or deposit continued until now from the cut-off to the present channel of the river there is a solid body of land raised above the water, susceptible in places of habitation and cultivation. That land is the subject of controversy in this suit. It embraces parts of the old bed of the river on both sides, and what was (by the government survey made in 1828) fractional sections 10 and 11, all of fractional section 12 except the strip of same left by the cut-off on the northeast adjoining section 13, fractional sections 14 and 18, and the upper part of section 15, except that these three fractional sections last mentioned, or parts of them, and perhaps part of what was once section 10, have supplied, in whole or in part, the present permanent channel of the river across the lower portion of the point, as shown on the sketch. The plaintiff claims the whole of this "made" or "raised" land, under article 509 of the Civil Code, on the ground that it is an alluvial formation, attached as accretions to that portion of section 12 on De Soto Point (now De Soto Island) which adjoins section 13, and which remained after the river broke its cut-off through there in 1876. Her suit is petitory in character. From an adverse judgment in the district court she prosecuted an appeal to the court of appeals, Second circuit, and, being cast there, has obtained a writ of review for its consideration here.

But our conclusions on the facts and the law of the case are no more favorable to her contentions than were those of our brothers of the other courts. We learn from the testimony that what is now the land in controversy manifested itself as a bar under the surface of the water in about a year after the cut-off occurred. The discovery was made by a Cincinnati boat running aground. This was the first intimation or evidence a bar was forming there. By 1870 it was showing up above low water, and continued to rise higher and higher until it became dry land, even when the river was full, from where the cut-off had been to the present channel. It thus appears that that portion of De Soto Point the surface of which the river cut away when it was forming a new channel for itself has been restored. The land—the same

fractional sections which defendants or their authors owned—is there now. It was a case of temporary submergence. The river went over it, and in doing so carried away its surface to about the usual depth of the river at that point. But the river did not remain upon the land. It settled itself in a permanent channel south of it, and then proceeded to uncover the land it had passed over. It did this by its deposits and withdrawal of its waters. Dry land at the same place as before the submergence is there now, susceptible of survey and identification as per the original lines of the government survey. Indeed, it was surveyed under order of court in this very case, and the old lines in part run out. Under these circumstances we hold that title to the fractional sections which defendants' authors acquired did not pass from defendants by reason of the river going over the land and occupying it for a time. Ownership of soil carries with it the ownership of all that is directly above and under it. Civ. Code, art. 505. The ground upon which the river rested temporarily in going over that portion of De Soto Point never ceased to belong to defendants the heirs of Birney, and the deposits placed upon it by the river in retiring from it, having been put upon land belonging to them, became likewise their property. The evidence shows that the deposits first began at the lower end of the land in dispute, near the present channel of the river, and gradually extended up towards section 12, or what remains of it, at the foot of what is now De Soto Island; that is to say, the highest part of the restored land is at the lower end, on the east side thereof, and it gets lower as it extends northward and westward. It is shown that at high stages of water in the river boats may circle or circumnavigate the land in controversy. The federal government dredged a canal from the present channel of the river, along the Mississippi shore, to enable boats to reach Vicksburg; and a depression or channel alongside of what remains of section 12, filled with water when the river is high, enables them to pass around the northern end of the restored land and back to the river again through what is called "West Pass" on the west side. At low stages of water, however, these passes around the northern and western sides of the restored land are dry. It would seem, therefore, that the land in controversy is hardly to be considered as accretions formed to the soil of that portion of section 12 left above where the cut-off had been. We are of the opinion that the doctrine of reappearance of land after submergence is the one that controls here, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy, though having a bearing upon the same. In Gould, Waters (2d Ed.) § 158, it is said: "If navigable waters owned by the state suddenly encroach upon private lands adjoining, and

there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property." The author cites many authorities in support of this proposition, among them Sir Mathew Hale's *De Jure Marais*; *Woolrych, Waters*, 22, 37; and *Mulry v. Norton*, 100 N. Y. 426, 3 N. E. 581 (found also in 53 Am. Rep. 206). In the case last referred to it was held that: "If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed, and assert his proprietorship, when the identity can be established by reasonable marks, or by situation, extent of quantity, and boundary on the firm land." See, also, *Angell, Tide Waters* (1st Ed.) 77; *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. The true solution of this dispute is to have the old lines of sections 10, 11, 12, 14, 15, and 18 run out as near as can be on and over the restored land, and let plaintiff Mrs. Hughes and the defendants heirs of Birney take such land as may be found within the limits of the sections owned by them respectively.

It is therefore ordered that the judgment of the district court and that of the court of appeals be set aside, and it is now adjudged and decreed that this case be remanded to the district court in and for the parish of Madison for further proceedings according to the views herein set forth and the law; costs of all the courts up to this time to be borne by plaintiff; subsequent costs relating to the survey and division of the land to be borne by plaintiff and the heirs of Birney equally.

(107 La.)

CANE v. HERNDON. (No. 14,131.)¹
(Supreme Court of Louisiana. March 17, 1902.)

TAX DEED—RECITALS—VALIDITY—SALE—PRESCRIPTION.

1. Under article 210 of the constitution of 1879, and Act No. 85 of 1888, it was not obligatory upon the tax collector to recite in his tax deed the fact that, before offering the property as a whole, he had offered the least quantity that any bidder would buy for the taxes, interest, and costs due thereon, and, if it be a fact that such previous offering was made, the tax purchaser should be permitted to prove it by evidence aliunde, unless to do so would be to contradict the positive recitals of the deed.

2. Where the tax deed, in such case, is susceptible of interpretation, the presumption established by the constitution in favor of its *prima facie* validity extends to the meaning of the language used, and it will be presumed, *prima facie*, that, of two possible meanings,

that meaning was intended agreeably to which the deed may be valid rather than that which must render it void.

3. Where two or more vacant lots, of the same size and value, in a city or town, are assessed together, for a lump sum, the constitutional requirements as to offering the "least quantity" may be complied with either by offering one of the lots or by asking bidders to compete by stating and designating the least quantity that they may be willing to buy for the taxes, interest, and costs due on the whole.

4. The failure of the collector to offer the least quantity before selling the whole property affects the title with a vice for which it may be annulled in an action brought within the legal delay, but which is not so radical as to protect the owner against the prescription denounced by section 66 of Act No. 85 of 1888, or section 5 of Act No. 105 of 1874.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Laud, Judge.

Action by M. D. C. Cane against E. B. Herndon. Judgment for defendant, and plaintiff appeals. Affirmed.

David Thompson Land and Henry Hunsicker, for appellant. Alexander & Wilkin son, for appellee.

MONROE, J. Plaintiff alleges that she owns lots 14 and 15, in square No. 54, in the city of Shreveport; that the defendant is in possession thereof, claiming under a tax title; and that said title is void for the reasons that the deed from the tax collector shows upon its face: (1) That the least quantity of the property which any bidder would buy was not offered, but that the whole was sold in block; and (2) that said property was not sold for the amount of the taxes, interest, and costs. It is also alleged that the defendant is a possessor in bad faith, and there is a prayer for judgment, decreeing his title void, and condemning him for rents and revenues, etc. The defendant pleads the prescription of one, two, five, and ten years, affirms the validity of his title, and alleges that he has been in open, peaceable, and uninterrupted possession thereunder since January 11, 1889. He further alleges that in December, 1886, the said property was offered for sale by the sheriff under a judgment and writ of fieri facias against the plaintiff for over \$40,000, and was adjudicated to him for \$550, and that said amount was then and there paid by him, and credited on said judgment, and that plaintiff is estopped to assert the claim here set up by reason of the fact that she received the benefit of said payment, and of the further fact that she has stood by for twelve years or more without asserting said claim, during which time large judgments standing against her have become prescribed, and respondent has been in possession of, and has paid the taxes on, the property in question. He prays that the demand be rejected, but that, in the event of his eviction, he be granted judgment for said \$550, and for the taxes disbursed by

¹ Rehearing denied April 22, 1902.

him, with interest, etc. The evidence fails to show that the defendant acquired any title by virtue of the adjudication of the sheriff on December 4, 1886, as it is admitted that there was no procès verbal of adjudication, and no deed by the sheriff. It also fails to show that the amount paid by the defendant was credited on any judgment or fl. fa. against the plaintiff, that it inured to her benefit, or that she was ever made aware that the property in question had been adjudicated to the defendant. The defendant and the then sheriff (who has been out of office for several years) testified orally (over the objection of the plaintiff's counsel) to the fact of the adjudication and to the amount. The defendant testified that he had subsequently paid said amount to the minors, plaintiffs in the writ, through their tutor, and the account furnished by the tutor to his wards was introduced (also over the objection of plaintiff's counsel) for the purpose of showing that the tutor had charged himself with said sum. We agree with the judge a quo that the oral testimony was admissible as showing that the defendant had bid a certain amount for the lots in question, and that he had paid said amount to the tutor; but we do not think that the account furnished by the tutor, who was not put on the stand, was admissible as against the plaintiff, who was not a party thereto, and was afforded no opportunity to cross-examine its author. We therefore dismiss the matter of the sheriff's sale, of December 4, 1886, and proceed to the consideration of the tax deed of January 11, 1889.

Article 210 of the constitution of 1879 reads, in part, as follows: "The collector shall, without suit, and after giving notice to the delinquent in the manner to be provided by law (which shall not be by publication—except in the cases of unknown owner) advertise for sale the property on which the taxes are due in the manner provided for judicial sales, and, on the day of sale, he shall sell such portion of the property as the debtor shall point out, and, in case the debtor shall not point out sufficient property, the collector shall, at once and without further delay, sell the least quantity of property which any bidder will buy for the amount of the taxes, interest, and costs. * * * All deeds of sale made, or that shall be made, by collectors of taxes shall be received in evidence by the courts as prima facie valid sales." The act of 1888, No. 85, under the authority of which the sale in question was made (section 63) provides: "That each state tax collector * * * shall execute and sign, in person or by deputy, in the name of the state of Louisiana, a deed of sale to the purchaser of any real estate sold for taxes, in which he shall relate, in substance, a brief history of the proceedings had; shall describe the property, state the amount of the taxes,

interest and costs, and the bid made for said property, and the payment made to him in cash, and shall sell said property to the purchaser with the right to be placed in actual possession thereof," etc. The deed under which the defendant claims reads: "State of Louisiana, parish of Caddo. Be it known that this day, before me * * * came and appeared John Lake * * * collector of state and parish taxes for said parish, acting herein under and by virtue of the authority vested in him by the constitution and laws * * * and in the name of the state of Louisiana, who declares that he does, by these presents, sell, convey, and deliver unto E. B. Herndon the following-described property assessed to M. D. C. Cane upon the tableau of taxes in and for said parish of Caddo for the year 1888, to wit: Lots 14 & 15 in block 54, city of Shreveport. The said property was advertised in the Shreveport Democrat, a newspaper published in said parish, from the 29th day of April to the first day of June, 1889, making full thirty clear days from the date of the first insertion to the day of sale, announcing said sale to take place at the front door of the civil district court house of said parish within the legal hours of sale on the 1st day of June, 1889. When on said sale day, between said legal hours of sale, and at said court house door, after first having read the advertisement announcing the amount of taxes, interest, and costs due on said property for the year 1888, proceeded to offer the said described property for sale, for cash, without appraisement, in legal tender money of the United States, to pay and satisfy said taxes, interest, and costs, when, at said offering, the said E. B. Herndon, having bid the sum of nineteen and $\frac{95}{100}$ dollars for said property, became the purchaser thereof at that price, subject to redemption, as provided by law. This sale is made for the consideration of the sum of nineteen and $\frac{95}{100}$ dollars, cash in hand paid, the receipt of which is hereby acknowledged. The said sum being for taxes \$14.70, interest \$—, advertising \$—, and costs \$5.25, making said sum of nineteen and $\frac{95}{100}$ dollars." This act bears date June 11, 1889, and was recorded on the same day. It is not suggested that there was any defect in the assessment, or that the plaintiff did not receive notice of the intended sale. The allegations are that the tax deed shows on its face that the requirements of the constitution were not complied with, in that it shows that the property was offered in block, without there having first been offered the least quantity that any bidder would buy for the amount of the taxes, interest, and costs, and that it also shows that it was not sold for the amount of the taxes, interest, and costs. The ground of attack last mentioned is predicated upon the idea that the recital in the deed—"the said sum being for taxes \$14.70, interest \$—, adver-

tising \$——, and costs \$5.25, making said sum of \$19.95"—is to be construed as meaning that the collector sold the property for \$14.70 of taxes, and \$5.25 of costs, and that he received nothing in the way of interest. We do not so interpret the language used. Neither the constitution nor the statute requires that the different items of taxes, interest, and costs be specified in the deed; and whilst the collector has specified the amount of the tax separately, we understand him to have aggregated the items of advertising, interest, and costs in one amount. This becomes obvious if the blanks which are left in the deed, as prepared, but which were not filled, be omitted, thus: "The said sum being for taxes \$14.70 interest, advertising and costs \$5.25, making said sum of \$19.95." No attempt was made, though the ex-collector was on the stand as a witness, to show that the amount for which the property was sold did not include all taxes, interest, and costs due, and we have no reason to assume that the collector failed to discharge his duty in that respect.

Considering the remaining grounds of attack relied on by plaintiff, in connection with the plea of prescription which has been interposed, the questions suggested are: (1) Does it appear affirmatively, from the recitals of the tax deed, that the collector offered the property in block without having previously offered the least quantity that any bidder would buy for the amount of the taxes, interest, and costs? (2) Is it competent to show, by proof aliunde quam the deed, that such previous offering was made? (3) If it be held that such proof cannot be received, or, being received, that it falls of its purpose, and that, as a matter of fact, the collector offered the property in no other manner than in block, is the resulting defect in the title of such a character as to deprive the holder of the benefit of the prescription on which he relies? The judge of the district court reached the conclusion that the deed does not show upon its face that the collector failed, before selling the property in block, to make the effort required by the constitution to sell the least portion that any bidder would buy for the amount of the taxes, etc., and that it was competent for the defendant to prove, by oral testimony, that such effort was made without success, and that, even though the collector had failed to offer the property otherwise than in block, the resulting defect would not be so radical as to place the title beyond the protection of the prescription invoked. From his very able opinion we make the following excerpts: "Act 85 of 1888, in section 63, provides that the tax collector, in his deed, 'shall relate, in substance, a brief history of the proceedings had, shall describe the property, state the amount of the taxes, interest and costs and the bid made for said property and the payment made to him, in cash, and shall sell said property to the purchaser,' etc. Section 66 of the same act pro-

vides, 'All actions to annul tax sales for any irregularities or informalities of whatever nature shall be prescribed by two years from the day the tax collector's deed is recorded.' This act requires certain specific recitals in the tax deed, but as to all other formalities 'a brief history of the proceedings.' Does the failure to mention in the 'brief history of the proceedings' any one of the various proceedings required of the tax collector by the revenue law of the state render his deed absolutely null and void on its face? This question is answered by article 210 of the constitution of 1879, in the provision making all tax deeds *prima facie* evidence of valid sales. * * * Assuming that the tax deed shows a sale in block, and that evidence is not admissible to show that the tax collector first offered the least quantity that any purchaser would buy, the question arises as to the nature of such defect or irregularity in the proceedings. Is it a nullity or defect that is so absolute and radical that it cannot be cured by any of the prescriptions pleaded? That such a defect is a ground of nullity is conceded, and is shown by the following adjudged cases, viz.: *Norres v. Hays*, 44 La. Ann. 907, 11 South. 462; *Improvement Co. v. Succession of Fasnacht*, 47 La. Ann. 1294, 17 South. 800; *Bristol v. Murff*, 49 La. Ann. 357, 21 South. 519. These were suits to annul tax sales. Prescription was not pleaded, and the nature of the nullity, whether relative or absolute, was not discussed. The question is therefore *res nova* in our jurisprudence." Our learned Brother then proceeds to cite authority to the effect that "the validity of tax sales is to be tested under the same principles as judicial sales"; that "irregularities and defects, growing out of any judicial sale, which may be cured by motion, include any informality in the order, decree, or judgment of the court under which the sale was made, or any irregularity in the appraisal, or advertisement, in time or manner of sale, or any other defect whatsoever," save want of citation, and that such irregularities and defects in tax sales are cured by motion or prescription, and to the further effect that notwithstanding the jurisprudence, which he recognizes, holding that the prescription of three and five years does not apply to cases in which there is want of notice, radical defect in the assessment, or no law authorizing the sale, it has not been held, since the decision in *Barrow v. Wilson*, that such prescription does not bar an action to annul a tax sale "on account of informalities, irregularities, or illegalities, connected with the sale." And he concludes that the present action is therefore barred by the prescription of three and five years.

It is certainly true that neither the constitution of 1879 nor the statute under which the sale in question was made required, as a condition precedent to the validity of the title resulting from such sale, that the deed should specifically recite that, before offering

the property in block, the collector had offered the least quantity that any bidder would buy for the taxes, interest, and costs. If, therefore, as a matter of fact, the collector first offered the least quantity, the only thing of which the plaintiff could complain would be that in relating, "in substance, a brief history of the proceedings," he had omitted to mention such offer, and the complaint would be entitled to no consideration, for the double reason that such mention is not required and that its omission could work no injury. The plaintiff, however, complains that, as a matter of fact, the least quantity was not offered, and it is said that the recital in the deed is conclusive to that effect, and cannot be contradicted by the oral testimony of the defendant, or of the collector, whose term of office has expired. The recital in question reads: "When, on said sale day * * * after first having read the advertisement, announcing the amount of the taxes, interest, and costs due on said property for the year 1888, proceeded to offer said described property for sale for cash, without appraisement * * * at said offering, the said E. B. Herndon, having bid the sum of \$19.95, * * * became the purchaser," etc. It is true that there is no affirmative statement in this recital to the effect that the least quantity of the property that any bidder would buy for the taxes, interest, and costs had been offered, before the offer of the whole. And it is equally true that there is no statement that the debtor had failed to point out the property to be seized, though it is only in that event, by the express terms of the constitution, that the collector is authorized and required to sell "the least quantity," etc. Upon the other hand, the statement as made, and the fact, the nonexistence of which the plaintiff alleges, and the existence of which the defendant asserts and offers to prove, that the whole property was offered only after the offering of such least quantity, may very well stand together, so that the effect of the testimony to which the plaintiff objects is not to contradict the recitals of the deed, but merely to show that the collector took certain steps, which were required to be taken, but which do not appear, and which are not required to appear, from those recitals. It is to be remembered, in this connection, that, besides those provisions of article 210 of the constitution of 1879, upon which the plaintiff relies, there is the further provision, that "all deeds of sale made, or that may be made by collectors of taxes shall be received in evidence by the courts as prima facie valid sales."

The prima facie presumption, therefore, in the case of a tax sale which is open to construction, is that the meaning intended by the language used is such as would give effect to the deed, rather than render it void upon its face. And it is for the attacking party to show that such a construction is inadmissible, or is unsupported by fact.

This has not been done in the instant case, but, on the contrary, the testimony which was objected to was offered by the defendant in support of, and sustains, a construction of his deed of which it is fairly susceptible, and which gives validity to his title. And we are of opinion that the testimony was properly admitted. Nor do we think that this view conflicts with the ruling in *Norres v. Hays*, 44 La. Ann. 912, 11 South. 462, and *Bristol v. Murff*, 49 La. Ann. 357, 21 South. 519, since in neither of those cases was there any attempt to show that the collector offered the "least quantity," etc., before offering the whole property, and it may be assumed that the recitals in the deeds then before the court, though similar to those upon which the present defendant relies, were intended to mean, and, for that reason, were accepted as meaning, that no preliminary offer of the least quantity of property was made. It does not follow, however, that those recitals were susceptible of no other interpretation, or that such meaning would have been attributed to them if it had been shown that it did not accord with the fact. There is some difference between the testimony of the defendant and that of the ex-collector as to the manner in which the offer of the least quantity of the property in question was made; the defendant testifying that one of the two lots was offered, and the collector that the offer was made in his "usual manner," which was to ask, "What is the least amount of this property that any bidder will take and pay the taxes thereon?" (including interest and costs). If there was an offer to take less than the whole, he would then ask, "What specified part?" If, on the other hand, there was no offer to take less than the whole, he would ask, "Who will take the whole of this property and pay the taxes?" etc. And the sale would be made to the bidder who would be willing to pay the amount due in consideration of the adjudication to him of the least portion of the property, or of the whole, as the case might be. We are of opinion that, for the purposes of this case, in which there were two vacant lots, of the same size and value, assessed together, for a lump sum, either method of offering would have fulfilled the requirements of the law, the object of which was, and is, to prevent the sale, unnecessarily, of a number of town lots, or of a large tract, or tracts, of land in the country, the taxes upon which might be realized, in the one case, by the sale of one, the least valuable, lot, and in the other, by the sale of an inconsiderable portion of the land. Beyond all this, however, is the question: If the collector fails to offer "the least quantity of the property" before offering and selling the whole, is the resulting defect in the title of such a character as to deprive the tax purchaser of the benefit of the prescription which is here relied on? Article 3543 of the Code provides that "all

informalities connected with, or growing out of, any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons." Section 5 of Act No. 105 of 1874 reads, "Any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this state shall be prescribed by the lapse of three years from the date of such sale." The concluding paragraph of section 66 of Act No. 85 of 1888, being the statute under the authority of which the property in question was sold, declares that "all actions to annul tax sales for any irregularities or informalities of whatever nature shall be prescribed by two years from the day the tax collector's deed is recorded." The last section of this statute repeals "all those parts of laws, on the subject of levy, assessment and collection of state taxes, heretofore enacted, which are in conflict with the constitution of the state, or are inconsistent with, or superseded by, or contrary to, or in conflict with," its own provisions. The prescription of five years, established by the Code (from the date of the sale) against "informalities" in any public sale, are clearly inconsistent, as to the matter of time, with the prescription of two years (from the recording of the deed) against "irregularities or informalities" in "tax sales" established by the act of 1888, and we may, therefore, leave the article of the Code out of the question in this case.

The acts of 1874 and of 1888 may stand together, by holding that the latter applies merely to "irregularities and informalities" in tax titles, whilst the former is still in force as establishing the prescription of three years against more serious defects. In *Person v. O'Neal*, 32 La. Ann. 228, and *Lague v. Boagni*, Id. 912, it had been held, before the adoption of the act of 1888, that the prescription of three years, under the act of 1874, was inapplicable, in the one case, where property had been sold for taxes without notice to the owner, and, in the other, where the property had been assessed in the name of a person, not the owner, whilst the title of the owner was spread on the public records, the purchasers were shown to have been aware of the defects, and it did not appear that they were in possession. These cases were reviewed in *Barrow v. Wilson*, 39 La. Ann. 403, 2 South. 809, and the case of *Person v. O'Neal* was overruled, whilst the case of *Lague v. Boagni* was differentiated and practically sustained. It was also held that neither the prescription of three nor of five years applied to the right of action of a minor to annul a tax sale. In *Breaux v. Negrotto*, 48 La. Ann. 441, 9 South. 502, the court, in part, overruled *Barrow v. Wilson*, and returned to the doctrine, announced in the case of *Person v. O'Neal*,

that, "whatever defects in a tax sale may be cured by the lapse of three years, the want of personal notice to the owner, or his agent or curator, cannot be, because such notice is a condition precedent to the seizure, without which there could be no sale," and this doctrine has since been repeatedly affirmed. But the court has gone no farther, nor do we find any sufficient reason for doing so at this time. A law authorizing an assessment and sale of property for taxes, an assessment under the authority of, and as required by, such law, and the notice to the owner, as required by the constitution, of the intention to sell, were regarded as conditions precedent, without the existence or observance of which it was considered that a proceeding leading to the sale of property for taxes was of no binding force or effect, and the title resulting therefrom, in contemplation of law, no title at all; and hence incapable of being validated by prescription. If, however, property is legally assessed, and the owner receives notice of the intention of the collector to sell it for the taxes due, it may reasonably be presumed that he will avail himself of the opportunity thus offered to protect his rights by insisting that all the conditions, as to the manner of the sale, and especially those which are imposed for his benefit, shall be strictly observed. If he stands by and allows the property to be sold in disregard of such conditions, there can be no reason, unless it be that the state is without power in the premises, why the prescription established by law should not protect the purchaser in his title. As to the policy of such legislation and the power of the state, all writers and jurists are agreed. "The policy of such laws is unquestionable, and the power to enact them is undisputed." *Cooley, Tax'n*, 376. "Public policy demands the enactment of such laws, and they are universally sanctioned by the practice of nations and the consent of mankind." *Blackw. Tax Titles*, 643. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation over all persons and property within its jurisdiction." *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177.

Whatever merit, therefore, there might be in the position of the plaintiff's counsel, and it has certainly been most strongly presented, that the deed under which defendant holds is not subject to interpretation or explanation, we should still be obliged to hold against his client on the subject of prescription. Conceding that a tax sale may be annulled in an action brought within the time prescribed by law, because of the non-observance of the legal requirements as to the offering of less than the whole before selling the whole property, it nevertheless

remains that such action may be barred by prescription; the only question to be determined being whether the law was intended to apply to it. For reasons which were considered sufficient, it has been held that the prescription established by the law of this state was inapplicable in certain cases, where to have held otherwise would have been, in effect, to have deprived the owners of their property under circumstances which it was not believed were within the contemplation of those laws. But the policy of the state has been more emphatically declared in the present constitution, and in the statute adopted pursuant thereto, and, whilst this recently enacted law does not control in the case now before us, it does not, upon the other hand, encourage the courts to go farther than they have done, on behalf of the taxpayer, in the matter of construing the statutes of prescription.

Judgment affirmed.

(107 La.)

W. T. ADAMS MACH. CO. v. NEWMAN.
(No. 13,918.)

(Supreme Court of Louisiana. April 14, 1902.)
CONDITIONAL SALE—RIGHTS OF MORTGAGEE.

1. Where all the essential elements and conditions for an absolute sale are present, in a contract between parties, the effects flowing legally from that particular contract follow, whether the parties foresaw and intended them or not, and though they may refer to the contract as an agreement to sell, or as a conditional sale.

2. Where machinery has been sold to a planter, which he has immobilized by attaching it to his plantation, and the property to which the same was attached was permitted to be seized and sold without opposition of any kind in enforcement of a pre-existing mortgage, the seller cannot, after the sale, as against the purchaser, recover the machinery under a claim of ownership.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by the W. T. Adams Machine Company against Isadore Newman. Judgment for defendant, and plaintiff appeals. Affirmed.

Merrick & Lewis, for appellant. Olegg & Quintero, for appellee.

NICHOLLS, C. J. The plaintiffs, in their petition filed April 8, 1895, alleged themselves to be the owners of certain boilers, cotton gins, and other machinery which was then on a plantation in the parish of East Baton Rouge belonging to the defendant; that on July 10, 1891, they entered into a contract with W. S. Slaughter & Bro., by which they placed the said machinery in the possession of said Slaughter, with a suspensive condition of sale, under which the entire price should be paid for the said machinery; that

it was understood the title to the said machinery was to remain with petitioners until the said price was paid, as would more fully appear by the said contract, which they declared they annexed; that the defendant, being well aware that said property belonged to petitioners, received possession of the same nevertheless, took possession of the same, and maliciously and illegally refused to deliver the same to petitioners, although the same had been repeatedly demanded of them, claiming that the same belonged to him; that defendant had illegally and wrongfully held possession of said property for over a year; that the action of defendant in withholding the property was malicious, and for the purpose of causing petitioners an injury, and they were entitled to recover damages for the said malicious and illegal action. That they had been injured in the sum of \$850 by said malicious and illegal action, and they placed their damage, attorney's fees, the use of the machinery for one year, and the annoyance and vexation incident to and growing out of the wrongful action of the defendant, at \$500, and punitive damages at \$300. They prayed that defendant be ordered, adjudged, and decreed to deliver over the said machinery to them, or, upon failure so to do, to pay to them the price thereof, to wit, the sum of \$1,552.95, with interest from March 15, 1893, and for \$850 damages, with legal interest thereon. Plaintiffs annexed the following instrument to their petition: "W. S. Slaughter & Bro. Trust Deed to W. T. Adams Machine Co., Beneficiary. W. M. Ross, Trustee. State of Louisiana, County of East Baton Rouge. This indenture, made and entered into this the 10th day of July, A. D. 1891, by and between W. S. Slaughter and Joseph H. Slaughter, composing the firm of W. S. Slaughter & Bro., the parties of the first part, W. M. Ross, as trustee, party of the second part, W. T. Adams Machine Company, manufacturer, of the city of Corinth, county of Alcorn, in the state of Mississippi, of the third part, witnesseth: That the first party, for the consideration hereinafter stated, and the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to the said second party, his successor or successors and their assigns, all the right, title, claim, or interest of said party of the first part in and to the following property: [describing it.] * * * All the above-described machinery is located in the parish of East Baton Rouge and state of Louisiana, and is all the machinery of this description that is owned by or in the possession of the party of the first part. To have and to hold said property, together with all the appurtenances thereunto belonging, and all the improvements that may be afterwards attached or added thereunto; but this conveyance is made in trust, however, for the following purposes, to wit:

The said first party is justly indebted to the said third party in the sum of fifteen hundred and fifty-two and $\frac{85}{100}$ dollars, evidenced by our several promissory notes or contracts as follows, to wit: One for the sum of \$317.65 dollars, dated the 10th of July, A. D. 1891, and due and payable on the 15th day of September, 1891; one for the sum of \$617.65 dollars, dated the 10th day of July, A. D. 1891, and due and payable on the 1st day of January, 1892; one for the sum of \$617.65 dollars, dated the 10th day of July, 1891, and due and payable on the 1st day of September, A. D. 1892, which said notes were paraphrased, 'Ne varietur,' by B. J. Hummel, notary public, for identification herewith, with interest on each from date at the rate of 8 per cent. per annum until paid, and in each of which said notes it is specified, among other things, that the legal title to the said machinery for the purchase money of which said notes were given, and which is not waived hereby, was and is reserved in the said third party until full payment of all the said notes therefor, together with all the interest accrued thereon, and to more effectually secure and make certain the payments of the said promissory notes or contracts, as hereinabove described, this conveyance is executed. Now if the said first parties shall pay off and discharge said notes as they respectively fall due, together with all the interest accrued thereon, and the costs of executing and recording this conveyance, then the same shall be void and of no effect. But if default shall be made in the payment of said promissory notes or contracts, or either of them, or any part thereof of either of them, as they shall respectively and successively fall due, as hereinabove provided, then and in that event each and all of said notes, whether due or not according to tenor and effect thereof, shall be taken and considered as due, payable, and collectible from the date of such default. And the said second party, his successor or successors, shall, at the request of the said third party, his assigns or personal representatives, with or without first taking possession of the said property, and with or without having it present at day of sale, and after giving 5 days' notice of the time, place, and terms of sale by posting notices thereof in at least three public places in the county and state wherein said property is situated, proceed to sell the same to the highest and best bidder and purchasers for cash at the place named in such notice, and apply the proceeds arising therefrom—First, to the payment of preparing and recording this instrument; second, to the payment of two and one-half per cent. commissions thereon to said trustee or his successor, and the necessary expenses incurred by him in executing said trust, which shall also include reasonable attorneys' fees by him incurred; third, to the payment of the said promissory notes or indebtedness herein secured, and the overplus, if any, then to be

paid to the said first parties, or whoever may be entitled to the same; and in the event of a sale of said property by said trustee, he shall make as good and valid a title to the same as the first and third parties could now make. It is further understood and agreed between the parties hereto that the said first parties is to retain possession of said property until default in the payment of one or either of said notes, and that the said third party or assigns or personal representatives are hereby granted the right, power, and privilege, at any time, at their option, to appoint another trustee in the place of the said W. M. Ross to carry out and execute the trust, and to change the said trustee as often as the said third party may so desire, which appointment may be in writing, and exhibited at this said sale in the event of a sale thereof. And the said first parties hereby waive and relinquish all right of redemption, and consent that the purchaser, in the event of sale of said property, or any part thereof, take a perfect and indefeasible title in and to the same. In testimony whereof, the first parties hereunto set their hand and seal the day and year above written. [Signed] W. R. Ayres. [Seal.] J. R. Mathews. [Seal.] [Signed] W. S. Slaughter & Bro. [Seal.] This was recorded in East Baton Rouge in the Book of Mortgages on September 12, 1891. The notes referred to in this instrument, identical except as to date of payment, were as follows: Promissory notes annexed to commission offered in evidence by plaintiff, marked Exhibits "B" and "C," filed June 19, 1890. Exhibit B: "\$617.65. Corinth, Miss., July 10th, 1891. On the 1st day of September, 1892, we, or either of us, we promise to pay to W. T. Adams Machine Co., at their office in the city of Corinth, Alcorn Co., Miss., purchase money for [describing certain machinery], * * * contracted to be sold to, and now in possession of, the undersigned, the sum of six hundred and seventeen $\frac{85}{100}$ dollars, with interest thereon from date until paid at the rate of 8 per cent. per annum. It is understood and agreed that the title in and to said property shall remain in said W. T. Adams Machine Company until this note, with all the others, for the purchase money of said property, is paid. And the said W. T. Adams Machine Company, their agents, representatives, or assigns, if said sum is not paid at maturity, may either enforce a collection thereof by suit, or take possession of said property wherever found, as theirs, and in the latter event any and all sums previously paid on this or any note given for the purchase money of said property shall be taken as rental and payment for the use, wear, and tear thereof. And it is further agreed that if suit be brought to collect said sum an additional sum of 10 per cent. thereon shall be recovered as an attorney's fee thereof. [Signed] W. R. Ayres. [Seal.] [Signed] J. R. Mathews. [Seal.] [Signed] W. S. Slaughter & Bro.

[Seal.]” An exception of no cause of action filed by the defendant was referred to the merits.

Defendant answered, first pleading the general issue. Further answering, he averred that the property described in plaintiff's petition was an immovable by destination, and was attached to the plantation in the parish of East Baton Rouge. That he acquired the said property by purchase at a public sale made by the sheriff of East Baton Rouge, under process of court, on the — day of —, 189—. That he acquired the same free from mortgage or privilege in favor of any one, and more especially the plaintiff. That he was the true and lawful owner of the same. He prayed that plaintiffs' demand be rejected.

Plaintiffs filed a supplemental and amended petition, in which they reaffirmed all the allegations of the original petition. They averred that the notes referred to in the contract annexed to and made part of the original petition are two certain nonnegotiable promissory notes, dated Corinth, Miss., July 10, 1891, for \$617.65 each, and payable, respectively, on the 1st of January, 1891, and 1st of September, 1892, and bearing interest at 8 per cent. per annum from date. “Your petitioners further show that in said notes it was understood and agreed that the title to the machinery referred to in plaintiffs' original petition shall remain in the W. T. Adams Machine Co. until said notes, with all others for the purchase money of said property, are paid, and the said W. T. Adams Machine Company, their agents, legal representatives, or assigns, if said sum is not paid at maturity, may either enforce the collection thereof by suit, or take possession of said property wherever found as theirs, and in the latter event any and all sums previously paid on this or any other note given for the purchase money of said property shall be taken as rental and payment for the use and wear and tear thereof. And it is further agreed that if the suit be brought to collect said sum an additional sum of ten per cent. (10%) thereon shall be recovered as an attorney's fee therefor; of which will more fully and at large appear, by reference to the said notes annexed and made part of this petition for greater certainty. Your petitioners further show that said contract was recorded in the parish of East Baton Rouge, and that Isadore Newman, the defendant in this case, had notice of all the conditions annexed to this contract, and nevertheless maliciously and illegally took possession of petitioners' property, and openly refused to deliver same to your petitioners.” They prayed for citation, and for judgment as prayed for in their original petition.

Defendant excepted to this petition, for the reasons: (1) That the amended and supplemental petition changes the issues presented in the original petition, and delays

the trial of this cause. (2) That the original petition herein filed was a suit upon a contract or a suit sounding in damages, and that the exception of no cause of action has been cumulated with the merits, and that it is now too late for the plaintiff to change or attempt to change the issue and to bring suit upon said note or notes. (3) That the facts sought to be alleged in the amended and supplemental petition were known to the plaintiff and to his counsel, and, if true, could have been and should have been set up in the original petition. In view of the premises they prayed judgment on these exceptions, and that the amended and supplemental petition be rejected at plaintiff's costs; and, as in his original answer, prayed that the plaintiff's suit be dismissed at his costs. These exceptions were referred to the merits. The district court rendered judgment in favor of the defendant, and plaintiff appealed.

The evidence shows that the machinery involved in this litigation was placed in the possession of Slaughter & Bro., under their contract with plaintiffs, and was by them set up on their plantation in East Baton Rouge; that they paid the plaintiffs upon the price of this machinery \$300 on or about the 20th July, 1891, and \$322 on or about the 26th of September, 1891; that no other payments were made. The defendant, holding a mortgage on this plantation on which the machinery was, enforced the same by seizure and sale, and at the same, made in execution, became the adjudicatee. Upon the certificate of mortgages read at the sheriff's sale by the sheriff under the number 12 was recited: “A trust deed in favor of W. T. Adams Machine Company for \$1,552.95, evidenced by three promissory notes, all bearing interest at the rate of eight per cent. per annum from July 10, 1891, until paid, recorded September 12, 1891.” In the brief filed on behalf of the plaintiff it is said, “The sale was a conditional sale, and it was therein stipulated that the title to the machinery should remain in the vendor until the entire price was paid. A large part of the price was never paid, and the title never passed to Slaughter Bros.” Plaintiffs urge that the condition here spoken of was suspensive condition; that upon default of Slaughter & Bro. on the payments of the notes they were entitled to retake possession of the machinery, as being their property; and that defendant's interference with the exercise by them of this right was unwarranted and unjustified. They refer the court to various articles of the Civil Code touching conditional obligations (Civ. Code, arts. 2471, 2457, 2043, 2044) and conditional sales, and to the decision of this court in *Baldwin v. Sheriff*, reported in 47 La. Ann. 1468, 1469, 17 South. 883. They maintain that there is no immobilization of a movable which, belonging to one person, is attached to real estate by reason of the owner of the real estate at-

taching it to the immovable; that under a seizure and sale of the real estate with movable property attached to it, under such circumstances the title to the movable does not pass to the purchaser, as it would be the property of a third person, and therefore null (Civ. Code, art. 2452); that the owner of the movable has the right to claim it, with remuneration for its use, and damages if taken and retained improperly. They maintain that, even if title to the property passed to Slaughter & Bro., their vendor's privilege was not lost by the fact that the latter should have thought proper to annex the machinery to an immovable, and they would have the right to assert this privilege, such action to the contrary notwithstanding. The defendants differentiate the Baldwin Case from that now before the court. They say that in that case, though there had been a sale of the movable, the price being unpaid, the vendor had had recourse to judicial proceedings, and under an enforcement of the resolutive condition he had obtained a judgment contradictorily with his vendee, dissolving the sale, and that the appraiser therefore was before the court as the owner of the movable by decree of court; that in this case the plaintiffs had never sued Slaughter & Bro., nor are they parties to this suit, but that plaintiffs sue as absolute owners of the machinery, as if the contract with Slaughter had never been made, and as if the judicial sale of the plantation of Slaughter & Bro., to which the machinery was annexed, and at which sale the defendant bought the plantation, had never taken place. "The plaintiffs had not availed themselves of their right to sue for the dissolution of the contract, nor did they attempt to have the property upon which they might have had a privilege sold separately; but on the contrary, as against themselves, they had shown they had delivered the property with a dissolving condition to its debtor, and to be sold confusedly with the mass of the debtor's property. Having done this, they cannot claim even a vendor's privilege, and cannot set up a claim of ownership against a third person, because it has not itself caused to be declared by a court the effect of the dissolving condition, and has not placed itself in the position of such creditor, as is required by the Code." We have to dispose of the rights of parties as presented by the pleadings.

Plaintiffs claim the ownership of the machinery covered by the contract made by them with Slaughter & Bro. They say that contract evidenced a mere conditional sale,—a sale suspended by a condition; the condition being that the entire price should be paid before the title to the property should pass. Is that position sustained by the evidence? We think not. Comparison of their contract with Slaughter Bros. with that referred to by this court in *State ex rel. Bulkley v. Whited & Wheless*, 104 La. 125, 28

South. 922, and with that discussed in *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160, will show that the contract between themselves and Slaughter Bros. was evidently a present sale, intended to be and actually accompanied by possession on the part of the purchaser. It is true that the vendors desired to place their contract in such form and condition as would enable them to insist that it evidenced either an absolute sale or a conditional sale under a suspensive condition, as the requirements of their interests under differing circumstances might exact, but it is impossible for a contract at one and the same time to be a contract of entirely different and conflicting characteristics. Our Code says that all things that are not forbidden by law may legally become the subject of or the motive for contracts, but different agreements are governed by different rules adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider: (1) That which is the essence of the contract. For the want thereof there is either no contract at all or a contract of another description. Thus a price is essential to the contract of sale. If there be none, it is either no contract, or, if the consideration be other property, it is an exchange. (2) Things which, though not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce without destroying the contract or changing its description. Of this nature is warranty, which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect. (3) Accidental stipulations which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease are examples of accidental stipulations. What belongs to the essence and to the nature of each particular description of contract is determined by the law defining such contracts. Accidental stipulations depend on the will of the parties, regulated by the general rules applying to all contracts. Our Code recognizes conditional contracts; it recognizes a classification of conditions of "conditions precedent" and "conditions subsequent," "suspensive conditions" and "dissolving" or "resolutive" conditions, and it affixes to each class their appropriate legal effect. It recognizes (as we declared in the *Bulkley Case*) "promises of sale, conditional sales, and sales with earnest," also absolute present sales, with the dissolving condition implied. There was nothing standing in the way of the plaintiffs' making a conditional sale of the machinery referred to and fixing the conditions attached thereto, but it was beyond their power to make, in fact, a contract of

absolute sale of the machinery and withdraw from such sale the effects fixed and flowing from it by virtue of the law itself. We repeat here what we said in the Bulkley Case: "Parties are at liberty to make contracts so long as they are legal, and to agree upon accidental stipulations, but when they make a contract with fixed legal essentials they are powerless to control the legal effect of the contract itself. The contract being made, the law governs its results. *Coolley v. Broad*, 29 La. Ann. 347." What we have just said about "rights" extends to "remedies." In *Levicks v. Walker*, 15 La. Ann. 246, 77 Am. Dec. 187, this court said: "Parties regulate their own conduct by their stipulations, but they cannot prescribe rules of proceeding for public officers, nor demand that the courts of justice shall depart from the usual mode of enforcing their decrees." The plaintiffs do not claim this machinery as theirs by virtue of the operation in their favor of the resolatory or dissolving condition on a contract in which the title of the property—the object of the sale—passed first to the purchaser and was subsequently withdrawn by reason of non-payment of the price. Had they presented such a claim, they would have been met with the legal proposition that the dissolution of a contract for failure of parties to comply with engagements does not take place of right,—the party complaining of the breach had to either sue for the dissolution or ask for the same by way of an exception taken in a suit brought against himself. The condition which they invoke in their favor is not the "resolatory" condition, or "dissolving" condition, but the "suspensive" condition, which, if it existed, kept this machinery constantly, not only on paper, but in fact, in the ownership of the plaintiffs. That claim is not supported by the evidence. The contract they made is not such as they claim it to have been. With matters standing as they are, the requirements of the case do not call for any expression of opinion as to what rights or remedies they might have had, had they pursued a different course, nor as to whether they yet have any rights or remedies, and, if so, what they are or may be. The plaintiffs did not enjoin the sale of this machinery forming part of the plantation when it was sold in execution of defendant's mortgage, nor did they intervene or proceed by third opposition to safeguard their rights. They allowed the property to be sold as an entirety, and defendant to purchase it as such. We do not think it necessary to enter into any extended discussion of the legal points raised in this case. They will be found covered by the opinions rendered in the case of *Baldwin v. Sheriff*, 47 La. Ann. 1468, 17 South. 883; *Maginnis v. Oil Co.*, 47 La. Ann. 1489, 18 South. 459; *Scannell v. Beauvais*, 38 La. Ann. 217; *Walburn-Swenson Co. v. Darrell*, 49 La. Ann. 1044, 22 South. 310; *Hall v. Hawley*, 49 La.

Ann. 1047, 22 South. 205; and the authorities cited in those cases.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and it is hereby, affirmed.

(107 La.)

GRAY v. BOURGEOIS, Tax Collector.
(No. 14,284.)¹

(Supreme Court of Louisiana. Feb. 17, 1902.)

CONSTITUTIONAL LAW—LIMITATION OF ACTIONS—STATUTES—REPEAL—MUNICIPAL CORPORATIONS—SPECIAL ELECTION—ISSUE OF BONDS—SPECIAL TAX.

1. The general assembly has the constitutional right to fix a period beyond which actions attacking the legality and regularity of special elections held under the provisions of articles 281 and 232 of the constitution shall be barred.

2. Section 17 of Act No. 5 of 1890 has not been repealed by either Act No. 12 or Act No. 114 of 1900.

3. It is not necessary, at a special election held under articles 281 and 232 of the constitution, seeking to obtain from the property taxpayers of a town authority in municipal authorities to incur a debt for designated purposes and to secure payment of the same by the levy of a special tax, that the debt to be incurred for each particular purpose should be specially set out. Application of the tax funds in detail inside of the purposes for which they were authorized is left to be controlled by the discretion of the authorities.

4. Should the municipal authorities attempt to apply the special tax to the payment of debts created anterior to the authorization granted them, or for debts incurred for purposes not authorized by the constitution, the same may be prevented by the remedy of injunction.

5. Under authority granted by the taxpayers of a town to incur debt to the municipal authorities thereof, and to issue bonds to represent same, and to secure the debt and bonds by a special tax, the authorities may, without issuing bonds at all, create a debt for the purposes stated, and levy a special tax within the constitutional limit, if it be more advantageous and advisable to do so. The bond issue is authorized merely in aid of raising the money needed for the purposes stated.

6. When the property taxpayers of a town at a special election have authorized the town authorities to incur a debt of \$10,000 and interest, and authorized the levying of a special tax of 5 mills for 10 years on the valuation and assessment fixed by the constitution, the authorization is null and void in so far as the debt and interest authorized to be incurred exceeds the special tax which is authorized to be levied to pay the debt and interest. Each year's installment of debt and interest must correspond with that year's special tax. The authorization granted is not void in its entirety, but debts and interest incurred under it must be scaled or pruned down.

Monroe and Provosty, JJ., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

Action by Marie L. Gray against E. Bourgeois, tax collector. Judgment for plaintiff, and defendant appeals. Modified.

¹ Rehearing denied April 23, 1902.

Charles L. Wise (Foster, Milling, Godchaux & Sanders, of counsel), for appellant. Charles A. O'Neill, for appellee.

Statement of the Case.

NICHOLLS, C. J. The plaintiff alleged: That the defendant, tax collector of the town of Morgan City, had seized and advertised for sale certain described property of hers in that town in enforcement of a certain illegal tax of five mills on the dollar, assessed by the municipal corporation of Morgan City in 1901. That said tax was illegal, unconstitutional, null and void, and the manner of attempting to enforce the sale was illegal, informal, and irregular, and she was entitled to a writ of injunction restraining and prohibiting said collector from collecting said tax for this: (1) That the said special tax is pretended to have been levied according to the provisions of article 281 of the constitution of this state, and the notice of election provided for in that article was not published for 30 days, as required; that the ordinance calling said election was only adopted on November 16, 1900, the first publication was made on November 24, 1900, and the last publication on November 15, 1900; and, even if the said publication had been made on November 17th,—i. e., the first issue of the paper after the ordinance was adopted,—30 clear days would not have elapsed before the election. (2) That the said tax is pretended to have been levied to pay for certain bonds in principal and interest, and the said town of Morgan City has never issued nor negotiated said bonds with interest, according to the assessed valuation of the property in said town. (3) That the notice of said election and the ordinance calling for the same do not state the amount to be devoted to any one object, and state various objects confusedly. (4) That at least one of the objects stated in the notice of election and the ordinance calling for same is illegal and unconstitutional, it being stated therein that it is for the purchase of a steam fire engine, when in fact the said fire engine had already been purchased by said corporation many months before the said ordinance was adopted calling for said election, and the corporation notes had been issued in payment of said engine, and the debt had already been contracted. (5) That on account of the illegalities in the said bonds (especially these hereinabove recited), and because of the fact that the tax is inadequate to pay same, and unconstitutional, null and void, the said municipal authorities cannot and will never negotiate said bonds; that, therefore, the said tax has not been pledged to pay said bonds, and is not being devoted for the purposes stated in the publication aforesaid; and that in fact the proceeds of said tax have been partially, at least, used for paying a debt which was in existence and had been contracted before the call for the election was made, or the ordi-

nance adopted. (6) That the publication of the notice of sale of said property has not been published for the length of time required by law, and will not be published hereafter, because the office of the newspaper in which it has appeared has been destroyed by fire. They aver that they are entitled to a writ of injunction restraining and prohibiting said tax collector of Morgan City from selling said property. She prayed that the tax collector be cited to show cause why a writ of injunction should not issue restraining and enjoining him from collecting the said tax; that on trial of the rule the writ of injunction issue; that said writ be maintained, and the said tax declared and decreed absolutely null and void. The court ordered the rule to issue. The defendant excepted that the town of Morgan City was a necessary party. Under reservation of the exception, defendant answered the rule, pleading first the general issue. He maintained the validity and legality of the tax. He averred that the tax was levied by the proper authority, after all the requirements of law had been complied with. He averred that, plaintiff having become delinquent, he (tax collector), after complying with the formalities of law, had legally advertised said property for sale, and the advertisement was legal. The district court held that it had been proved that the special election held in the town of Morgan City on December 17, 1900, was held on the thirtieth day from the first publication of the notice of election, and that same was therefore not preceded by the 30 days for publication required by the constitution and laws of the state. It therefore adjudged and decreed that an injunction issue as prayed for, restraining the enforcement of the tax until further orders. Defendant answered on the merits, reiterating the allegations he had made in his answer to the rule. The court rendered judgment for the same reasons which it had assigned for issuing the injunction prayed for by the plaintiff, adjudged and decreed the special tax of five mills levied at said special election on November 17, 1900, on all property subject to taxation within the said corporation of Morgan City was unconstitutional, null, and void, and made perpetual the injunction which had been issued. The tax collector appealed. Appellant pleaded in the supreme court the prescription of six months, alleging that the action instituted by the plaintiff was instituted more than six months from the date of the promulgation of the result of the special election held on the 17th day of December, 1900, at which election the special tax, the collection of which is hereby enjoined, was voted,—all of which appears upon the face of the record herein filed; that the right to contest the validity of said election and said taxes voted at said election must be asserted within six months from the date on which the result of said election is promulgated, or the right to institute such

an action is barred; that, as said plaintiff and appellee allowed more than six months to elapse from the date on which the result of said election was promulgated, her right of action as set forth in her petition is prescribed by the lapse of six months, and defendant and appellant therefore pleads in bar of plaintiff's action the prescription of six months. In view of the premises, defendant and appellant prays that the plea of prescription herein filed be sustained, that the demand of appellee be rejected at her cost, and for general relief.

On the 17th of December, 1900, a special election was held in the corporation of Morgan City by virtue of an ordinance of the common council of that town adopted on the 16th of November to take the sense of the property taxpayers of Morgan City as to whether the said municipal corporation should be authorized: (1) To incur a debt of \$10,000 for the purchase of a steam fire engine and hose cart, for the construction and erection of a suitable building to house said apparatus, and for the construction and erection of a public market building in and for said town, the title of which shall vest in said municipality. (2) To issue negotiable bonds aggregating \$10,000 in principal, running through a period of 10 years, and bearing interest at the rate of 5 per cent. per annum from their date, to represent said indebtedness, each of said bonds to be of a face value of \$1,000, and numbered from 1 to 10, respectively, payable at the following periods of time, to wit, one bond of \$1,000 shall mature and be paid on the 1st day of March in each year for a period of 10 years, commencing March 1, 1901, and that the interest shall be paid on the 1st of March in each year, commencing March 1, 1901, upon the whole of the bonds remaining unpaid. (3) To levy, assess, and collect for and during each of the years 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, and 1909 a special tax of five mills on the dollar of the assessed valuation in each year of all the property in the corporate limits of said town subject to taxation under the laws of this state, to pay the said bonds and interest. Three commissioners were appointed by the common council to serve at the said election. The ordinance under which the election was held provided that due publication of the ordinance and notice of said election be made by the mayor in the official journal of the town of Morgan City for 30 days preceding such election, as by law required. On the 19th of December, 1900, the three commissioners, in presence of three witnesses, met for the purpose of and compiled the returns sent in by the commissioners of the Morgan City precinct, and in their return or procès verbal of compilation declared that: "Having compiled the returns sent in by the commissioners of the said town, we find there were cast for the proposition aforesaid sixty-five votes, and there were cast against

the proposition six votes. That the amount of the assessed value of the property voted for the proposition was seventy-eight thousand seven hundred and forty dollars (\$78,740), and the amount of the assessed value of the property voted against the proposition was three thousand eight hundred and ninety dollars (\$3,890)." The mayor of Morgan City promulgated the result of the election on the 24th of December, 1900. On the 26th of December, 1900, the common council met, the declared object of the meeting being "to carry out the levying and collecting of the special tax for improvements approved by the taxpayers. An ordinance was then adopted entitled "An ordinance to incur a debt of ten thousand dollars, to issue interest-bearing negotiable bonds therefor running through a period of ten years, and to levy, assess and collect a special five mill tax on all property in the limits of the town of Morgan City to pay said bonds and principal and interest pursuant to authority and power granted by the property tax payers at the special election held on December 17th, 1900, under article 281 of the constitution of 1898 and Act No. 114 of the Acts of 1900 of the State of Louisiana." The ordinance, following the language of the proposition voted on by the taxpayers, ordained that the corporation of Morgan City incur a debt of \$10,000 for the purposes stated (stating them); that interest-bearing negotiable bonds be issued to represent said indebtedness aggregating the sum of \$10,000 in principal, running through a period of 10 years, and bearing interest at the rate of 5 per cent. per annum from their date, each of said bonds to be of the face value of \$1,000, and numbered from 1 to 10, respectively, one each of said bonds to mature and become payable on the 1st day of March of each and every year for a period of 10 years, commencing in the year 1901; that the interest shall be paid on the 1st of March of year commencing 1st of March, 1901, upon the whole of the bonds remaining unpaid; that to pay said bonds in principal and interest a special tax of 5 mills on the dollar of the assessed valuation in each year of all the property within the corporate limits of the town subject to taxation under the laws of the state shall be levied, assessed, and collected for and during each of the years from 1900 to 1909, both inclusive; that the tax collector keep a separate account of all the taxes collected under the ordinance, and that they be deposited with the town treasurer, and by him deposited in a special account, and shall be devoted exclusively to the purposes set forth, and the town treasurer be prohibited from making any disbursement of the said taxes except for the purposes stated. In the record is an affidavit and certificate of the assessor of the parish of St. Mary of date December 26, 1900, to the effect that the assessment of the town of Morgan City for the year 1900 amounts to the sum of \$238,-

705; that this assessment is the basis of the 5-mill levy for a bond issue of \$10,000, authorized and ordered to be issued by the town of Morgan City at a special election held for that purpose on December 17, 1900, and that 5 mills on the dollar is levied and assessed on said assessment of \$238,705, and that upon this assessment the 5 mills levied will be collected for the purposes named in the ordinance of the town of Morgan City, to wit, the discharge of the principal and interest of the bond issue of \$10,000. The petition in the present suit was filed on the 8th of July, 1901, more than six months after the promulgation of the election returns. From the allegations of the petition it appears that the special tax for the year 1900 was in process of collection by the town tax collector when the present suit was instituted, as its object was to stay by injunction the sale of plaintiff's property, which had been seized and was about to be sold in enforcement of the same. The suit is therefore a collateral attack upon the election proceedings in aid and support of her individual resistance of the tax upon her own property. The tax is primarily sought to be decreed unconstitutional, null and void, to effect that object, though plaintiff's prayer is general and sweeping.

Article 232 of the constitution declares that "no municipal tax for all purposes whatsoever shall exceed in any one year ten mills on the dollar of valuation, providing that for giving additional support to public schools and for the purpose of erecting and constructing public buildings, public school houses, bridges, wharves, levees, sewerage work and other works of public improvement, the title to which shall be in the public, * * * any municipal corporation may levy a special tax in excess of said limitation whenever the rate of such increase and the number of years it is to be levied, and the purposes for which the tax is intended shall have been submitted to a vote of the property tax payers of such municipality entitled to vote, under the election laws of the state, and a majority of the state and a majority of the same in numbers and in value, voting at such election shall have voted therefor." This article of the constitution was followed by article 281, which declares that municipal corporations, when authorized so to do by a vote of a majority in number and amount of the property taxpayers qualified as electors under the constitution and laws of this state voting at an election held for that purpose, after due notice of said election has been published for 30 days in the official journal of the municipality, and, when there is no official journal, in a newspaper published therein, may incur debt and incur negotiable bonds therefor to the extent of one-tenth of the assessed valuation of the property within said municipal corporation as shown by the last assessment made prior to the submission of the proposition to

the property taxpayers as above provided, and may be authorized by the property taxpayers voting at said election to levy and assess special taxes upon property subject to taxation in the corporation, provided said taxes so imposed do not exceed five mills on the dollar of the valuation in any one year, nor run for a greater number of years than the number named in the proposition submitted to the taxpayers. No bonds shall be issued for any other purpose than stated in the submission of the proposition to the taxpayers and published for 30 days as aforesaid, nor for a greater amount than therein mentioned; nor shall such bonds be issued for any other purpose than for paying and improving streets, roads, and alleys, purchasing or constructing a system of waterworks, sewerage, drainage, lights, public parks, and buildings, bridges, and other works of public improvement, the title to which shall vest in the municipal corporation; nor shall such bonds run for a longer period than 40 years from their date, nor bear a greater rate of interest than 5 per cent. per annum, nor be sold by the municipal corporation issuing same for less than par. Several statutes were adopted by the general assembly in enforcement of article 281 of the constitution, to wit, Act No. 5 of 1899, and Acts No. 12 and No. 114 of 1900. Act No. 5 of 1899 not having fully covered the subject-matter it was dealing with, Act No. 12 was passed in 1900, and was evidently designed as a supplement thereto, with some alterations or modifications of the former act. By its title it provided for the repeal of all laws or parts of laws conflicting therewith, so far as they appertained to drainage districts. Section 13 of the act—the repealing clause—declared that: "All laws or parts of laws appertaining to drainage districts contrary to and inconsistent with the provisions of this act are hereby repealed, provided that all laws or parts of laws which are applicable alike to drainage districts and other corporations provided for by the constitution or laws of Louisiana, shall in no manner be affected by the provisions of this act, in so far as they reach to the other corporations above referred to." Act No. 114 of 1900 declared one of its purposes to be "to repeal all laws contrary to or in conflict therewith." Section 9—the repealing clause of the act—declared that all laws or parts of laws contrary to or in conflict with the provisions of the act be, and the same are hereby, repealed, especially Act No. 5 of the Extra Session of 1899, and that this act take effect from and after its passage. This court has held that under the title of this act Act No. 5 of the extra session of 1899 was repealed only in so far as its provisions were "contrary to or in conflict with" the provisions of the last-mentioned act. The seventeenth section of Act No. 5 of 1899 declared "that from and after a delay of six months from the date of the result of any such election

no one shall have any cause of action to contest the regularity, formality or legality of the petition of tax payers for the calling of any election herein provided for, of the ordering of the same, of the notice of same, of the holding of same, of the returns thereof, of the examination and count of the ballots, of the examination and canvass of the returns, of the declaration of the result, or of the promulgation of the result of any such election, and that after such delay all such causes of action should be prescribed." This prescription the defendant has invoked. Plaintiff contends that section 17 of Act No. 5 of 1899 was repealed by the later Acts of 1900, and, should this be not the case, then that section is inoperative or unconstitutional in view of the fact that the requirement of the notice which must have preceded the election was a "constitutional mandatory requirement the force of which could not be broken by the legislature, directly or indirectly."

Opinion.

We are of the opinion that section 17 of Act No. 5 of the Extra Session of 1899 has not been repealed by either Act No. 12 or Act No. 114 of 1900. It has the same effect now as it had when enacted. The general assembly did not attempt through that section to alter in any manner a constitutional requirement. It simply directed that all parties interested in the subject-matter of the elections provided for who had objections to urge against the validity or legality of the election, should advance them within a given fixed delay. The section was simply a statute of repose,—a legislative estoppel against those particular objections being urged later as grounds of complaint. Plaintiff is in error in supposing that the legislature was without power to work the estoppel to the extent it did. There is scarcely any right which a person has from which he may not cut himself off by his own action or inaction. The want of notice as the position of third parties or rights of third persons may be involved, may be acquiesced in. The notice is a provision of law enacted for the benefit of and protection of particular persons or classes of persons, and is not to be forcedly exacted, if in reality in some particular case it be not to their advantage. They may waive their privilege to object should they think proper, and silence and inaction are declared expressly, under our Civil Code, to be "under some circumstances the means of showing an assent that creates an obligation." This statute in question simply fixes by law in this particular class of cases the facts and circumstances which will be held to evidence "an assent" to what has been done. Parties objecting in fact from the first to the election, or anything connected therewith, may, by their attitude, be thrown practically by the law into the list of those who originally concurred in and brought about the election. It has

been repeatedly held that a person who has actively assisted in bringing about the passage of an act cannot subsequently question its constitutionality, and that one not injuriously affected by a statute cannot do so. So, also, a person voting affirmatively for the doing of a certain act has been held estopped from subsequently contesting the act which was done (partially, at least) by effect of his vote. The statute of repose simply closes the door to inquiry on this subject, and assumes that the party seeking to assail the act is one not entitled to raise that issue. An absolute loss of ownership is a much more serious loss than the loss of a right to resist the enforcement of a tax upon that property, and yet by statute law the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription. Civ. Code, arts. 496, 2015. If the right be lost, his own negligence and laches are the proximate cause of the same. He cannot urge that, being guaranteed in the protection of his property by the constitution, it has been taken from him "without due process of law." Cooley, in his work on Constitutional Limitations (chapter 7, p. 181 [1st Ed.]), referring to attacks upon the constitutionality of a law, says: "There are cases where a law in its application to a particular case must be sustained because the party who makes objection has, by prior action, precluded himself from being heard against it." Where a constitutional provision is designed for the protection solely of the property rights, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid, if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege if he received the compensation awarded, or brought an action to recover it. So, if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the ground of unconstitutionality is removed. And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam, and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his

right to a common-law trial by jury. In these and the like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacles, and lets the statute in to operate the same as if it has in terms contained the condition. In criminal cases, however, the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement. Another familiar instance of waiver or estoppel is where a party fails to invoke a constitutional right or privilege until after judgment gone against him. The privilege or right has not been set aside, but lost simply because it has not been advanced. Non constat in the case at bar that the plaintiff was not one of those who voted for the proposition. So far as the pleadings show, no one but the plaintiff objects to the result of the special election. The balance of the community desire the election to stand. She should not be permitted in this collateral way to force matters to be set aside so far as they are concerned, and she should not be permitted to escape individual taxation, and yet reap as a citizen of the town the advantages of the outlay of the money of the other citizens. We are of the opinion that the exception of prescription is well taken against the attack upon the legality of the official election of the 17th of December, 1900, and it is hereby sustained.

The sustaining of this plea leaves before us for consideration the other objections urged by the plaintiff. We will take them up, though not in the order in which they were made.

First. She urges that her property was about to be sold in enforcement of the tax which she is resisting without 80 days' advertisement. That is a matter which does not come before us in this case, the sole issue before this court being as to the constitutionality or legality of the tax.

Second. She contends that the notice of election and the ordinance providing for the same do not state the amount to be devoted to any one object, but merely mention the various objects confusedly. Neither the constitution nor the laws thereunder require a more than detailed statement of the purposes for which the debt was to be created or the tax applied than was given. The people, by their vote, seem to be satisfied to leave the application of the tax funds (inside of the purposes for which the tax was authorized to be levied) to the discretion of the common council.

Fourth. "That on account of the illegalities in the bonds and because of the unconstitutionality of the tax and its inadequacy to pay said bonds, the corporation cannot negotiate the same, and has not been able to pledge

the tax, and the proceeds of the tax are therefore being used to pay a debt of anterior existence." These are mere allegations, and tender no issue, except the last affirmative allegation that the proceeds of the tax are being used to pay a debt of anterior existence. There is no evidence whatever in the record to support that averment, and, if this were true, it would authorize an action against the council for illegal diversion of the fund, and a preventive injunction. This, however, would present a question entirely distinct from that of the legality and constitutionality of the tax. There is no evidence or claim that any debt has as yet been created by the common council under the authority granted to it by the taxpayers, and none that any bonds have yet been executed, or that any endeavor has been made prospectively to negotiate them. If, under the circumstances of the case, bonds, if executed, could not be negotiated, it would be a very good reason for the council not to execute them at all. There is no obligation on the part of the council to do so. It is merely authorized, not obliged, to issue bonds. Under the authority granted to it by the taxpayers, it may, without issuing bonds at all, create debt within the constitutional limit, and levy special taxes within the constitutional limit, if it be more advantageous and more advisable to do so. The bond issue was merely authorized in aid of raising the money needed for the purposes stated.

Fifth. That the tax is pretended to have been levied to pay for certain bonds in principal and interest, and the said town has never issued nor negotiated said bonds, and in fact the said tax is inadequate to pay said bonds with interest, according to the assessed valuation of the said town. In respect to this point counsel of the plaintiff in their brief say: "The second cause of nullity—that the tax is inadequate to meet the proposed bond issue—is destructive of the validity of the tax. The total amount of the assessed valuation of all property situated in the town of Morgan City for the year 1900 was \$228,705. The five-mill tax on the valuation would be \$114.52½. The bond issue provides for 10 bonds of \$1,000 each, one of which is payable on the 1st of March of each year, and the interest on the entire debt is payable annually on the same day. At the expiration of the first year the town would be compelled to pay \$500 interest and one bond of \$1,000, making a total of \$1,500. At the expiration of the second year the town would owe \$1,450, and the liability would thus decrease at the rate of \$50 per year, and not until the expiration of eight years would the tax be adequate to meet the debt incurred for that year. During the eight years the deficit would accumulate to an extent that it would be impossible to finance the town. In the case of Callaghan v. Town of Alexandria, 52 La. Ann. 1013, 27 South. 540, municipal corporations are held to be absolutely prohibited from predicated the is-

suance of bonds upon an appropriation of any portion of the general fund tax. The special tax must be adequate to meet the bond issue, and the bonds cannot be issued for any greater amount than the special tax will take care of."

Before examining this last point it may be well to notice that no attempt has been made to have pledged or appropriated in advance for the payment of the debt to be incurred any portion of the taxes set aside for the all-mony of the town, as was done in the Callaghan Case. If the town authorities had in view the application of a portion of those taxes to that debt, they evidently did not propose to do so until after the financial situation of the town in any given year had been first fixed. The twenty-third section of Act No. 5 of 1899 declares that all incomes derived from the public improvements purchased or constructed and all incomes derived from public markets, waterworks, or lights, when so set aside by the legislative body of the municipality, shall, after the expenses and costs of maintenance of said improvements are paid for, constitute a trust fund, to be devoted to the payment of the interest on the bonds so issued or the indebtedness so contracted; and any surplus after the payment of such interest shall be placed in the sinking fund (the sinking fund provided for by the twenty-fourth section of the act), to be used in the extinguishment of the principal of said obligations at maturity. Whether or not the town has any such income we do not know, nor can we know whether there ever will be such an income, and, if so, how much it will be. We have no knowledge whatever of the financial condition of the town of Morgan City. We do not know whether it owes debts or not, whether it has issued bonds or not. If it owes debts, or has issued bonds, the fact does not appear in the transcript; but the plaintiff does not charge that the amount of debt which the town has been authorized to incur exceeds the constitutional limit of one-tenth. Standing by itself, the limit of indebtedness has not been exceeded. The rate of taxation authorized by the taxpayers to be levied for the purpose of paying the debt which they authorized the municipal authorities to incur is also within the constitutional limit of five mills. Though the proposition submitted to the taxpayers and voted for affirmatively by them conform, so far as the record discloses, to the letter of the expressed constitutional requirements of articles 252 and 281 of the constitution of 1898, a question arises none the less whether it be in fact constitutional as made, and to the full extent made. The articles of the constitution, while fixing a rate of the special taxation not to be exceeded, and an amount of indebtedness not to exceed a certain amount relatively to the amount of the valuation of the taxable property of the town, have not declared that the amount of the debt authorized to be incurred and the bonds

authorized to be issued must, as to amount, fall inside of the fund provided for their payment through the special tax. The fixed policy of the state has for many years prior to the constitution of 1898 been adverse to the creation by municipal corporations of a floating unsecured debt. That policy found expression in the 2448th section of the Revised Statutes, which declares that "the police juries of the several parishes, and the constituted authorities of the incorporated towns and cities in this state, shall not hereafter have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted." We are not aware of any statute repealing this section of the law. We do not find any conflict between it and the provisions of the constitution. They are not inconsistent provisions. In the case at bar the taxpayers of the town of Morgan City were solicited by the town authorities to authorize them to incur a debt of \$10,000 for certain purposes. This they consented to do, but at the same time, under and through the same proposition, they consented that the corporation issue bonds to the amount of \$10,000, with 5 per cent. interest from date, payable annually,—an authorization varying materially from the authority to create a debt of \$10,000. A debt of \$10,000 would stand fully provided for by the special five-mill tax, but the debt evidenced by bonds, such as were authorized would not. For a portion of this amount they would be unsecured and unprovided for. We are of the opinion that under the articles of the constitution cited property taxpayers of a municipality are not warranted in authorizing the creation of an unsecured debt or unsecured bonds, but that the debt and bonds authorized, while conforming in other respects to the letter of the articles, must be such as will be fully provided for as to principal and interest through the special tax provided for their payment; in other words, that the debt should not exceed in amount the special tax which is authorized to be levied to pay it. The debt, with its interest, authorized by the property taxpayers of Morgan City to be created by its municipal authorities, exceeds the special tax provided to meet it, and to that extent their action is null, void, and of no effect.

We have next to examine whether, under the language of the propositions as submitted to the taxpayers, and as then voted upon by them, any portion of the debt can be created, or any bonds other than those specifically authorized to be issued can be executed and issued. It will be seen that, while the taxpayers authorized the creation of a debt of \$10,000, they at the same time authorized the execution and issuing of certain bonds specially and minutely described as to dates, amounts, maturities, and interest, etc., and authorized the levying of a special tax to pay such bonds. The authorities, instead of leaving certain

details of the ordinance open to be accommodated to the conditions of a contract which they might find necessary or might be able to make, fixed them by anticipation, and the question is whether the authorities can alter the form of the bonds, their amounts, etc., so as to "prime them down" (to use an expression easily understood) to conform to the debt legally authorized to be created by the taxpayers. We may state here that the debt which the authorities of Morgan City applied to the taxpayers to be authorized to incur, and which they were authorized to incur, was in reality one of \$10,000, with legal interest thereon, as shown by the proposition submitted and voted upon. We do not think that the authorization voted was null and void in its entirety from the mere fact that it attempted to convey a power greater than the taxpayers were competent to grant. The power granted should be held legal up to and within the amount of the special tax provided for as the means of paying the principal and interest of the debt to be contracted. *Oubre v. Town of Donaldsonville*, 33 La. Ann. 390. The authorities of Morgan City are authorized to act under the authorization as conferred upon them by the property taxpayers at the said election to incur debt and issue bonds as voted for to that extent, but no further.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court overruling the exception of the prescription of six months leveled against plaintiff's attack upon the validity and legality of the election held in Morgan City on the 17th of December, 1900, referred to in the pleadings, be, and the same is hereby, annulled, avoided, and reversed, and said exception of prescription is hereby sustained, and plaintiff's demand, in so far as it attacked the validity and legality of said election, be, and the same is, dismissed; that there be further judgment decreeing null, void, and of no effect so much of the authorization granted by said property taxpayers at said election as authorizes the municipal authorities of Morgan City to incur debt and to issue bonds for an amount greater in principal and interest than will be secured as to payment of principal and interest by the special tax authorized by the taxpayers at said election to be levied to pay said debt and bonds. Plaintiff's demand against defendant is perpetuated to the extent of enjoining them from incurring debt or issuing bonds for an amount greater than said special tax will provide the means for paying, both principal and interest. It is further ordered, adjudged, and decreed that, except in so far as judgment has been hereinbefore rendered in favor of the plaintiff against the defendant, plaintiff's demand be, and it is hereby, rejected, and her suit dismissed. Costs of appeal to be borne by the appellee; costs of the district court to be paid by the defendant.

MONROE and PROVOSTY, JJ., dissent.

32 So.—4

JOHNSON v. STATE.

(Supreme Court of Mississippi. May 26, 1902.)

MURDER—EVIDENCE—GARMENTS—NONPRODUCTION—TESTIMONY—ADMISSIBILITY—WITNESSES—SUPPORTING CREDIBILITY—STATEMENTS OF WITNESS.

1. On a prosecution for murder, it was error to admit evidence relative to a pair of overalls in the possession of the state, said to have been found near accused's charcoal kiln after the crime, and to bear blood stains, and to have the appearance of having been washed, where the overalls were not produced, or their nonproduction explained.

2. On a criminal prosecution, where a conviction could not have been had without the testimony of a certain witness, it was error to permit the state to support his credibility by showing on his examination in chief statements by him to others out of court, and in the absence of defendant.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Irving Johnson was convicted of murder, and he appeals. Reversed.

T. G. Birchett, Jr., and T. D. Marshall, for appellant. W. L. Easterling, Asst. Atty. Gen., for the State.

CALHOON, J. Without the testimony of Wm. Henderson, defendant could not have been convicted. At any rate, no court would have permitted a verdict of guilty to stand. This witness presents himself in most questionable shape. He it was, and he only, who went to and left Vicksburg in a wagon with deceased. On the way he had a quarrel with him. He alone, without his companion, arrived about midnight at the store of Newman, who had sent him to Vicksburg. Except by his testimony, the defendant, Johnson, does not appear at the scene of the killing. As to Johnson, no motive appears. Henderson made conflicting statements. It is shown by him that he confessed that he himself did the killing, and his explanation of the cause of this confession is too flimsy for serious consideration. His statement as witness as to the place where he says Johnson slew deceased is, from the physical facts, manifestly untrue. The killing was done on the wagon, beyond any question. A shirt and a pair of overalls were found near the charcoal kiln of Johnson, hung on a tree by the road, three days after the homicide; and witnesses said there was blood on them, appearing to have been washed in places. The state had possession of these clothes, and defendant's objection to any testimony without their production, or explanation of nonproduction, should have been sustained. The state was allowed to bolster up the credibility of its witness Henderson, in its examination of him in chief, by showing by him his own statements to others, out of court, in the absence of defendant. This was error, as has been often held, and it is always reversible error in a close case on the facts, as this case is.

Reversed and remanded.

WORTHAM v. STATE.

(Supreme Court of Mississippi. May 26, 1902.)
INTOXICATING LIQUORS—SALE OF LESS THAN A GALLON—PURCHASE FOR ANOTHER—PURCHASER'S INTEREST IN SALE—AGENCY—INSTRUCTIONS—ACTS ABSOLUTELY PROHIBITED—MOTIVE AND INTENT.

1. Where one receives money from another and buys whisky with it for him in quantity less than a gallon from a third person, and delivers it to him, the buyer is guilty of an illegal sale, though he has no interest in the whisky or the sale thereof; delivery being an essential element of the illegal sale, and all who participate in the acts constituting a misdemeanor being guilty as principals.

2. The fact that the buyer acts entirely for the person for whom he buys does not make him an agent for such person, agency not being predicable of crime; but his acts in respect to both such person and the seller are those of a principal, the act of delivery making him guilty of the sale.

3. On a prosecution for selling whisky in a quantity less than a gallon, an instruction which did not refer to the spirit, benevolent or otherwise, with which defendant acted, was not erroneous, the offense being punishable without regard to the spirit with which it was done.

Appeal from circuit court, Harrison county; J. H. Neville, Judge.

"To be officially reported."

Jim Wortham was convicted for selling whisky in a less quantity than one gallon, and he appeals. Affirmed.

McWille & Thompson and Bowers, Chaffe & McDonald, for appellant. Monroe McCurg, Atty. Gen., for the State.

TERRAL, J. The appellant was indicted in the circuit court of Harrison county for selling whisky in a less quantity than one gallon, and convicted. The facts were agreed to be that "Charles Thames met the defendant in McHenry, in Harrison county, and asked him if he could get him a pint of whisky, and defendant told him that he could, and thereupon took fifty cents, and went off and bought a pint of whisky from another person, not authorized by law to sell same, paying therefor the fifty cents given him by Thames, and that said liquor, so bought and delivered to Thames, was not the property of defendant, who was not interested therein, but was the sole property of the person from whom defendant bought same." This instruction was given to the jury on the part of the state: "The court instructs the jury that, if they believe the facts set out in the agreed statement, beyond a reasonable doubt, they will find defendant guilty." This conviction is assailed upon the grounds: (1) Because the evidence, it is said, will not support a conviction; (2) the instruction is said to be erroneous.

1. The case here made by the agreed statement of facts is substantially the same as *Wiley v. State*, 74 Miss. 727, 21 South. 797. In every case there is a seller as well as a buyer, and a delivery of the whisky sold is an essential and necessary act of the seller to constitute criminality. The seller here,

whoever he was, took the hand of Wortham to make a delivery of the whisky to Thames, and Wortham, whatever his intention was, and however his connection with the matter arose, became a participant with the owner of the whisky in the sale of it to Thames. The essential fact of delivery was the sole act of Wortham. And as in misdemeanors all persons who participate in doing any of the acts constituting elements of crime are, in law, guilty as principals, Wortham may not deny responsibility for his part in this transaction. Wortham was not the agent of Thames in the purchase of the whisky. There are no agents in the violation of law. Whatever acts, being the elements of crime, are done by any one, are done by such one as principal, and not as agent. No one of the participants in crime is guilty because of a relation of agency to any of the other persons, but each is guilty because his act is a necessary part of the whole crime. Wortham was not the agent of Thames, because agency is not predicable of crime; but his act, in respect to both the seller and Thames, is that of a principal actor. In respect to what was done at the instance of Thames, there is no culpability; but in respect to the delivery of the whisky for the seller to Thames the act was that of Wortham as a principal.

2. There is no error in the instruction. That form of instruction in liquor cases is approved in *Beck v. State*, 69 Miss. 217, 13 South. 835. Where the act denounced by law is punishable without regard to the spirit, whether benevolent or otherwise, in which the act was done, the doing of the act is a crime, and it is proper to so inform the jury.

Affirmed.

SUPREME CONCLAVE KNIGHTS OF DAMON v. SAYLOR.

(Supreme Court of Mississippi. May 26, 1902.)
LIFE POLICY—AGE OF INSURED—FALSE REPRESENTATION—EVIDENCE.

An insurance company's constitution and by-laws precluded its insuring parties over 54. Insured's application, dated March 29, 1890, stated that he was 54 at his last preceding birthday, November 26th. Defendant offered the registration books, showing that he registered about a month before giving his application, and gave his age at 64. Another registration book showing that in 1892 he gave his age at 51. The tax assessor testified that in 1896 insured told him he was over 60, and not subject to poll tax. Several others testified that he was over 54. Plaintiff offered a deposition of one witness that insured, to the best of his recollection, was born in 1844, and some witnesses testified that insured's appearance did not indicate he was over 54. Insured's wife testified that he told her he was 54, etc. *Held*, that a peremptory instruction should have been given for defendant.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

Suit by Mrs. P. A. Saylor against the Supreme Conclave Knights of Damon, in the

circuit court of Lauderdale county, to recover \$2,000 on a life insurance policy issued by defendant on the life of her husband, John R. Saylor. Judgment for plaintiff, and defendant appeals. Reversed.

The certificate of insurance issued to Saylor stipulated that his application for membership should be made a part of the contract of insurance. Under the constitution and by-laws of the defendant in force when the certificate sued on was issued, no persons were given insurance who were more than 54 years old. In his application, John R. Saylor stated that he was 54 years old at his last birthday, next preceding the application, which was dated March 29, 1899, and that he was born November 26, 1844. On the issue made as to the true age of John R. Saylor, the defendant order introduced the following evidence: The registration book of the city of Meridian was introduced, which showed that John R. Saylor registered about a month before the date of the application, giving his age at 64 years. The registration book of Lauderdale county was also introduced, showing that in May, 1892, he gave his age as 51 years. The tax assessor was introduced, who testified that he went to the assured in the year 1896 to get his personal assessment, and told him that all persons between the ages of 21 and 60 were required to give in a poll; that insured then stated that he was over age. One J. D. Harwell testified that he first knew the assured, Saylor, in 1872, and that he (witness) was then 28 years old, and that, from comparison with his own age and the appearance of Saylor, he must have been 58 or 59 years old in 1899. Witness John W. Earson testified that he (witness) was in June, 1901, 58 years old; that the mother of witness and the stepmother of Saylor were sisters; that he was reared with Saylor in Missouri, and that he thinks Saylor was 2 years older than witness; that Saylor left the home of witness in 1861, and was then about 21 years old; and that, judging from his own age, Saylor was born about the year 1840. He was asked the questions: "Who is the older,—yourself or John R. Saylor?" He answered: "He is, of course." "Can you positively state that on March 31, 1899, John R. Saylor was older than 54 years?" He answered: "He must have been, as I was then 56, but he was older than I was." In contradiction of this evidence, plaintiff introduced the deposition of one witness who stated that John R. Saylor, to the best of his recollection, was born in 1844; and some witnesses testified that, at the time of his death, Saylor's appearance did not indicate that he was more than 54 years old. Mrs. Saylor, appellee, testified that she was married to Mr. Saylor in 1867, and had known him about a year before; did not know his age, but he told her his age, and that he was born in 1844, and was 54 years when he died. Upon the issue as

to whether assured was afflicted with rheumatism, a number of witnesses testified that for several years the assured complained of rheumatism; but Mrs. Saylor testified that he did not have rheumatism, and other witnesses also testified that he had no appearance of having it, and they had never heard him so complain. From a verdict and judgment for plaintiff for the full amount sued for, defendant appeals.

Hall & Wimberly, and Neville & Willbourn, for appellant. Ethridge & McBeath, for appellee.

WHITFIELD, C. J. This verdict is manifestly wrong on the evidence. With every disposition to uphold verdicts where reasonably possible, we cannot permit this verdict to stand. Corporations must be protected in all their just rights. The peremptory instruction for defendant should have been given.

Reversed and remanded.

BRITISH & AMERICAN MORTG. CO. v. BURKE et al.

(Supreme Court of Mississippi. May 26, 1902.)

MORTGAGES—PAYMENT—FAILURE OF MORTGAGEE TO SATISFY—ACTION FOR PENALTY.

Ann. Code 1892, § 2451, provides that on full payment of a mortgage the mortgagee shall enter satisfaction on the record, and that, if he shall not do so within one month after request, he shall forfeit to the party aggrieved any sum not exceeding the mortgage money. A mortgagor who had paid the mortgage requested the mortgagee at various times to "cancel the deed of trust," "to take proper steps to have the deed of trust canceled and marked 'satisfied' by proper authority," and to "cancel the mortgage." *Held*, that the right to the penalty was dependent on a strict compliance with the statute, so that the requests for "cancellation of the deed of trust" and for cancellation of the mortgage were not sufficient to support the action for failure to acknowledge satisfaction of the mortgage.

Appeal from circuit court, Lowndes county; E. O. Sykes, Judge.

"To be officially reported."

Action by M. M. Burke and another against the British & American Mortgage Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Wm. Baldwin, for appellant. Newman Cayce, for appellees.

TERRAL, J. Appellant, in February, 1892, loaned to appellees \$600, and to secure its payment appellees executed a mortgage on 160 acres of land in Lowndes county, which was placed of record in Book 71, page 6 et seq. In 1896 the mortgage debt was paid by the attorney of appellees to the attorney of appellant, when the former wrote the latter directing him to "have the trust deed paid by this draft canceled at once." On

January 28, 1899, N. Cayce, as attorney for the Burkes, wrote A. L. Richardson, New York, as follows: "In July, 1896, M. M. Burke and I. S. Burke paid to the British and American Mortgage Co. a note the payment of which was secured by a deed of trust upon land in this (Lowndes) county. It being part of the land included in the deed from the British and American Mortgage Co. to I. S. Burke, of date Nov., 1898. The record of said deed of trust has never been marked 'Satisfied,' but it appears to be uncanceled upon the record. M. M. and I. S. Burke hereby request that the mortgagees aforesaid take proper steps, and have the record of said deed of trust marked 'Satisfied' by proper authority." On March 4, 1899, appellant wrote to A. L. Richardson, saying: "The mortgage executed about 1892 on 200 acres of land, and paid in full to W. V. Sullivan during the year 1896, has never been canceled. We now demand of you to cancel the same instantler." This suit is to recover of appellant \$600, the full penalty allowed by section 2451, Code 1892, upon the alleged ground that appellant "did not, within one month after request, make acknowledgment of satisfaction upon the margin of the record of said deed of trust of February, 1892." The requests, three in number, as above recited, were alleged in the declaration, and were proven as recited. It was also in proof that A. L. Richardson was the agent of the British & American Mortgage Company in 1894 and since. A jury was waived, and the case was submitted to the circuit judge, who gave a verdict and judgment for appellees for the \$600 penalty, and the mortgage company appeals.

The right of appellees is, as we regard it, strictissimi juris. If so, they cannot recover in this suit. Not a single one of the requests made is a proper one. The first one was for the cancellation of the trust deed and for an entry of satisfaction upon the margin of its record. The second request, made by attorneys, also was to have acknowledgment made upon the margin of the record of a deed of trust upon land conveyed by appellant dated November, 1896, and that was not the fact. The third request was that "the mortgage executed about 1892 on 200 acres of land, and paid in full to W. V. Sullivan during the year 1896," be canceled. We have earnestly regarded these three requests, and have closely scrutinized them, and we think that there is not one of them that supports the declaration. If it be said that we are standing too strictly upon the letter of the statute, the reply is we do so because the action is given solely by the letter of the statute. Upon compliance with the letter, appellees may recover; without it, they cannot. We think the action, as pleaded, is not sustained by the evidence before the court. The appellees virtually admit that the requests are not literally correct,—that is, do not ask

for the doing of the thing for which the suit is brought; but they insist that either of them is sufficient to have put upon appellant the duty of doing that which appellees desired. But it might be noted that there was undisputed evidence that appellant had, upon the payment of the \$600 mortgage, executed authority for its cancellation, and therefore supposed it so marked on the margin of the record. Besides, during the existence of the \$600 mortgage two other mortgages of appellees to appellant for a considerable quantity of land in Lowndes county were outstanding between the parties, and the cancellation of these two mortgages or deeds of trust was thought to be alluded to, and there is room to think that appellant promptly marked upon the margin of the record a cancellation of this particular mortgage when its noncancellation was specially pointed out to it. We do not place, however, our decision upon any excuse of this sort, but upon the failure of appellees to make the request in compliance with the provisions of section 2451, Code 1892.

Reversed and remanded.

BROWN et al. v. WEST.

(Supreme Court of Mississippi. May 26, 1902.)

ACTION ON NOTE—DEFENSE—USURY—DIRECTION OF VERDICT.

In an action on a note defendant's evidence tended to show that through stress of circumstances he was compelled to agree to furnish plaintiff with cotton largely in excess of what defendant's plantation could produce, under penalty of paying plaintiff a certain amount for each bale of the deficit; that plaintiff knew the plantation was small; that the arrangement was merely a device to cover usurious interest; and that a large part of the note sued on was for penalties charged up under the agreement. *Held*, that a peremptory instruction for plaintiff was erroneous.

Appeal from circuit court, Sharkey county; Geo. Anderson, Judge.

"To be officially reported."

Action by J. B. West against W. D. Brown and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Catchings & Catchings, for appellants. Theodore McKnight, for appellee.

TERRAL, J. J. B. West, surviving partner of Chaffe, Powell & West, sued Brown and wife upon the following note: "\$1,325.00. Rolling Fork, Miss., Feb. 23rd, 1893. On the 7th day of January, 1894, I promise to pay to the order of Chaffe, Powell and West, at their office in New Orleans, La., thirteen hundred and twenty-five & ⁰⁰/₁₀₀ dollars, for value received, with interest at the rate of ten per cent. per annum from maturity until paid. W. D. Brown. A. V. Brown." On this note credits amounting to \$632.67 were indorsed, and for the balance, after deducting said credits, plaintiff below had a verdict through

a peremptory instruction to that effect. This peremptory instruction was given to the jury notwithstanding the defendant below introduced evidence tending to show that a considerable portion of the debt sued for was usury; that more than \$500 of it was charged against him in dealings running through several years because of his failure to ship to Chaffe, Powell & West a large number of bales of cotton in excess of what was made on his plantation; that his plantation was a small one, and known to be so to West, and yet, under stress of circumstances, he was compelled to agree to ship Chaffe, Powell & West a large quantity of cotton each year, or in default to pay \$1.25 for every bale of the deficit, from which agreement more than \$500 of the debt sued on arose. He insisted that this arrangement was but a device to cover usurious interest. He offered in evidence circumstances tending to prove such conclusion, and from which the jury might have inferred such design. Under such circumstances a peremptory instruction was erroneous. *Chaffe v. Hughes*, 57 Miss. 256. The defendant below offered also other matters in contradiction of the claim sued on, which, we think, should not have been excluded from the consideration of the jury by a peremptory instruction.

Reversed and remanded.

CITY OF MERIDIAN v. McBEATH.

(Supreme Court of Mississippi. May 26, 1902.)

MUNICIPAL CORPORATIONS—NEGLIGENT OBSTRUCTION OF STREET—INJURY TO DRIVER—CONTRIBUTORY NEGLIGENCE.

A city set a small post about 2½ feet high at a street corner 2 feet from the curb, to protect some piping and the sidewalk from vehicles. Plaintiff, who lived near this place, was driving rapidly around the corner at about 10 o'clock at night, collided with the post, and was injured. The night was somewhat dark, and plaintiff did not see the post, though there were electric lights at each of the four corners a block distant. A street car coming along an intersecting street at the time of the accident tended to distract plaintiff's attention and memory from the post. *Held*, that the questions of the city's negligence in so placing the post and of plaintiff's contributory negligence were for the jury.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

"To be officially reported."

Action by John F. McBeath against the city of Meridian. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller & Baskin, for appellant. Woods, Fewell & Fewell, for appellee.

TERRAL, J. A small post, 2½ feet high, was set in Thirty-First avenue at its intersection with Eighth street. It is located some 2 feet within Thirty-First avenue. The avenue there was 30 feet or more wide, so that at least 28 feet of the avenue was left free

and open for public travel. The plaintiff below, in a two-horse buggy, was traveling in a brisk trot along Eighth street, and, coming to Thirty-First avenue, and desiring to proceed down it to the south, turned his buggy to the right for that purpose, when the axle of his buggy struck the post, and precipitated him violently to the ground, from which fall he received serious injury. The city set the post where it was to protect from injury some terra cotta piping there laid and the sidewalk by the passage of wheeled vehicles over them. The injury happened about 10 o'clock at night. There were electric lights at the next street crossings north, south, and east, but none at the crossing where the post was set. The night was somewhat dark, and the post was not seen by the plaintiff, though its being there should have been well known to him, as he lived near-by, and was conversant with that particular corner. The city insists that it is proper for the post to be where it is for the protection of the sidewalk and tiling, and that, as ample room on Thirty-First avenue, east of the post, is left for all necessary and safe travel along said avenue. It has performed its duty in that regard, and is not liable for any mishap to plaintiff; and especially it is not liable because plaintiff must have often seen the post, by reason of which he is guilty of contributory negligence in not avoiding the striking of it, that bars him of any remedy. The plaintiff, however, insists that all parts of the street should be free of dangerous obstructions, and that his momentary forgetfulness of the existence of the post should not be imputed to him as a fault. Whether the coming of the street car along Eighth street to a point opposite the post at the time plaintiff's buggy struck it operated to prevent recollection of its being there, or whatever other cause produced temporary forgetfulness of the fact, should not, of itself, as we think, defeat a recovery. Such is the constitution of the mind, since the fall, at least, that its imperfections in this respect should not be imputed as a fault. A small, low post, set like this one, under the circumstances in evidence, was manifestly a dangerous impediment to plaintiff, if forgetful of its being placed at that point, and, of course, it would be dangerous to others under similar circumstances. The question of the negligence of the city in placing this post where, under the circumstances in evidence, it could not be readily seen, and where, if not seen, it was likely to cause injury to one making the change of direction that plaintiff was making, and the question of negligence of the plaintiff under the circumstances of his hurt, were severally questions for the determination of the jury; and their finding, made under instructions fairly submitting to them the respective contentions of the parties, we do not feel at liberty to reverse. The cases bearing on the decision here made may be found in the briefs of counsel.

Affirmed.

**CITY OF BAY ST. LOUIS v. BOARD OF
SUP'RS OF HANCOCK COUNTY.**

(Supreme Court of Mississippi. May 26,
1902.)

**COUNTIES—COURT HOUSE—USE OF ROOM BY
CITY—ULTRA VIRES CONTRACT—TENANT
AT WILL—HOLDING OVER.**

1. Though, antecedently to the constitution of 1890, limitation ran against counties and municipal corporations, this was true only as to property not held nor used for public or governmental purposes, and did not prevent a county from recovering possession of a room in the court house occupied by a city under claim of right for more than 10 years.

2. A contract whereby the board of supervisors of a county agreed that a city should contribute a certain sum toward the building of a court house, and thereby become the owner of a room in it for city purposes, was ultra vires and void.

3. A city which, pursuant to an unauthorized agreement with a county board of supervisors, occupied a room in the county court house for city purposes, was, during such occupancy, a mere tenant at will, and after the expiration of 60 days' notice to vacate was subject to the remedy provided by Code, § 2547, against tenants holding over.

4. The fact that the city thought it owned the room, and claimed adversely, was immaterial.

Appeal from circuit court, Hancock county; G. Q. Hall, Judge.

Action by the board of supervisors of Hancock county against the city of Bay St. Louis. From a judgment in the circuit court reversing a justice's judgment for defendant, defendant appeals. Affirmed.

This was an action brought by Hancock county, under Code, §§ 2547, 2548, as landlord, against the city of Bay St. Louis, to get possession of a room in the court house of said county, which said city was using as a city hall. In its affidavit the county alleged that the city took possession of the room in 1874, by consent of the county, and became its tenant at will; that in August, 1900, the county terminated the tenancy by ordering the city to vacate in 60 days thereafter; that the 60 days had expired, but the city remained in possession of the room. The answer of the city admits receiving proper notice to vacate, but denied that it is the tenant of the county, and set up, as a defense, that it contributed \$700 towards the construction of the court house in 1874, and that it has occupied it ever since, and set up the 10 years' statute of limitations as a bar to plaintiff's recovery. It set up, further, that, if the payment of the \$700 under the agreement, and its occupancy, did not perfect its title to the room, it made the parties to the suit tenants in common of the building, and the action would not lie. There was a judgment in the justice of the peace court for the city, from which the county appealed. A trial was had in the circuit court, and upon the conclusion of the evidence the court gave a peremptory instruction for plaintiff. From a verdict and judgment accordingly, the city appeals.

McWille & Thompson and Bowers, Chaffe & McDonald, for appellant. Miller & Ford and Dodd & Griffith, for appellee.

CALHOON, J. Antecedently to the constitution of 1890, the law was that the statutes of limitation ran against counties and municipal corporations; but even then this was true only as to property they had not for use for public or governmental purposes, such as court houses, jails, streets, etc. The contract of the county in this case, made in 1874, with the municipality, that the latter should contribute to build a court house for the county, and thereby become owner of a room in it for city purposes, was ultra vires of the board of supervisors, and void. The pursuant occupation of that room by the city, and its continuous occupation of it for 26 years, constituted no bar, and the city, while so occupying, was simply the tenant at will of the county. On the expiration of the 60 days' notice to vacate, the right of tenancy by the city, and its term as tenant, expired, and its holding after that was a holding over after the expiration of the term in the purview of Code, § 2547, and entitled the county to the remedy provided by that section. It is immaterial that the city thought it owned the room, under the facts, and claimed adversely.

Affirmed.

ALFRED v. STATE.

(Supreme Court of Mississippi. May 26,
1902.)

RAPE—INDICTMENT—EVIDENCE.

Where an indictment for rape does not charge that the victim was under the age of consent, and the evidence does not show that the intercourse was against her will, a conviction cannot be sustained, even if she is shown to be under such age.

Appeal from circuit court, Jackson county; J. H. Neville, Judge.

Jesse Alfred was convicted of rape, and he appeals. Reversed.

Appellant, Alfred, was indicted in the circuit court of Jackson county for rape, and convicted. The indictment charges that "Jesse Alfred, forcibly, violently, and against her will, feloniously did ravish and carnally know Bertha White." The evidence showed that Bertha White was between seven and eight years old, but it does not show that the act was done without the consent or against the will of Bertha. Defendant's motion for a new trial was overruled, and he appeals.

H. Bloomfield and W. H. Maybin, for appellant. Monroe McClurg, Atty. Gen., for the State.

CALHOON, J. This conviction cannot be sustained (*Bonner v. State*, 65 Miss. 293, 3 South. 663); the indictment not charging

that the female was under the age of consent, and it not being proved that the intercourse was against her will.

Reversed and remanded.

STATE v. SULLIVAN.

(Supreme Court of Mississippi. May 26, 1902.)
SALE OF MORTGAGED PERSONALTY — DISCHARGE OF LIEN—FAILURE TO PAY DEBT NOT YET DUE.

The sale by the mortgagor of mortgaged personalty without paying the debt secured, when the debt is not due at the time of the sale, is not a violation of Ann. Code 1892, § 1184, prohibiting the sale of mortgaged property without the consent of the mortgagee without immediately discharging the incumbrance.

Appeal from circuit court, Winston county; G. Q. Hall, Judge.

R. E. L. Sullivan was indicted for selling mortgaged personalty without satisfying the incumbrance. From an order sustaining a demurrer to the indictment, the state appeals. Affirmed.

Defendant, on November 17, 1899, executed a mortgage, due and payable December 1, 1900, to Blumenfeld & Fried, as beneficiaries, on personal property, to secure a debt of \$68. Before the maturity of the debt, and without the consent of the beneficiaries, the defendant sold the property within the county, without discharging the debt, for which an indictment was presented under section 1184 of the Annotated Code of 1892. Defendant demurred to the indictment, which was sustained. The state appeals.

Monroe McClurg, Atty. Gen., for the State.
 Geo. Richardson, for appellee.

TERRAL, J. The lien upon property of a deed of trust is discharged by the payment of the debt secured thereby. The debt is the principal thing; the lien is but an incident to it; and the grantor is not bound to pay the debt, and thereby discharge the lien, until the debt is due. Now, here, Sullivan is indicted for not paying the debt (discharging the lien) before it comes due, and in that respect we think the indictment faulty.

Affirmed.

HEWES v. SEAL.

(Supreme Court of Mississippi. May 26, 1902.)

TAXATION—SALE—VALIDITY—SEPARATE TRACTS—REDEMPTION.

1. Decedent owned a large quantity of land in a certain county, consisting of separate tracts, and some of it being town lots. The whole was assessed to him in 1899, the separate pieces appearing on the assessment roll in different places, separated by other lands. In selling the land for taxes, the collector first offered a proper quantity, which did not bring the full amount due on all the land. He thereafter added another piece, not treating each

separate piece as an independent assessment; and when the whole of any one separate tract failed to bring an amount sufficient to pay the whole tax due he added another, or part of another, until the whole of decedent's land was sold. *Held*, that the sale was void.

2. Any party in interest had a right to redeem from such sale the whole of any one tract of land separately assessed, and could not be required to redeem the entire land.

Appeal from chancery court, Harrison county; Stone Deavors, Chancellor.

Bill by Mary N. Seal against Frank S. Hewes and another. Judgment overruling Hewes' demurrer to the bill, and he appeals. Affirmed.

Col. R. Seal owned a large quantity of land in Harrison county, consisting of separate tracts, some of it being town lots. All of it was assessed to him in 1899, the separate pieces appearing on the assessment roll in different places, separated by other lands. Col. Seal died, and the taxes due on the land for the year 1899 were not paid, and in March, 1900,—the time fixed by law,—the tax collector sold the land for the taxes. In making the sale he first offered a proper quantity, which did not bring the full amount of the taxes due on all the land. He added another piece, not treating each separate piece as an independent assessment, and when the whole of any one separate tract failed to bring an amount sufficient to pay the whole tax due he added another, or a part of another, separate tract, and so on until the whole of Seal's land was offered and bid in by defendant Sintes, and the tax collector made him a deed conveying all the lands to him, and lodged it with the clerk of the chancery court, appellant, Hewes. Subsequent to this tax sale, appellee, Mrs. Mary N. Seal, acquired title to a portion of these lands. She applied to appellant, Hewes, who was chancery clerk, to redeem that portion of the lands embraced in her deed. The clerk refused to permit her to redeem that portion of the land unless she would pay all the taxes and damages, and redeem all the land embraced in the deed to Sintes, claiming that he had no authority, under section 3823 of the Code of 1892, to partially cancel a tax deed. Mrs. Mary N. Seal then filed her bill in the chancery court of Harrison county, setting up the foregoing facts, seeking to compel appellant, Hewes, to accept the taxes and damages for the lands she owned, and allow her to redeem same from the tax sale. Sintes was made a party to the bill. Act Feb. 17, 1888 (Laws 1888, p. 206, c. 166), provides that whenever lands in Harrison county change ownership the owner shall have the right to pay the taxes assessed against said lands to the sheriff and tax collector; and, where the change of ownership occurs in lands sold for taxes, the owner applying to pay said taxes shall pay over to the tax collector the proper pro rata share of taxes due on said lands having changed ownership for the ben-

est of said buyer of said lands at tax sale. Defendant Hewes demurred to the bill because it seeks to impose on him the duties and responsibilities which are placed by law on the sheriff; because it seeks to force defendant, contrary to law, to apportion taxes and costs, and to cancel a portion of a tax deed. The demurrer was overruled, and defendant Hewes appeals.

E. J. Bowers and McWillie & Thompson, for appellant. Ford & White and H. Bloomfield, for appellee.

CALHOON, J. We do not decide whether chapter 166, p. 206, Acts 1888, is or is not in force, or whether, if in force, it makes tax payments on change of ownership to go exclusively to the sheriff, or merely gives the sheriff an equal right with the chancery clerk to receive them, or whether it applies at all after the tax collector's deeds have been filed with the clerk. It is immaterial in this case, because the sale to Sintes was void. There was no sale. Sintes has no right except to be reimbursed his outlay, with interest, etc., on all the land redeemed (Code 1892, § 3830), and the clerk may receive that and cancel (id. § 3823). Any one in interest, or any one for him, in case of such void sale, may redeem the whole, not part, of any lot or tract separately assessed by paying the chancery clerk on that as required by Code, § 3823, because, where a tax conveyance embraces parcels separately assessed, each such parcel must be treated as if separately conveyed to the purchaser at tax sale. It is easy enough for the clerk, with the rolls at hand, to ascertain amounts, and cancel as to parcels so redeemed.

Decree overruling demurrer to the bill affirmed, and cause remanded, with 30 days to answer after mandate filed below.

KELLY v. STATE.

(Supreme Court of Alabama. May 15, 1902.)

BASTARDY—RESEMBLANCE OF CHILD TO DEFENDANT—ASSOCIATION WITH OTHER MEN.

1. On a prosecution for bastardy, it was proper to permit the bastard child to be introduced in evidence by the state, for the purpose of showing the likeness of the child to the defendant.

2. Where the state, on a prosecution for bastardy, had proved the defendant's association with the prosecutrix about the time of probable conception, it was error to exclude evidence offered by the defendant that she had also associated with other men during that period, and that she was in the company of another man, under circumstances affording opportunity for sexual intercourse, about that time.

Appeal from circuit court, Clarke county.

Willie Kelly was found guilty on a bastardy proceeding, and appeals. Reversed.

This was a bastardy proceeding, in which the appellant, Willie Kelly, was tried and found guilty of being the father of the bastard child of Florence Stephens. On the

trial of the cause the evidence for the state showed that Florence Stephens was delivered of a bastard child on July 27, 1900. The state, for the purpose of showing the likeness of the child to the defendant, proposed to offer the child in evidence, so the jury could view it. The defendant objected to the introduction in evidence of the child, and the court overruled the objection, and permitted the child to be introduced in evidence, and the defendant duly excepted to the ruling of the court. Defendant, the child, and the mother are all white persons. There was testimony in behalf of the state to show that during the month of October, 1899 (the month prior to the time the state contended the child was conceived), the defendant associated with Florence Stephens, having been frequently in her company; and, to rebut this testimony, the defendant offered to show that during such time she was also seen in company of other men; and he proposed to prove by one Sellers and one Barr that they saw her at Alameda about sundown on the fourth Sunday in October, drinking cider with a young man other than defendant; that Alameda is about two miles distant from her home; that she and the young man left Alameda alone, going in the direction of her home; that one of the witnesses drank some of the cider, and it made him drunk; that the road from Alameda to her home leads mostly through the woods. The state objected to this evidence, and moved to exclude it, and the court granted the motion, and the defendant duly excepted.

Lackland & Wilson and Davis & Gunn, for appellant. Chas. G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. There is in Paulk v. State, 52 Ala. 427, this dictum: "On an issue formed in a bastardy proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person who had opportunities of illicit intercourse with the mother." It would necessarily follow that the prosecution, upon such issue, would be entitled to show that the child resembled the defendant, and, logically, that in such cases it would be competent to make proof of the child before the jury to show its resemblance, or lack of resemblance, to the putative father. In Linton v. State, 88 Ala. 216, 7 South. 261, the charge was miscegenation of the defendant. Linton, a white woman, with John Blue, a negro; and, of the propriety of allowing the prosecution to prove Blue's race by producing his person before the jury, this court said: "There was no error in allowing the state to make proof of the person of John Blue to the jury, in order that they might determine by inspection whether he was a negro, as charged in the indictment. There had been a severance in the trials of appellant and Blue; and evidence of this char-

acter is clearly competent to show sex (*White v. State*, 74 Ala. 31), age (*State v. Arnold*, 85 N. C. 184), personal resemblance (*State v. Woodruff*, 67 N. C. 89; *State v. Britt*, 78 N. C. 439), color and race (*Garvin v. State*, 52 Miss. 207; *Gentry v. McMinnis*, 3 Dana, 385), and many like facts in regard to the personality of the defendant himself, or of any other individual involved in the issue. *Whart. Cr. Ev. § 311 et seq.*" The question in *Linton's Case*, being one of race, and not of resemblances, is not the question here, and that case is not authority here; but we have quoted from the opinion in that case to show our citation there with approval of the cases of *State v. Woodruff*, 67 N. C. 89, and *State v. Britt*, 78 N. C. 439, both of which were bastardy cases, and in one of which evidence of the child's resemblance to the defendant, given by the midwife, was received, and in the other it was held competent to make proof of the child to the jury to show its resemblance to the defendant. It is thus made to appear that in *Linton's Case*, as well as in *Paulk's*, there is a dictum of this court to the effect that in bastardy proceedings proof may be made of the child. We shall hold in line with these dicta, and indorse the ruling of the circuit court in this connection. Much may be said as to the uncertainty of such evidence, and there are authorities against its competency, as well as for it; but evidence should not be rejected merely on the ground that its bearing is not of a given degree of certainty, and while evidence of this sort may, in point of fact, often throw little light on the issue, or none, it may, we think, be submitted for the jury's consideration, as affording in most cases the basis for reasonable deductions on their part. The court committed no error in allowing proof of the child to the jury.

We are, however, of the opinion that the court erred in excluding the evidence offered by the defendant of the association of the prosecutrix with others, and particularly with another young man, about the probable date of conception, and the circumstances of such association; the state having proved defendant's association with her about that time as affording an inference that he then had sexual intercourse with her. It seems clear to us that the proposed testimony of the witnesses *Sellers* and *Barr* that, covering the time of probable conception, she was in the company of other men, and that on one occasion, nine months before the birth of the child, she was in the company of another man under circumstances affording opportunity for sexual intercourse, his attentions to her at that time, etc., was competent in rebuttal of the inference intended to be and naturally afforded by the evidence introduced by the state as to the association of defendant with her about that time.

For the rejection of this evidence, the judgment must be reversed. The cause is remanded.

BAILEY v. STATE.

(Supreme Court of Alabama. May 15, 1902.)
MURDER IN SECOND DEGREE—SURROUNDING FACTS AND CIRCUMSTANCES—"MORAL CERTAINTY"—RECKLESSNESS—INTENT.

1. On a prosecution for murder in the second degree, the evidence showed that the defendant and deceased were both white men and friends; that defendant recklessly fired into a crowd of negroes, which resulted in the killing of deceased, who was standing near the negroes. The defendant had had a difficulty that night with one of the negroes, and at the time he fired the gun said "there would be a negro less here to-night." *Held*, that it was not error to permit a witness, who had testified on his direct examination that the killing occurred on a Saturday night at a negro party or dance, to testify upon further examination, in rebuttal by the state, "that there was a negro gathering there that night," as such evidence was competent to show the facts and circumstances surrounding the killing.

2. On a prosecution for murder in the second degree, a charge to the jury to convict "if you believe the defendant guilty, from the evidence, to a moral certainty," was not error, as the expression "to a moral certainty" is a legal equivalent for "beyond a reasonable doubt."

3. Where the evidence on a prosecution for murder in the second degree tended to show a reckless firing by the defendant into a crowd, which resulted in the killing of deceased, a charge, asked by the defendant, that the jury could not find him guilty unless they were satisfied from the evidence, beyond a reasonable doubt, that he fired with the intention to kill a human being, was properly refused, as a preconceived purpose to kill any particular person was not necessary.

Appeal from circuit court, Chilton county; N. D. Denson, Judge.

William Bailey was convicted of murder in the second degree, and appeals. Affirmed.

The appellant in this case, William Bailey, was indicted and tried for murder in the second degree for the killing of Joe Patton by shooting him with a gun, and was convicted of murder in the second degree, and sentenced to the penitentiary for 12 years. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. At the request of the solicitor the court gave to the jury the following written charge: "I charge you, gentlemen of the jury, if you believe the defendant is guilty, from the evidence, to a moral certainty, you must convict the defendant." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give, among others, the following charge requested by him: "That unless the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant fired the gun with intention to kill a human being, they cannot find the defendant guilty of murder in the second degree."

William A. Collier, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. Sam Glass, a witness for the state, testified on his direct examination that the killing of the deceased occurred on

a Saturday night at a negro party or dance. This witness, after being cross-examined by the defense, upon further examination in rebuttal by the state was permitted to testify, against the objection of the defendant, "that there was a negro gathering there that night." It was competent to show in evidence all the facts and circumstances attending the killing. The facts which the evidence on the part of the state tended to establish rendered this evidence not only relevant, but very material. The defendant and deceased were both white men and friends, and the defense set up was that the shooting was accidental. The evidence on the part of the state tended to show a reckless firing of the gun by the defendant into a crowd of negroes, which resulted in killing the deceased, who was standing near the negroes. The evidence also tended to show that the defendant had had a difficulty that night with one of the negroes, and at the time he fired the gun said "there would be a negro less here to-night." The court committed no error in the admission of the evidence.

In *Jones v. State*, 100 Ala. 88, 14 South. 772, it was said that the expressions, "to a moral certainty," and "beyond a reasonable doubt," are legal equivalents. A written charge to the jury in a criminal case which predicates a conviction of the defendant upon a belief, to a moral certainty, of his guilt, from the evidence, is the equivalent of one which predicates a conviction upon their belief beyond a reasonable doubt of defendant's guilt, from the evidence. There was no error in the giving of the charge requested by the state.

Charge No. 2 requested by the defendant was properly refused. There was evidence tending to show reckless firing of the gun into a crowd of negroes,—the perpetration of an act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, which, under our statute, constitutes murder in the first degree, although there was no preconceived purpose to deprive any particular person of life. It was not necessary, to constitute murder in the second degree, for which the defendant was on trial, that he should have the specific intention to kill at the time he fired the gun. *Nutt v. State*, 63 Ala. 184.

We find no error in the record, and the judgment is affirmed.

LETOHATCHIE BAPTIST CHURCH v. BULLOCK.

(Supreme Court of Alabama. May 13, 1902.)
EQUITY—REMEDY AT LAW—DEED—MENTAL
CAPACITY—HOMESTEAD—UNDUE INFLUENCE
—MODE OF EXERCISE—PLEADINGS—MULTI-
FARIOUS.

1. One claiming as devisee who seeks to recover the land from one in possession under a deed from testator subsequent to the will, which deed the devisee claims is void because the grantor lacked mental capacity, and because it attempts to convey the homestead

without his wife joining, has a plain and adequate remedy at law, and hence cannot maintain a bill in equity to set the deed aside.

2. Where one claiming as devisee seeks to recover the land from one in possession under a deed from testator subsequent to the will, a bill alleging that the deed was procured by undue influence, and praying that it be canceled on that ground, presents grounds for equitable relief.

3. Where a bill for equitable relief also alleges matter of purely legal cognizance, such allegations do not render the bill multifarious, or affect the jurisdiction of the court to grant the equitable relief.

4. Where a bill to cancel a deed on the ground that it was procured by undue influence alleges the persons who exerted such influence, it is sufficient, and need not allege the mode in which such influence was exerted.

5. On a bill to set aside a deed, an objection that the suit has not been discontinued as to one taking a life estate thereunder, and who is dead, cannot be taken for the first time on appeal, especially where no prejudice has resulted from the life tenant's name remaining as that of a party.

Appeal from chancery court, Lowndes county; W. L. Parks, Chancellor.

Action by John W. Bullock against the Letohatchie Baptist Church. From a judgment for plaintiff, defendant appeals. Affirmed.

The averments of the bill and the facts of the case are sufficiently stated in the opinion. The respondent demurred to the bill as amended, among others, upon the following grounds: "(1) Said amended bill is multifarious, in that it seeks to have the deed referred to annulled and set aside on account of the mental incapacity of W. P. Bullock to execute the same, and at the same time to have the said conveyance annulled and set aside on account of undue influence exercised over W. P. Bullock, and at the same time to have said conveyance set aside and annulled on account of the failure of the grantors therein to comply with the statutory requirements necessary for the conveyance of a homestead. (2) That said bill is repugnant and inconsistent, in that it seeks to have set aside said deed on account of the mental incapacity of the grantor, W. P. Bullock, and at the same time affirms the mental capacity of the said grantor, by seeking to have said conveyance avoided on account of the failure of the grantors to observe the statutory requirements in the execution of a homestead. (3) That it is not averred who exercised the undue influence. (4) It is not averred in what the undue influence consisted." There was also a motion to dismiss the bill for the want of equity. Upon the submission of the cause upon the motion, demurrers, and evidence, the chancellor rendered a decree granting the relief prayed for in the bill, and ordered accordingly. From this decree the respondent appeals, and assigns the rendition thereof as error.

J. M. Chilton and Whitten & Hinson, for appellant. Watts, Troy & Caffey, for appellee.

McCLELLAN, C. J. This bill is filed by Bullock against the Letohatchie Baptist Church. It avers that Wm. P. Bullock, the uncle of complainant, in the year 1885 executed his last will and testament, wherein there was a devise to Louisa A. Bullock of a life estate, and to complainant the remainder estate, in a farm (the land here involved); that Wm. P. died in 1897; and that his said will has been duly probated. It further avers that in 1890 said Wm. P. was stricken with paralysis, and from thence to his death was unsound of mind; that shortly before his death he signed a deed of said farm, purporting to convey a life estate therein to said Louisa A., and the remainder to said church; that, as to the greater part of the land,—160 out of 240 acres,—this deed was void because it covered the homestead of Wm. P., and was not acknowledged by his wife, the said Louisa A., separately and apart from the husband, etc., as required by the statute; that as to the whole of the land this deed was invalid, because Wm. P. was non compos mentis at the time he signed, and it was so invalid in whole, for the further reason that said Wm. P. was induced to sign it through and by the exercise upon him to that end of undue influence by his said wife, one Beville, the pastor of said church, of which Wm. P. was a member, J. W. Dickson and his wife, M. E. Dickson, or some of them. The prayer is for the cancellation of said deed in toto, or, if the court should find that Wm. P. Bullock was capable of executing the same, then for its cancellation as to that part of the land which constituted the homestead of said Bullock, and for general relief.

At the time of bill filed, the complainant was not in possession of the land. The bill, therefore, has no equity in so far as it proceeds on the theory that Wm. P. Bullock was non compos mentis at the time he signed the deed; for, in that aspect, complainant's remedy was plain, adequate, and complete at law. And for the same reason the bill is without equity in so far as it rests the partial invalidity of the conveyance on the facts that a part of the land constituted the grantor's homestead, and that the wife's separate acknowledgment was not taken. In that category of fact, also, complainant's right and remedy were legal, and not equitable. The third aspect of the bill, however, presents a case of purely equitable cognizance,—the cancellation of the deed on the ground that Wm. P. Bullock was defrauded or coerced into signing it by undue influence. So that we have a bill presenting the case in three alternative aspects, in two of which equity is without jurisdiction to grant relief, and the third presents facts for the interposition of the court of chancery. The joinder of these matters of legal cognizance with the matter of equitable jurisdiction is not of importance. "A bill cannot be rendered multifarious by joining with matter proper for

equitable action and relief another matter cognizable by courts of law." *Yarborough v. Adm'r v. Avant*, 66 Ala. 526; *Baines v. Barnes*, 64 Ala. 375; *McGriff v. Alford*, 111 Ala. 634, 20 South. 497. We therefore consider the present bill as one simply and only to set aside and cancel the deed signed by W. P. Bullock in July, 1897, for that it was procured to be signed by and through the bringing to bear upon him of improper and undue influence. In our opinion, its averments are quite sufficient to the presentation of such a case. We have never understood it to be necessary to allege with particularity the quo modo the result complained of was accomplished, but only that it was accomplished by undue influence exerted by named persons. The inquiry is not whether the improper influence was sufficient to have coerced the will of a man of ordinary capacity and force of character, but only whether the influence, whatever it may have been, did in point of fact control the act in question,—not whether it should have had the effect charged, but whether it did have that effect; and any influence which coerces an act in which the judgment and will of the actor do not concur is undue influence. Hence it is that the averment should be rather of the result, than of the particular and special acts and modes of causation. We are not of opinion that either the motion to dismiss, or the demurrer to the amended bill, should have been sustained.

The bill was filed originally against the church only, and sought to have the deed canceled as to the remainder estate in the land, leaving the life estate of Mrs. Louisa A. Bullock to stand. We suppose this course was taken because she had the same estate under the will, and to cancel the deed as to her would therefore seem to be a vain and useless thing to do. But the respondent at once objected to the bill in this connection by demurrer for inconsistency, repugnance, and what not, for that it confessed the validity of the deed as to one estate purporting to be conveyed by it, and questioned it as to the other, etc. The complainant thereupon, in response, as it were, to this demurrer, amended the bill by making Mrs. Bullock a party, and praying the cancellation of the deed as a whole. But she never was served with process, and never appeared in the case; the fact being that she died, and thereby put an end to the life estate, before service could be had upon her. After this the case proceeded, without objection on the part of the church, as if Mrs. Bullock had never been named as a party to the bill at all. There was, of course, no occasion to revive against her personal representatives or heirs, since nothing involved in the case passed to them. Technically there should have been a suggestion of her death, and a discontinuance as to her, or perhaps an amendment striking out her name as a party respondent; and, had any point been made

in that behalf in the court below, doubtless the proper course to eliminate her from the cause would have been taken by the complainant. No such objection was there made; and we will not entertain it as it is now made for the first time on appeal in this court, especially as nobody's rights or remedies have in the least been prejudiced by her name remaining in the bill as that of a party respondent.

The evidence in the case is very voluminous and conflicting. Much might be written upon it, but without serving any good purpose. It has been most attentively read and carefully considered; and from it we reach the conclusion that, at the time Wm. P. Bullock signed the deed sought to have canceled, he was a man of weak and impaired mind; that he was unduly influenced thereto by his wife, Louisa A. Bullock, and by his pastor, Dr. W. H. Beville, who were, perhaps, aided therein somewhat by other persons interested in the acquisition of the land by the church; that said deed was therefore voidable at the suit of the complainant. The fact that Mrs. Bullock and Beville stood to the grantor in relations of confidence and trust, while not necessary to the conclusion we have reached, gives additional strength to it. The averment in the bill that this undue influence was exerted with the intent to defraud the complainant we regard as surplusage, not necessary to be proved.

The decree of the chancellor must be affirmed.

JONES et al. v. PEEBLES et al.

(Supreme Court of Alabama. May 13, 1902.)
ESTATES—ADMINISTRATORS—CONTRACTS—APPEAL—CROSS ASSIGNMENTS OF ERROR.

1. The administrators of an estate have not authority to enter into a contract to mortgage all the crops grown on the estate to pay a mortgage on the land given by their intestate, and future advances to be made by the mortgagee to assist in raising the crops.

2. Where no appeal was taken by the appellees, their cross assignments of error cannot be considered, unless appellants consent in writing indorsed on the transcript, or there is joinder by them on the cross assignments.

Dowdell and Tyson, JJ., dissenting.

Appeal from chancery court, Pickens county; Thos. H. Smith, Chancellor.

Action for specific performance of a contract by Winston Jones & Co. against Mary E. Peebles and another, administrators of the estate of E. B. Peebles, deceased. From a judgment for defendants, plaintiffs appeal. Affirmed.

The prayer of the bill was as follows: "The premises considered, the complainants do now ask and pray that a preliminary injunction and restraining order be now issued to defendants, and each of them, and all and every one acting or pretending to act as agent or otherwise, from withholding said cotton from complainants, and enjoining and

restraining them and each of them, and each and every person acting or pretending to act for them as agent or otherwise, from selling or disposing of said cotton otherwise than in accordance with the terms and provisions of said contract with complainants, and enjoining them from committing or doing any other act in violation of their said contract without the consent of complainants, and commanding defendants, and each of them, to specifically perform their said contract, and to ship said cotton to complainants in accordance with their said contract; and that on final hearing a decree be entered making said preliminary injunction final and perpetual. And they also ask for all such further orders, processes, or decrees as the nature of the case may at any time require in its further progress." The contract which was sought to be specifically enforced was in words and figures as follows: "State of Alabama, County of Pickens. Agreement entered into by Winston Jones & Co. and Dr. J. Moody, adm'r., and Mrs. Mary E. Peebles, as administratrix of Emory B. Peebles, deceased, this 13th day of January, 1896, witnesseth: That whereas, the estate of the said E. B. Peebles is indebted to Winston Jones & Co. in the sum of twenty-seven thousand one hundred and twenty-five $\frac{25}{100}$ dollars, as evidenced by his several promissory notes, and secured by mortgage on the 10th day of July, 1895, and of record in the probate office of said county, with conditions therein set forth; and whereas, Winston Jones & Co. are willing to aid the said administrators in consummating the terms and provisions of said mortgage, and, in the event the estate is not able to meet the payments as they become due, the said Winston Jones & Co. agree to extend the unpaid amounts under said mortgage, and any balance so unpaid to be carried over for the next year, and so on as to such extensions from year to year until January 1st, 1903. Winston Jones & Co. agree further to advance to the administrators of said estate of Peebles a reasonable amount of cash and supplies, say three thousand dollars per year, during this time, to enable them to carry on the business; the said Winston Jones & Co. to have a mortgage on all the crops of cotton, cotton seed, and corn raised by said administrators on all the lands owned by the estate, and also on the lands owned by Mrs. Mamie E. Peebles, deeded to her by E. B. Peebles during said seven years; all the cotton to be shipped to said Winston Jones & Co., Mobile, for sale by them in the usual way; proceeds to be applied to the payment, first, of the new advance to make the crops, and any surplus to be applied to the old mortgage aforesaid. Now, in consideration of the foregoing, and it being to the interest of said estate, as well as Mrs. Mamie E. Peebles, the said Mrs. Mamie E. Peebles agrees to turn over to the administrators of said estate of E. B. Peebles the use and control of all the

property, real and personal, deeded to her by E. B. Peebles on the 8th day of December, 1895, and of record in the probate office of said county, free of rents, until the first of January, 1903, and all said rents, incomes, and profits to be used by said administrators to pay and satisfy the said mortgage debt of E. B. Peebles to Winston Jones & Co., all taxes on the property owned by Mrs. Peebles that was deeded to her by E. B. Peebles to be paid out of the income of all the estate property until the said debt to Winston Jones & Co. is fully paid. In the event Dr. Moody should resign, or in any manner cease to manage the said business, then it is agreed that Mrs. Peebles and Winston Jones & Co. shall select a suitable person to conduct the business in his stead to a final consummation as aforesaid, or the representatives of Mrs. Peebles and of Winston Jones & Co. may so act in such selection. Witness our hands this, the day and year first above written. Executed in duplicate. [Signed] Winston Jones & Co. J. Moody. Mamie E. Peebles." On the final submission of the cause on the pleadings and proof, there was a decree rendered, the substance of which is sufficiently stated in the opinion. From this decree the complainants appeal, and assign the rendition thereof as error. There were also cross assignments of error made by the appellees, but the record does not show that any cross appeal was taken, nor is there shown any agreement between the parties for the appellees to make cross assignments of error, nor is there a joinder by the appellants in the cross assignments of error.

A. C. Bogle and Pettus & Pettus, for appellants. Willett & Willett, for appellees.

DOWDELL, J. The appellants filed their bill in the chancery court of Pickens county for the purpose of enforcing the specific performance of a contract made and entered into by them under the firm name of Winston Jones & Co. on the 13th day of January, 1896, with the appellees, Mamie E. Peebles and Dr. J. Moody, as the administrators of the estate of E. B. Peebles, deceased. In addition to the special prayer, the bill contained the general prayer for relief. Upon the final hearing on the pleadings and proof the chancellor denied the relief sought against the respondents by the bill in their representative character, holding that they, as administrators, were without authority, and powerless to bind the assets of the estate of their intestate by entering into said contract, but under the general prayer granted only partial relief against the respondent M. E. Peebles. From this decree the present appeal is prosecuted. While error is also complained of in the decree in the directions for the stating of the account between the complainants and respondents under the order of reference for that purpose, the main question involved in the controversy on this appeal is that of the authority and power of the administrators,

as such, to enter into the contract sought to be specifically enforced, and its consequent validity. Pertinent to this question, the bill and the facts in the case show that E. B. Peebles, respondents' intestate, was the owner of a large quantity of land in Pickens county, and during his life, for many years, and up to the time of his death, farmed extensively, and also merchandised, during which time he had business transactions with the complainants, Winston Jones & Co., who did a commission business in the city of Mobile, and who were the said E. B. Peebles' commission merchants. In March, 1895, the said E. B. Peebles and Winston Jones & Co. had a settlement of accounts between said Peebles and Jones & Co. in which it was ascertained that the said Peebles was largely indebted to the said Jones & Co. A written agreement was then entered into between them, in which it was agreed that the said Peebles would, upon certain conditions stated in said agreement, execute a mortgage on a large amount of land and personal property, which he then owned, to said Winston Jones & Co., to secure his indebtedness to them. Pursuant to said agreement, all the terms and conditions of which having been complied with by the said Winston Jones & Co., the said E. B. Peebles did, on the 10th day of July, 1895, make and execute a mortgage to the said Winston Jones & Co., a copy of which is made an exhibit to the complainants' bill. In December, 1895, the said E. B. Peebles died, leaving his estate incumbered with said mortgage. In January, 1896, the respondents, Dr. J. Moody and Mamie E. Peebles, took letters of administration on the estate of the said E. B. Peebles, deceased, and immediately qualified and entered upon the discharge of their duties as such administrators, and on the 13th day of January made with Winston Jones & Co. the contract in question. The facts show that it was the purpose and intention of the parties, in entering into said contract, to pay off and discharge said mortgage indebtedness from E. B. Peebles to Winston Jones & Co. with the rents, income, and profits from the mortgaged property, and thereby save to the estate of the said E. B. Peebles, deceased, and to his heirs, the land and other property covered by the mortgage (and to that end, and for that purpose, the said Mamie E. Peebles pledging the rents and income from her individual estate). The facts show that the contract was just and fair and reasonable in its terms. In accordance with its provisions, the cotton grown and raised on the lands for the year 1896 was shipped to Winston Jones & Co., at Mobile, and by them sold, and the proceeds applied under the terms of the contract, and the contract otherwise in all of its terms was carried out by all of the parties for the year 1896. The facts further show that Winston Jones & Co. continued for the next year (1897) to carry out said contract in good faith, and have all along

performed their part, until they were prevented from further performance by the respondents; that the respondents received all of the benefits under the provisions of said contract in growing and raising the crop of 1897 in the way of advances in money and supplies to the respondents and their tenants on said lands, made by said Jones & Co. in accordance with the terms of the contract, but that the said Mamie E. Peebles, respondent, after said crop of 1897 had been so grown and gathered, refused to ship said crop to said Jones & Co. according to the contract, and wholly refuses to further carry out and perform said contract. The facts further show that under the agreement of settlement of March, 1896, between the said E. B. Peebles and Winston Jones & Co. and under the mortgage of July 10, 1895, executed pursuant to said agreement, as well as under the contract of January 13, 1896, entered into between the complainants and respondents for the purpose of paying off and discharging said mortgage indebtedness, and thereby preserving the lands under said mortgage to the estate of their intestate, certain benefits were to accrue and would accrue to Winston Jones & Co. in the performance of said contract, which operated as an inducement for entering into the same, and for such as no adequate and just compensation could be had in an action at law, in the assessment of damages, on a breach of the contract. With this preliminary statement of the facts, as shown in the record, we proceed to the discussion of the propositions of law applicable thereto, and which we think control in the case.

The doctrine of equity jurisdiction to compel the specific performance of contracts is well settled. It rests upon the just principle that men should be required to act in good faith towards each other in their business transactions; and that they should not be permitted to violate solemn contracts entered into, when it would be to the detriment of the other contracting parties for them to do so. When a proper case is presented for its exercise, the party injuriously affected by a breach of the contract is entitled to the relief as a matter of right; as much so as he would be entitled to a judgment for damages in an action at law for the breach. *Chambers v. Iron Co.*, 67 Ala. 358; *Bogan v. Daughdrill*, 51 Ala. 314; 1 Story, Eq. Jur. §§ 715, 717, 717a, 742; 3 Pom. Eq. Jur. § 1404. What will constitute a proper case for the exercise of equity jurisdiction for enforcing the specific performance of a contract in general is determinable upon the inadequacy of any remedy in a court of law to fully meet the ends of justice. In the following cases it seems to be clear upon authority that the jurisdiction will obtain and relief be granted, viz.: Where the remedy at law is for any reason doubtful, uncertain, or inadequate (*Casey v. Holmes*, 10 Ala. 783); or where an action at law in damages for a breach would not put the parties in a situation as beneficial to

them as if the agreement had been specifically performed (1 Story, Eq. Jur. § 716 et seq.; 3 Pom. Eq. Jur. p. 441, note 2); or where the nature of the case is such that a performance alone will answer the ends of justice (*Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120); or where there are special circumstances that operated as an inducement to the making of the contract which a court of law could not consider in an action in damages for a breach; and in every case where an action at law for damages would not afford complete relief (*Kirksey v. Fike*, 27 Ala. 386, 62 Am. Dec. 768; *Johnson v. Brooks*, 93 N. Y. 338; 3 Pom. Eq. Jur. p. 444). The facts and circumstances in the present case, as shown by the record, bring the case fairly within the principles above stated. They show that the complainants were commission merchants and cotton factors in the city of Mobile; that their business and profits in this particular consisted in advancing money and supplies to merchants and farmers, to enable them to grow crops and buy cotton, in order that they (Jones & Co.) might secure the handling and sale thereof; and for which advances and supplies and sales of cotton they received a commission from the parties dealing with them. The facts also show that Jones & Co. were largely interested as owners in the steamboat companies on the Bigbee river, by which this particular cotton was shipped to Mobile, Ala., and on account of which they received a profit from freight charged for shipping said cotton. They were also interested in the compress and warehouses in Mobile, by which the cotton would be handled, and in the insurance companies by which the cotton would be insured, sharing in the profits arising from these sources; all of these profits being of such character that they could not be considered in the measure of damages for a breach of the contract in an action at law, yet were advantages accruing to Jones & Co. from the contract, which induced them to enter into it. Apart from the consideration of the question of the power of the respondents in their representative character to make the contract, the contract, in its terms and under the peculiar circumstances of the case, is such as clearly calls for the exercise of the jurisdiction and power of a court of equity for its specific performance.

Did the administrators exceed their powers and duties, as such, under the law, in entering into the contract? Recurring to the mortgage of E. B. Peebles, deceased, to Winston Jones & Co., of July 10, 1895, and for the purpose of paying off and discharging which the contract of January 13, 1896, was entered into by the respondents, it will be seen that said mortgage contained a contract out of which other and future advantages were to accrue to both Jones & Co. and E. B. Peebles. After describing the property covered by the mortgage, and providing the manner of sale in case of default, the instru-

ment continues as follows: "And, further, on consideration as aforesaid, I do hereby sell and mortgage to Winston Jones & Co. all the crops of cotton, corn, fodder, peas, potatoes, hay, etc., which I may grow or have grown on said lands or any other lands in said county and state which I may cultivate or cause to be cultivated, and I obligate myself to deliver them at convenient warehouses on the river, to be shipped to them in Mobile, and there by them sold in the usual manner on account of the above indebtedness, from year to year, all such crops of cotton as I may grow or cause to be grown; other crops to be disposed of so as to promote the best interests of the parties to this instrument as may be from time to time agreed upon, or sold as the other property is provided to be sold." Under the facts and circumstances, Winston Jones & Co. would have been entitled to a specific performance of this contract against E. B. Peebles on a bill filed for that purpose. This contract was therefore binding on his representatives. *Hays v. Hall*, 4 Port. 385, 30 Am. Dec. 530; *Brewer v. Brewer*, 19 Ala. 489; *Chambers v. Iron Co.*, 67 Ala. 358; *Strange v. Watson*, 11 Ala. 324; *Jenkins v. Harrison*, 66 Ala. 345; *Meyer v. Mitchell*, 75 Ala. 475, 480. By the contract of January 13, 1896, the administrators evidently intended to carry out the contract contained in the mortgage of their intestate to Jones & Co. of July 10, 1895, and this was not beyond their power and duty, when, in order to its performance, they had only to rent out the lands of the estate. They had the authority under the statute to rent the decedent's lands, and this without an order of the court, and, when the interests of the estate required it, to rent privately; the statute imposing the duty upon them, when lands are rented privately, to report such renting to the probate court. Code 1896, § 154. In *Clark v. Knox*, 70 Ala. 622, 45 Am. Rep. 93, it was said by this court, speaking through Brickell, C. J.: "The statute [Code 1876, § 2446; same as section 154 of the present Code] clothes an executor or administrator with the same power to rent, publicly or privately, the lands of the testator or intestate. The power involves the duty; and, if there is neglect to exercise it, he is answerable for the loss resulting, as he is for loss from the neglect of any other duty with which he is charged." The bill prays a specific performance of the contract as to the 278 bales of cotton now stored in the warehouse of the respondent Mamie E. Peebles. It is exhibited against the respondents in their individual as well as their representative capacity. The facts show that this cotton was grown and raised by tenants during the year 1897 on the lands of the estate and lands of the respondent Mamie E. Peebles, and was received by the respondents from such tenants, and stored in said warehouse. Of the 278 bales about 125 bales were raised on the lands of Mrs. Peebles, and the remainder, about 153, on the

lands of the estate. Of the 153 bales grown on the estate lands, about 45 bales were due for rent, and the remainder, about 108, were due for supplies and advances made to the tenants to enable them to make the crop on the rented lands of the estate. There can be no doubt of the validity of the contract as against Mrs. Peebles in her individual capacity, and of the right of the complainants to a specific performance against her as to the cotton grown on her individual lands; and this, the chancellor decreed, but denied relief sought as to the remainder of the cotton, holding that this cotton constituted assets of the estate, and that the contract was incapable of enforcement as to it, for the reason that the administrators were without authority to make the contract. We think it quite clear that the cotton raised by the tenants on the lands of the estate, in excess of the rents, was the property of the tenants, and, independent of any contract as to advances, constituted no part of the assets of the estate. If the cotton due from the tenants for advances became a part of the assets of the estate, it was by virtue of the contract, which is the foundation of this suit, since the supplies and advances so made were obtained through the contract. To hold that this cotton constituted a part of the assets of the estate would be, in effect, a ratification of the contract. The advances to make this cotton came from Winston Jones & Co. under the contract. It would be wholly unjustifiable to ratify the contract as to the estate, and at the same time repudiate it as to Winston Jones & Co. In equity the cotton representing the advances made to raise and grow the same, and which was received by the respondents from the tenants on the debt for such advances, was purchased with the money of Winston Jones & Co., and they (the respondents) should be estopped to deny the validity of the contract under which the advances were made and obtained, and by reason of which this cotton came into their possession. And this is true whether they hold this cotton in a representative or individual capacity. As to the 45 bales representing the rent of the estate lands, and which were assets belonging to the estate, it became and was the duty of the administrators under the law, independent of any express contract entered into by them in their representative capacity, to apply this rent cotton on the mortgage debt which incumbered the lands. It was their duty to rent out the lands for the purpose of discharging this mortgage debt with the rents, if it was to the advantage and interest of the estate for it to be paid off in that way. *Clark v. Knox*, 70 Ala. 622, 45 Am. Rep. 93; *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 19 South. 777, 54 Am. St. Rep. 131. If, then, it was their duty, and they had the authority under the law, to rent out the lands and so apply the rents, it would seem to logically follow that they could, in their representative char-

acter, make a valid and binding contract with the mortgagee creditor to apply the rents to accrue from the incumbered lands in discharge of the incumbrance. Our conclusion therefore is that the contract of January 13, 1896, was valid and binding, and capable of enforcement against the respondents in their individual capacity as to the cotton grown on the individual lands of Mrs. Peebles and the cotton received from tenants for advances that was grown on the estate lands, since such cotton constituted no part of the assets of the estate; and under the principles above stated the contract was valid and binding and capable of enforcement against the respondents in their representative character as to the rent cotton arising from the incumbered lands.

The foregoing expresses the views of the writer, and in which Justice TYSON concurs. But the majority of the court hold that the respondents were without authority, as administrators, to enter into the contract of January 13, 1896, and for that reason the same is invalid, and cannot be specifically enforced against them in their representative character.

We cannot consider appellees' cross assignments of errors, since no appeal was taken by the appellees, nor is there any consent in writing by the appellants indorsed on transcript, nor joinder by appellants in the cross assignments. See rule 3 of practice, page 1187 of the Code, and authorities cited under this rule. It may, however, be stated here that, as to the defense of nonclaim set up by the respondents in their answer, on precisely the same evidence offered in this case it was held in the case of *Jones v. Peebles* (Ala.) 30 South. 564, that there had been sufficient presentation of the claim under the statute.

It follows that the decree of the chancellor must be affirmed.

CHRISTIAN v. STATE

(Supreme Court of Alabama. May 15, 1902.)
CRIMINAL LAW—CONFESSION—ASSAULT WITH
INTENT TO MURDER—APPARENT POTENCY OF WEAPON.

1. One of a posse about to arrest defendant stated to him that they had come after him. He asked, "What for?" and, on being told that he knew what for, he said, "Yes; for shooting W. * * * I did it,"—and declared he was standing at W.'s gate when the shooting was done. Held that, no promises or threats being shown to induce a confession, the statements were admissible as a confession.

2. On a prosecution for assault with intent to murder, an instruction that unless the gun used by the defendant, loaded with No. 6 shot, fired at the distance of 20 steps, was capable of producing death, they could not find the defendant guilty, was properly refused, as an apparent adaptation of the means to the criminal design, rather than actual potency of the weapon, was all that was requisite to guilt.

Appeal from circuit court, Chilton county; N. D. Denson, Judge.

Joe Christian was convicted of an assault with intent to murder, and he appeals. Affirmed.

The appellant in this case, Joe Christian, was indicted, tried, and convicted for an assault with intent to murder one George Willis, and was sentenced to the penitentiary for 20 years. The evidence showing that the defendant committed the felonious assault upon George Willis was a confession made by the defendant under the facts and circumstances as shown in the opinion. The evidence for the state tended to show that the said Willis was shot while he was sitting in his door, and it was further shown that the gate where the defendant said he was standing when he shot George Willis was 20 or 25 steps from where George Willis was sitting at the time he was shot. The charge requested by the defendant, to the refusal to give which the defendant separately excepted, is copied in the opinion.

William A. Collier, for appellant. Chas. G. Browne, Atty. Gen., for the State.

McCLELLAN, C. J. It affirmatively appeared that no promises or threats were made to the defendant to induce or coerce him to a confession. All that occurred, bearing upon the character and fact of the confession received in evidence, was this: Three or four armed men, in quest of the defendant, to arrest him, came upon him in a house where there were several other people. One of the posse said to defendant: "Joe, we have come after you." Defendant answered: "What for?" The officer said: "You know what for." Defendant replied: "Yes; for shooting George Willis. * * * I did it;" and he said, further, that he "was standing at George Willis' gate when he shot him." And these statements of the defendant constitute the confessions which were admitted against defendant's objection. Clearly, there was no error in receiving this testimony. 1 May. Dig. 209, 211.

The only other ruling presented for review is the refusal of the court to give the following charge: "The court charges the jury that unless the jury are satisfied from the evidence, beyond a reasonable doubt, that the gun testified as the gun used by the defendant, loaded with number six shot, fired at the distance of twenty steps, as testified in this case, was capable of producing the death of George Willis at the time the gun was fired, they cannot find the defendant guilty of assault with intent to murder." Leaving out of view some minor infirmities, each sufficient in itself to condemn this charge, it will suffice to say that, assuming the assault with a gun within its carrying distance, it cannot be the law that guilt or innocence of the aggravated assault charged in this indictment turns upon the inquiry whether the weapon employed was potent to the effectuation of the murderous design of the defend-

ant. To say the most, an apparent adaptation of the means to the end is all that the jury need find in such case; and, to say the least, there is an apparent deadly potency in any ordinary gun, charged with No. 6 shot, at 20 steps. *Mullens v. State*, 45 Ala. 43, 6 Am. Rep. 691.

Let the judgment be affirmed.

CRAIG v. ETHEREDGE.

(Supreme Court of Alabama. May 15, 1902.)

APPEAL—MOTION—RECORD—BILL OF EXCEPTIONS—ABSENCE OF MOTION—AFFIRMANCE.

Where, on appeal from a judgment dismissing, on motion, an appeal from a justice, the record contains a copy of a motion on which the court is supposed to have acted, but the transcript does not show the motion enrolled by an order of court, and the motion is not embodied in a bill of exceptions, the motion is not before the appellate court, and the judgment must be affirmed.

Appeal from circuit court, Lawrence county; O. Kyle, Judge.

Action by J. N. Craig against B. T. Etheredge. From a judgment of the circuit court dismissing an appeal from a judgment of a justice in favor of defendant, plaintiff appeals. Affirmed.

The appellant, J. N. Craig, brought an action of detinue against the appellee, B. T. Etheredge, in a justice of the peace court. From a judgment in favor of the defendant the plaintiff appealed to the circuit court. In the circuit court the appeal was dismissed on motion made by the defendant. From the judgment dismissing the appeal the present appeal is prosecuted. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

D. C. Almon and Kirk & Rather, for appellant. C. M. Sherrod and W. T. Lowe, for appellee.

TYSON, J. This appeal is prosecuted to review a judgment of the circuit court dismissing, on motion, an appeal to that court from a judgment rendered by a justice of the peace. It is true the record contains a copy of a motion upon which the court is supposed to have acted when it rendered the judgment complained of. But it is not shown by the transcript that this motion had been enrolled upon the records of the circuit court by an order thereof. For aught appearing it was simply copied into the transcript from the motion docket or from the paper on file upon which it was written. Until an enrollment it is no part of the records of that court, and in order to make it a part of the record brought to this court it must be incorporated in a bill of exceptions. This not having been done, we are precluded from considering it. Without it before us, we cannot know upon what grounds the judge

acted in rendering the judgment of dismissal. *Ewing v. Wofford*, 122 Ala. 439, 25 South. 251, and authorities cited.

Affirmed.

(107 La.)

Succession of HALEY. (No. 14,044.)

(Supreme Court of Louisiana. April 28, 1902.)

APPEAL—REVIEW.

This case involves only questions of fact. (Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Helen C. Haley. From the judgment, the dative testamentary executors appeal. Affirmed.

Henry Ohlapella and James B. Rosser, Jr., for appellants. Albert Voorhies, for appellee A. H. Frederic.

PROVOSTY, J. The opponent exhibits an act of mortgage, and mortgage notes identified therewith, all regular on their face, and testifies to the consideration of the notes, and supports his statement by a witness of unquestioned reliability who saw \$3,000 of the money paid; the amount of the notes being \$5,000. As against this, the succession offers practically nothing. True, the nominal mortgagee testifies that he never lent any money to the deceased, but the effect of his testimony is entirely done away with by his saying that he knows of his having signed the act only because he recognizes his signature, and that he may have accepted the mortgage for somebody else, as is very frequently done when the real mortgagee prefers not to appear in the act. True, again, the opponent was tardy in urging his claim, but the delay is fully explained. The other circumstances pointed out by the representatives of the succession as casting a doubt on the verity of the plaintiff's claim are of too inconsequential a nature to afford a basis for judicial action. Prescription was interrupted by timely suit.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(107 La.)

Succession of WILLIAMS. (No. 18,945.)¹

(Supreme Court of Louisiana. April 14, 1902.)

APPOINTMENT OF ADMINISTRATOR—RIGHT TO OPPOSE.

A person without pecuniary interest in a succession is without standing to oppose the appointment of an administrator.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Daniel W. Williams. From the appointment of an administrator, opponents appeal. Affirmed.

¹ Rehearing denied May 12, 1902.

Theodore Cotonio, for appellants. Dinkelspiel & Hart, for appellee Fernandez. Milton J. Cunningham, for appellee public administrator. John N. Ogden, for appellees absent heirs.

PROVOSTY, J. This case exhibits oppositions to the appointment of an administrator, with no other interest in the opponent than, as to one of them, that he is a resident of the city of New Orleans, and, as to the other, that he is owner of a piece of real estate inventoried as belonging to the succession, to recover which a suit will be brought against him if the administrator is appointed. It is plain that the opponents are without interest, and therefore without standing to interfere with the management of this succession. *Hen. La. Dig. p. 1123, No. 12; Code Prac. art. 15.* The opponent acquired the property of the succession at a tax sale, and now wants to block the appointment of an administrator, so as to head off the bringing of a suit for the recovery of the property. In support of this proceeding he cites the decision of this court in the case of *Succession of Aronstein*, 51 La. Ann. 1052, 25 South. 932. In that case the opponent was an heir.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, and that the opponents pay the costs of the opposition and of this appeal.

(107 La.)

CITIZENS' BANK v. TOWN OF JENNINGS. (No. 14,228.)

(Supreme Court of Louisiana. April 28, 1902.)
POLICE JURIES—CONTRACTING DEBTS—POWERS.

The statute declaring that police juries and the constituted authorities of incorporated towns and cities shall not have power to contract any debt or pecuniary liability without providing in the ordinance creating the debt the means of its payment, is a prohibitory law, and such a limitation upon the power of police juries and municipal authorities that debts contracted in violation of its provisions are stricken with nullity, and incapable of judicial enforcement.

(Syllabus by the Court.)

Action by the Citizens' Bank against the town of Jennings. Judgment for defendant was affirmed by the court of appeals, and the plaintiff applies for certiorari or writ of review. Affirmed.

Cline & Cline, for plaintiff. Schwing & Moore, for defendant.

BLANCHARD, J. The writ of review having been allowed, this case is before us for determination on its merits. A resolution was adopted by the town council of Jennings in the year 1895 authorizing the purchase of two chemical fire engines, if found satisfactory after trial. The price agreed upon between the vendor and the town was \$1,700, of which \$200 was to be

paid in cash and the remainder in two years' time. The engines were supplied and supposedly tested, for in March, 1896, the town council passed a resolution accepting them, ordering the \$200, cash payment, to be made, and directing a warrant to be drawn in favor of the vendor for the \$1,500 deferred payment, payable on or before 24 months. The \$200 was paid and the mayor of the town drew a negotiable note, payable to the order of the vendor, due at 24 months, with 7% interest from date, for \$1,500. This note was delivered to the vendor and subsequently transferred to the plaintiff herein, who brought suit upon it, praying judgment for its amount, with the interest stipulated, and claiming recognition of the vendor's privilege upon the engines. The defense is that when the debt was created no provision was made for its payment, and that the municipal authorities of the town were without authority to bind the corporation by the issuance of any warrant or other evidence of debt except against money actually in the treasury. It was averred that the engines were long since tendered back to the vendor, and the answer repeats the tender to the plaintiff, assignee of the vendor. The trial court sustained this defense, and on appeal to the court of appeals its judgment was affirmed.

Ruling—Section 2448 of the Revised Statutes declares that the police juries of the several parishes and the constituted authorities of incorporated towns and cities in the state shall not have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted. This is a prohibitory law, and such a limitation upon the power of police juries and municipal authorities that it is operative as well against third persons holding the evidences of the debt contracted as against the original holders themselves. Repeated decisions have placed it beyond controversy that debts contracted in violation of this statute are stricken with nullity and incapable of judicial enforcement. *Oubre v. Town of Donaldsonville*, 33 La. Ann. 387. The purchase of the engines in question was not an ordinary, current, administrative expense of the town of Jennings payable out of the annual appropriation of current revenues, as was the debt sued for and held collectible in *Laycock v. City of Baton Rouge*, 35 La. Ann. 479. There was no estimate of receipts and expenditures which included the purchase of the engines, nor any allotment of a portion of the revenues of the year of the contract, or of future years, to the payment of their price, as was the case with respect to the debt sued for and held collectible in *Louisiana & N. W. R. Co. v. Police Jury*, 48 La. Ann. 331, 19 South. 282. Here, the ordinance of the town contracted a debt and provided the funds to pay a small part of it, to-wit:—\$200, but made no provision whatever

for the remainder and larger part, to wit:—\$1,500, with 7 % interest per annum. In this there was a palpable violation of the section of the Revised Statutes referred to, and this suit to enforce the terms of the contract, whether it be held to be an action on the note itself, or on the resolutions of the town council authorizing the purchase of the engines and accepting them after test, cannot be sustained.

It is, therefore, ordered that the judgment of the district court, affirmed by the court of appeals, rejecting plaintiff's demand and decreeing the return of the engines to the plaintiff, do stand as the judicial determination of the issue herein involved.

(107 La.)

STATE ex rel. ZEIGLER v. BOARD OF ASSESSORS et al. (No. 14,185.)

(Supreme Court of Louisiana. April 28, 1902.)
TAXATION—CANCELLATION OF ASSESSMENT—APPEAL—JURISDICTION.

Where, in a suit for the cancellation of an assessment, the sole question at issue relates to the validity of the assessment, no question of the constitutionality or legality of the tax being involved, and the amount of tax is less than \$2,000, this court is without jurisdiction, and the appeal will be dismissed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Mandamus by the state, on the relation of Charles W. Zeigler, against the board of assessors and others. Judgment for relator, and defendants appeal. Dismissed.

E. K. Skinner, for appellant board of assessors. Frank B. Thomas, Asst. City Atty., for appellant city of New Orleans. Francis C. Zacharie, for appellant state tax collector. E. Howard McCaleb, for appellee.

MONROE, J. The defendant appeals from a judgment ordering it to cancel an assessment of \$15,000 in the name of the relator for the year 1901, upon "merchandise or stock in trade in Standard Warehouse," etc. It appears that the relator is conducting the business of a public warehouseman in New Orleans, and that the property referred to consists of sugar, rice, and other agricultural products, which belong to other persons, and are stored therein; that he applied to the defendant within the legal delay, but without success, for the cancellation of said assessment; that his application was denied; and that he thereupon brought this suit. The defendant, by way of exception, and for answer, alleges that the petition discloses no cause of action; that the plaintiff is estopped by reason of his failure to make a return of his property for assessment purposes, and that the assessment complained of is valid and correct. The appellee moves to dismiss the appeal on the ground that there is no question of the constitutionality

or legality of a tax at issue, the sole matter in dispute relating to the validity of an assessment, and hence, the amount involved being less than \$2,000, that this court is without jurisdiction *ratione materiae*. These grounds are well taken, and the motion must be sustained. *Adler v. Board*, 37 La. Ann. 567; *Favrot v. City of Baton Rouge*, 38 La. Ann. 231; *Gillis v. Clayton*, 33 La. Ann. 285; *Minor v. Budd*, 38 La. Ann. 99; *Kock v. Triche*, 52 La. Ann. 833, 27 South. 854.

It is therefore ordered, adjudged, and decreed that the appeal herein be dismissed at the cost of the appellant.

(107 La.)

STATE v. PRESTON. (No. 14,404.)

(Supreme Court of Louisiana. April 28, 1902.)
CRIMINAL LAW—APPEAL—ARRAIGNMENT AND PLEA.

The record failing to disclose that the accused was arraigned, or that he pleaded to the indictment, or was called upon to plead, the verdict and sentence cannot stand.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

Ed. Preston was convicted of shooting with intent to kill, and brings error. Reversed.

Charles C. Egan, for appellant. Walter Gulon, Atty. Gen., and Joseph Moore, Dist. Atty., for the State.

BLANCHARD, J. The accused was indicted for shooting with intent to kill and murder. Tried by jury, he was convicted of shooting with intent to kill, and sentenced to imprisonment at hard labor for 12 months. He appeals.

It is absolutely essential to the validity of a verdict of conviction that the accused should be arraigned before put upon trial. There was no arraignment in this case. The record shows none. And there was no waiver of arraignment, even if it could be waived. There was, therefore, no issue joined between the prisoner and the state, and the verdict and sentence cannot stand. *State v. Epps*, 27 La. Ann. 227; *State v. Revells*, 31 La. Ann. 387; *State v. Ford*, 30 La. Ann. 311; *State v. Christian*, Id. 367; *State v. Chenier*, 32 La. Ann. 103; *State v. Hunter*, 43 La. Ann. 157, 8 South. 624; *State v. Fontenette*, 45 La. Ann. 902, 12 South. 937; *State v. McMichael*, 50 La. Ann. 428, 23 South. 992. The fact that no legal verdict had been found, for want of arraignment of the defendant, was called to our attention by the attorney general, who asked that the sentence of the lower court be set aside for that reason.

It is ordered that the verdict and sentence appealed from be set aside and annulled, and that the case be remanded to be proceeded with according to law.

(107 La.)

STATE *ex rel.* HORTER *v.* JUDGES OF
COURT OF APPEALS FOR PARISH
OF ORLEANS. (No. 14,414.)

(Supreme Court of Louisiana. April 28, 1902.)
SUPREME COURT—JURISDICTION—AMOUNT
INVOLVED.

Where it appears that a title set up to property by one who claims possession under it is contested by the possessor of the property, who, fearing eviction, sues to annul the title and enjoins against eviction, the possession of the property is not alone at issue, and the value of the property being in excess of \$2,000 this court, and not the court of appeals, has jurisdiction to entertain an appeal involving the controversy.

(Syllabus by the Court.)

Application by the state, on the relation of John C. Horter, for writs of mandamus and certiorari to the judges of the court of appeals for the parish of Orleans. Writ denied.

Harry H. Hall, for relator. Respondent judges, *pro se*. E. Howard McCaleb, for respondent David G. Baldwin.

BLANCHARD, J. David G. Baldwin instituted suit via executiva against John C. Horter in foreclosure of a mortgage for \$10,000, and at the sheriff's sale which followed purchased the property covered by the mortgage for \$6,500. Horter, who occupied the premises thus bought, thereupon brought an action against Baldwin and the sheriff to have this sale to Baldwin decreed null, and to enjoin them from dispossessing him of the property. To the petition setting forth his complaint, defendants, Baldwin and the sheriff, filed exceptions of no cause of action, which the trial judge sustained, dismissing the suit and dissolving the writ of injunction. Whereupon, Horter took an order of appeal from this judgment to the court of appeals for the parish of Orleans, and lodged the appeal there. It was met by a motion to dismiss for want of jurisdiction *ratione materię* in that tribunal. The court of appeals, acting rather *ex proprio motu* than on the motion to dismiss, because of some irregularity affecting the latter, held the court to be without jurisdiction and dismissed the appeal. Whereupon, the appellant, Horter, falling in his application for rehearing, applied to this court for its writ of certiorari to bring up the record of the cause, and for a writ of mandamus to compel the court of appeals to entertain jurisdiction of the appeal. It is alleged that no other court has jurisdiction of the appeal and unless the court of appeals is constrained to take jurisdiction, relator will be deprived of his right of appeal altogether, and that no relief in the premises is open to him except through the writs of certiorari and mandamus. See *State v. Foster*, 106 La. 425, 31 South. 57. To the rule nisi issued by this court, the respondent judges make return, justifying their action in dismissing the appeal on the ground that the purpose

of the suit brought by relator against Baldwin and the sheriff was to annul a judicial adjudication of real property made under executory process to enforce a mortgage for \$9,500 on property which Baldwin had bid in at the sale for \$6,500, and the value of which is averred by the relator to be \$16,000. The contention of the relator is that what is at stake in the suit he brought against Baldwin and the sheriff is the possession of the property, which is not worth more than \$2,000, or a sum within the maximum jurisdiction of the court of appeals. He insists his proceeding is one to be protected from trespass in his possession only.

It is deemed unnecessary to discuss the averments of the petition. The character of the action is determined by its prayer. The prayer of the petition in the suit against Baldwin and the sheriff is twofold:—(1) Judgment is asked in favor of the petitioner and against the defendants, decreeing the sale made by the sheriff under the executory process, which issued at the suit of Baldwin *v.* Horter, and all the proceedings had thereunder, to be null and void and of no effect. (2) A writ of injunction is asked restraining Baldwin and the sheriff from taking any further proceedings under and by virtue of the executory process, or the sale and adjudication made thereunder, or from interfering by virtue thereof with the petitioner in his possession of the property sold. Here, then, is a suit, one of the demands of which, and the one upon which the other demand is predicated, is to annul a sheriff's sale of property which the relator in his petition to annul avers to be worth \$16,000, which was proceeded against in foreclosure of a mortgage for \$9,500, and which brought at the sale \$6,500. All these amounts are far beyond the maximum jurisdiction of the court of appeals. In order to determine whether relator is entitled to be maintained in that possession of the property which he avers is really the only thing at issue, it must first be decreed that the sheriff's sale of the property to the purchaser, Baldwin, who seeks possession thereunder, is null. Since the sheriff's sale affects property of a value far in excess of the jurisdiction of the court of appeals, it must be held that tribunal has no authority to entertain the appeal. Because the relator, in his petition in the suit against Baldwin and the sheriff, sets up that Baldwin is the owner of the property in question under a tax title acquired pending the advertisement of the property for sale under the executory proceedings, avails nothing in the way of vesting jurisdiction in the court of appeals. Baldwin was not claiming, at the time he was enjoined, possession of the property under the tax title it is alleged he had acquired. He was claiming possession as adjudicatee at the sheriff's sale. The title he set up to the property was the one springing from the sheriff's sale. His right of possession—the one he was preparing to enforce

—was predicated on that title. If the title be good and valid the writ of possession he was about to invoke would lie. Who is to decide whether the title is good? Why only that court vested with jurisdiction covering the value of the property as to which the particular title set up is contested. That court is the district court, in the first instance, and this court on appeal.

On the merits of the controversy, the contention of relator that the acquisition by Baldwin of the property at tax sale extinguished the note and mortgage by confusion and, thereafter, the executory proceeding no longer had virile force, may or may not be good. But what court on appeal is to determine the question thus raised? Why only that court whose jurisdiction is latitudinous enough to embrace controversies involving property of the value of that over which this dispute arose. It is not, then, the mere possession of the property that is in dispute. A title to the property set up by Baldwin is contested and denied. It is that title upon which he chose to rest his right of possession, rather than upon that other which he acquired at tax sale.

It is ordered that the rule nisi which issued herein be discharged, and that the peremptory writ of mandamus be denied at the cost of the relator.

(107 La.)

BAKER v. ATKINS et al. PRATT v. SAME. MATTHEWS et al. v. PULLIN, Sheriff, et al. (No. 14,218.)

(Supreme Court of Louisiana. April 28, 1902.)
JUDICIAL MORTGAGES — RECORDING JUDGMENTS—PRIORITIES.

1. Where A. is the owner of real estate by undisputed title, and sells the same to B., who fails to record his title, the judgment creditors of A. can acquire judicial mortgages on such property by recording their judgments after the date of such sale and before its registry.

2. And in such case the judicial mortgages recorded against A. prior to the registry of the sale prime all such mortgages recorded against B., whether the latter be recorded before or after the former.

Nicholls, C. J., and Breaux, J., dissenting.
(Syllabus by the Court.)

Action by J. L. Baker and James A. Pratt against Atkins & Wideman and others, and by T. S. Matthews and others against W. R. Pullin, sheriff, and others. Case certified from the court of appeals. Question answered.

MONROE, J. The judges of the court of appeal of the First circuit certify the following questions: "(1) Where A. is the owner of real estate by undisputed title, and sells the same to B., who fails to record his title, can the judgment creditor of A. acquire a judicial mortgage on said property by duly recording his judgment after the date of said sale, but before the same is recorded? (2)

If so, what is the rank of said judicial mortgage, as to a judicial mortgage against B., resulting from the registry of a judgment against him after the date of the unrecorded sale, but before the registry of the other judgments?"

It appears from the statement of the learned judges that in 1889 W. H. Hope sold certain real estate to T. S. Matthews, and that the parties failed to record the act of sale. Atkins & Wideman obtained judgment against Matthews, which they recorded in December, 1891. Pratt obtained several judgments against Hope, which he recorded in March, 1893; and Baker obtained judgment against Hope, which he recorded in July, 1893. Some time afterwards the act of sale from Hope to Matthews was registered, and thereupon or thereafter Atkins & Wideman seized the property as belonging to Matthews, and had it sold under execution, and Baker and Pratt came in by way of third opposition, and claimed preference on the proceeds as creditors of Hope, with judicial mortgages on the property, antedating the registry of the conveyance to Matthews. The determination of the questions certified depends upon the construction to be placed upon the following articles of the Civil Code:

"Art. 2440. All sales of immovable property shall be made by authentic act or under private signature. Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

"Art. 2275. Every transfer of immovable property must be in writing; but if a verbal sale or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated under oath, provided actual delivery has been made of the property thus sold."

"Art. 2264. No notarial act concerning immovable property shall have any effect against third persons until the same shall have been deposited in the office of the parish recorder, or register of conveyances, of the parish where such immovable property is situated."

"Art. 2254. It shall be the duty of the recorder to indorse on the back of each act deposited with him the time it was received by him and to record the same without delay in the order in which they were received; and such acts shall have effect against third persons only from the date of their being deposited in the office of the parish recorder."

"Art. 2266. All sales, contracts and judgments affecting immovable property which shall not be so recorded shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording. The recording shall have effect from the time when the act is depos-

ited in the proper office and indorsed by the proper officer."

"Art. 2242. An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

"Art. 2246. Sales or exchanges of immovable property by instruments made under private signature are valid against bona fide purchasers and creditors only from the day on which they are registered in the manner required by law."

"Art. 2253. The record of an act under private signature, purporting to be a sale or exchange of real property shall not have effect against creditors or bona fide purchasers, unless, previous to its being recorded, it was acknowledged by the party or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment be signed by the parish recorder, a notary, or a justice of the peace, and recorded with the instrument."

"Art. 3322. [As amended by Act No. 78 of 1900.] The judicial mortgage takes effect from the day the judgment is recorded in the manner hereinafter directed."

"Art. 3328. The judicial mortgage may be enforced against all the immovables which the debtor actually owns or may subsequently acquire."

The foregoing provisions of law, in so far as they relate to sales of immovable property, establish and emphasize the rules: (1) That such sales shall be without effect unless evidenced by writing, with the single exception that a verbal sale is to be held good as against the vendor or vendee who confesses it when interrogated on oath, provided actual delivery has been made of the property. (2) That all such sales shall be "utterly null and void, except between the parties thereto," unless and until duly recorded in the proper office, and to this rule there is no exception. Turning, however, to another part of the Code, we find, under the title "Of Mortgages," the two articles 3322 and 3328, which have been quoted, and upon the basis of which it is thought by one of the learned judges whose questions we are endeavoring to answer that a judicial mortgage against the holder of an unregistered title takes effect when recorded, not only as between the mortgagee and such holder, but as priming all judicial mortgages recorded against the owner of record subsequently to the date of the unregistered conveyance, from which date and for which purpose it is assumed that the unregistered vendee "actually owns" the property. It is admitted that: "So long as a sale is unregistered, an innocent third person may acquire a valid mortgage, or title by purchase, either from the apparent owner himself, or by seizure and judicial sale made at the instance of the creditor of the apparent owner. 'But,'

it is said, 'in all cases where the judgment creditor's right has been sanctioned to seize and sell the property of his debtor, as against the real owner under an unrecorded title, the same was attached or seized before the recordation of the title to the purchaser.' In instances of this character it is the fact of the previous seizure that confers the right as against the apparent owner; and the question of mortgage or no mortgage has no bearing in determining the rights of the respective parties under such conditions. It is the action of the creditor, based on the faith of the records, that confers a superior right in favor of the creditor over that of the real owner under an unrecorded title. But when the creditor undertakes to exercise his claim to a judicial mortgage an entirely different question is presented. In the latter case, under the plain provisions of the Civil Code, the creditor's right of mortgage is limited and restricted to the property actually owned by the debtor at the time of the registry of the judgment." It would follow from the view thus presented that for the purposes of all judicial mortgages, whether recorded against the owner of record or against the holder of the unregistered title, the latter must be regarded as the actual owner of the property, and, quoad that property, as the only person affected. The answer to this, we think, is to be found in the declarations of the law that no sales of immovable property shall "have any effect against third persons until the same shall have been deposited," etc.; that such sales "shall have the effect against third persons only from the date of their being deposited," etc.; that "all sales of immovable property which shall not be recorded shall be utterly null and void, except between the parties thereto," etc. Giving effect to these provisions, there can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record; for, except as between the parties thereto, an unrecorded conveyance is "utterly null and void," and conveys no title. As between the parties, however, the unrecorded conveyance makes the grantee the actual owner of the property, and as between the grantee and his creditors the latter may enforce their judgments either by executing them or by recording them as judicial mortgages; and it is in that sense, and to that extent, as we understand it, that article 3328 is intended to have effect. If, upon the other hand, we attempt to give that article the effect attributed to it, we at once become involved in complications and contradictions from which there is no extrication. And in this connection it may be remarked that the inclination to acquire absolute dominion over some part of the earth's surface, and to hold on to the part so acquired, seems common to all mankind; and, being a species of property which can neither be removed nor concealed, it constitutes a visible asset, inducing confidence

in the financial responsibility of the owner, and affording to his creditors a convenient source from which to obtain satisfaction of their claims. For these reasons, and for others that might be mentioned, it is obviously of the utmost importance to the peace and welfare of society that all questions as to the manner by which such property is acquired and divested, and as to the moment at which one person becomes and another ceases to be the owner, should be governed by definite and fixed laws; and hence, we take it, the explicit and reiterated provisions of our Code. But if it be held that quoad the judicial mortgagee the actual owner of the real estate is or may be the holder of the unregistered title, whilst as to all other third persons the actual owner is the owner of record, we introduce into our system of law an element of uncertainty which appears to us to be destructive of the purpose to be accomplished. Thus, if it be true that the owner of record, notwithstanding the fact that he has already made a sale, which has not been registered, may sell or mortgage his property, and if it be true that, notwithstanding such unregistered sale or conventional mortgage, the property may be attached or seized under execution, or under executory process at the instance of his creditor, what reason can there be for denying to such creditor the right to record and make effective his judgment as a judicial mortgage? The law under which he acts leaves it optional with him to issue execution or not, as he pleases; to record his judgment or not as he pleases. Why, then, should it be said that his debtor is the actual owner of certain real property for the purposes of the execution, but that for the purposes of the mortgage resulting from the registry of the judgment the owner is unknown, and is at liberty to disclose his identity at his convenience? Another consideration which affects the question is that, so long as the title to real estate stands in a man's name, it may give him credit which he might not otherwise enjoy, and it would be impossible to say, in any given case, and in the absence of evidence on the subject, how far a creditor whose debt is contracted during such period is influenced in his dealing by the credit which his debtor derives from that source. Our jurisprudence upon the subject is reasonably clear, though there are perhaps one or two decisions which might admit of or require a somewhat nice differentiation. In *Logan v. Hebert*, 30 La. Ann. 727, it was held that an unrecorded deed transfers the property to the purchaser as against all the world except creditors of the vendor and bona fide purchasers from him without notice, and that the registry of a judgment will operate as a judicial mortgage on all the immovables belonging to the debtor, and situated in the parish where the registry is effected, whether the title to such immovables is recorded or not, and will be good

against everybody that such debtor's title is good against; which is equivalent to saying that such mortgage was not good against creditors of the vendor of the property. In *Gallaughier v. Hebrew Congregation*, 35 La. Ann. 829, it was held that, as to the owner by unregistered title, a recorded judgment operates as a judicial mortgage; but the court said: "Where the act is unrecorded, those creditors [referring to the creditors of the vendor] are not presumed to know of its existence, and, if they know of it, they are not bound to respect the transfer. They are authorized to ignore it, and to proceed directly against the property as though the transfer had never taken place, and the property unquestionably belonged to their debtor." The cases of *Broussard v. Le Blanc*, 44 La. Ann. 880, 11 South. 460, *Succession of Manson*, 51 La. Ann. 130, 23 South. 639, and *Douglass v. Douglass*, 51 La. Ann. 1455, 26 South. 546, presented peculiar features of their own. In *Broussard v. Le Blanc* the plaintiff, a married woman, sued for the recovery of certain property which had been seized by the creditors of one Nunez, her position being that the alleged title upon the faith of which the seizure had been made was merely a pignorative contract, or a fraudulent simulation, entered into by her for the purpose of securing a debt due by her husband. The seizing creditors affirmed that the transaction was a sale, and also alleged that they had acquired judicial mortgages, which, in any event, they were entitled to enforce. It was held that under the pleadings the mortgage rights of the defendant could not be determined; that there had been no sale of the property, and that the alleged vendee had never taken possession; and, whilst it was intimated that there might be some difference between the rights of a judicial and of a conventional mortgagee, the matter was merely referred to en passant, and the intimation was not made the basis of the judgment. In *Succession of Manson*, the facts were that one of the banks in New Orleans foreclosed a mortgage for \$5,000, and the property was adjudicated upon the bid of its counsel, and merely as a matter of convenience, to its cashier, who was not informed of it until afterwards, when, upon the same day, he executed an instrument in the form of a counter letter, declaring that he had no interest in the property. It was made known later, however, that there had been previously recorded against him a minor's mortgage for a large amount, and the purpose of the suit was to free the property so adjudicated therefrom. It was held that under the circumstances the minor's mortgage ought not to be held operative against the property. The case of *Douglass v. Douglass* was not unlike that of *Broussard v. Le Blanc*, the decision having for its basis an utterly void transaction, whereby the property of a married woman was made to appear the property of her husband, and the

question to be decided being whether the creditors of the husband's heir, who were not shown to have acted upon the faith of his supposed ownership, should be allowed to appropriate it to the payment of their claims. There is, no doubt, some language in these opinions which sustains the views which have been here considered, but we are of opinion that its application should be confined to the cases in which it was used, it being much safer at times to reason from general propositions to particular cases than the reverse. Our answer to the first question, then, is "Yes."

And we think that the law and the reasoning which lead to that conclusion require that we should answer the second question by saying that judicial mortgages recorded against the owner of record prior to the registry by him of the sale of the property prime all such mortgages recorded against the vendee, whether the latter be recorded before or after the former.

NICHOLLS, C. J., dissents. BREUX, J., also dissents for reasons stated in his separate opinion.

BREUX, J. (dissenting). The property was seized and sold under the execution of a judgment of Atkins & Wideman against W. H. Matthews, the buyer, whose title was recorded. Baker, opponent, claimed the proceeds of the sale on the ground that his judicial mortgage attached before the sale was recorded. Pratt, another opponent, claims on the same ground, but also claims to have priority over Baker, because his judgment was recorded when Baker had his recorded. Atkins & Wideman were the judgment creditors of Matthews, and had the property seized and sold, as before mentioned, under their judgment, recorded in 1891. Pratt's judgment was recorded in 1893, and Baker (creditors of Hope) also in that year. Hope, the original owner, was the owner of record when all these judgments were recorded, but he had sold the property to Matthews in 1889 under a title unrecorded. I take it that the articles of the Civil Code regarding registry are to be interpreted with article 3328 of the Civil Code. This article (3328) provides that a judicial mortgage may be enforced against all immovables which the debtor actually owns or may subsequently acquire. Hope did not actually own the property. It was owned by his vendee, Matthews: "Actual owner" (3328), as relates to judicial mortgages, is an owner of the property, whether his deed be recorded or not. The judicial mortgage creditors of the buyer have a substantial claim against the actual owner who has paid for the property. He has a right really earned; while, on the other hand, the judicial mortgage creditors of the seller have no real or substantial claim, for their debtor (the seller), before they had acquired any right against

him, had parted with his title. The judicial mortgage may be enforced against all immovables which the debtor actually owns. *Douglass v. Douglass*, 51 La. Ann. 1471, 26 South. 546; *Broussard v. Le Blanc*, 44 La. Ann. 883, 11 South. 460; *Succession of Manson*, 51 La. Ann. 130, 25 South. 639; *Dickson v. Hynes*, 36 La. Ann. 684.

I dissent.

(107 La.)

MOUNT et al. v. HARRELL. (No. 14,287.) (Supreme Court of Louisiana. April 28, 1902.)
SALE OF LAND—DEFICIENCY IN QUANTITY—
DIMINUTION IN PRICE.

Tracts of land were sold by defendant to plaintiffs, and each tract, except one, was sold as containing a stated number of acres. The vendor, when the parties met to complete the deed, swore that he said to the vendees that he was not prepared to give correct descriptions of the land, and that vendees requested him to complete the deed by describing the tracts as correctly as possible. This was not contradicted. The vendor sold all the land he owned in the locality named. The vendees claim that there is a deficiency, and sue for diminution of the price. There is deficiency in the number of acres in the tracts named, but there is no deficiency if all the lands in the locality not designated by the names and the number of acres is taken into account. Held that, in making up the total number of acres sold, defendant is entitled to include the acres not described with those described. All the tracts were of about equal value per acre, and the nature of the land about the same.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Pointe Coupée; L. B. Claiborne, Judge.

Action by J. B. Mount and others against L. R. Harrell. Judgment for defendant, and plaintiffs appeal. Affirmed.

Montgomery & Percy (Saunders & Gurley, of counsel), for appellants. Yoist & Hewes, for appellee.

BREUX, J. Plaintiffs, alleging a deficiency in the number of acres of land they bought from the defendant, sue for a diminution of the price. Defendant sold a number of tracts to the plaintiffs, describing each tract by name, but not by boundaries, and giving the number of acres contained in each tract, not mentioning the total acreage of all the tracts. On examination, we find 6,579 acres is the number. Plaintiffs' contention is that 640 ⁸⁶/₁₀₀ acres of land in the tract known as the "Glass Tract" and 320 acres in the McCajah Barrow tract and 391 ⁸⁰/₁₀₀ acres in the Butler Gilbert tract go to make up the tract of land called "Dr. Rigney" of 2,250 acres; that these tracts are by the description sold twice, and thereby increase the acreage 1,352.66 acres, more than one-twentieth part of the whole. Defendant admits the sale, and alleges that through no fault of his the description is faulty and defective, and that some of the lands are apparently sold twice under different names, and other tracts are entirely

omitted. He specially avers that he sold all lands owned by him on Raccourci Island, and that the deed contains $141\frac{44}{100}$ acres over and above the total number contained in the different tracts. The land is described as follows in the deed: (1) The Hill & Schlater tract, containing 680 acres. (2) The Burdick tract, containing 280 acres. (3) The Lake Breeze tract, containing 640 acres. (4) The William Leake tract, containing 775 acres. (5) The Glass tract, containing 640 acres. (6) The McCajah Barrow tract, containing 320 acres. (7) The Dr. Rigney tract, containing 2,250 acres. (8) The Butler Gilbert tract, containing 391 acres. (9) The Church & Peyton tract, containing 120 acres. (10) The L. Babers tract containing 242 acres. (11) State lands, containing 241 acres. (12) "All batture lands accruing to the above lands, and all other lands owned by the vendor on Raccourci Island, are hereby transferred to the vendees by this act." The land was sold, with a number of mules, for the sum of \$17,400. All parties concerned agree that the price for the mules was \$2,400, and that the price agreed on for the land was \$15,000.

The number of tracts delivered presents the first question for determination, and, if an insufficient number has been delivered, it will become necessary to determine whether the acreage called for can be supplied by including other lands than those specifically referred to by name in the deed. In reviewing the facts, our attention was attracted by defendant's statement, as a witness, that he said to plaintiffs, who met him to pass the deed, that he did not have a complete description of the land, and that plaintiffs, replying, said: "You are selling all the lands on the island. Give as correctly as you can the description of the property;" that there was nothing said at the time about the acreage, or specifically about the price of each acre. This is not contradicted by plaintiffs, who testified while the case was on trial. With reference to the description, the defendant testified that the McCajah Barrow tract is described twice in the act of sale in question, but that this is offset by a larger acreage in land he bought from the state, mentioned in the foregoing list of lands as less than it actually contains; that the Hill & Schlater tract, mentioned in the list as containing 680 acres, contains 960 acres. In the absence of a survey, or of any plat showing the acreage by the least attempt at measurement, we have taken up and examined as best we could the number of acres set forth in each deed under which defendant held at the time of the sale. In the deed under which defendant held before he sold, the Dr. Rigney tract was divided into four different tracts, and each tract was described by boundaries. Taking up the question of the area of the tract containing 680 acres, as per the defendant's deed to plaintiff, viz.,

the Hill & Schlater tract, we find that it was bought by the defendant from the parties just mentioned in 1895, and is known as the "Woodland," containing 960 acres, with boundaries given in the deed. The second tract in the same deed is described as also situated in West Feliciana, on Raccourci Island, bounded north by the Woodland, east by P. W. Barrow, south by vendee, west by line of Pointe Coupée. The number of acres in this tract is not stated in the deed. The next is the William Leake tract. It was sold by defendant as containing 775 acres. We turn to the deed under which defendant held, and find that this was the number of acres he bought from William Leake in 1888. It is described in the deed as sections 10 and 15, township 2 S., range 5 W. The defendant, vendor to plaintiffs, sold the Ames Webb tract as containing 640 acres in the deed under which he held dated in 1881. This tract is described as containing the number of acres corresponding with the number he sold. The same is true as to the number of acres in the Glass tract, viz., 640 acres, sold to the defendant at the sale in 1887. We take it that the Lake Breeze place was bought by the vendor in 1888 from Sheriff Barrow, sold to effect a partition, as it is the only place which measures 646 acres, as mentioned in the last deed. There was a McCajah Barrow title to 320 acres, bought by defendant in 1890 from the tax collector. We understand that that is the land referred to in defendant's deed to plaintiffs. There was a 280-acre tract, bought by defendant in 1890 at tax sale, which corresponds to the number sold to plaintiffs, and which we understand is the place referred to under the name of "Burdick." The number of acres corresponds and to some extent the name. The Butler Gilbert tract, we have reason to say, was bought by defendant at tax sale in 1893. The L. Babers land is referred to in an act of sale by Clack, sheriff of West Feliciana, in 1893, to defendant, as belonging to L. L. Babers, and as containing 242 acres. The name and number of acres correspond with the name and number of acres of the tract described above as the "Babers Tract." Defendant held patent, per certificate 2,883, N. S. L., Act 25 of 1894, to one tract of $421\frac{12}{100}$ acres; Lanier, register. The Church & Peyton title is of record, and was acquired by defendant in 1899. The complaint of plaintiffs is that the Glass, the McCajah Barrow, and the Butler Gilbert tracts were sold twice, because they were in the Dr. Rigney tract. Without including the Dr. Rigney tract as referred to under that name, we find that plaintiffs have received a number of acres equal to the number bought by them, as will be seen by the following list: (1) The Ames Webb tract of land, containing 640 acres, bought in July, 1881. (2) The William Dix tract, bought in July, 1881, containing 640 acres. (3) The

John Crocket tract, bought in July, 1888, containing 644.56 acres. (4) The Glass tract, bought in 1887, containing 640 acres. (5) The Lake Breeze tract, bought in 1888, containing 643 acres. (6) The William Leake tract, bought in 1888, containing 775 acres. (7) The Burdick place, bought in 1888, containing two-thirds of 145 acres. (8) The Burdick place, bought in 1888, containing one-half of two-thirds of 145 acres. (9) The Breeze place, bought in 1888, containing 646 acres. (10) The McCajah Barrow place, bought in 1890, containing 320 acres. (11) The Butler Gilbert tract, bought in 1893, containing 391.82 acres. (12) The Darling Babers tract, bought in 1893, containing 242 acres. (13) The land known as the "State Land," bought in October, 1894, containing 421.12 acres. (14) The Hill & Schlater land, bought in 1895, containing 960 acres. We here insert this list in order to avoid further reference to particular tracts. The deeds of purchase of the defendant show the number of acres opposite the name of each.

Plaintiffs further urge that the vendees are entitled to the different tracts and the number of acres contained in each, and that in addition they are entitled to all the land he owned on Raccoure Island; that, if he (vendor) had other tracts, he bound himself to deliver the other tracts. This objection finds an easy answer, as to a part of the number of acres, in the fact that two of the tracts contain more land than is set forth in the description in the deed. The Woodland was sold as containing 680 acres. It contains a larger amount than 680 acres. In addition, the lands transferred by the state were delivered as amounting to 241 acres, while they amount to 421 ¹²/₁₀₀ acres. This leaves a deficiency on plaintiffs' theory of 439 ⁷⁸/₁₀₀ acres. Without including the Dr. Rigney tract, and including the three tracts which form a part of the Dr. Rigney tract,—that is, the Glass, the McCajah Barrow, and the Butler Gilbert tracts,—plaintiffs are in possession of as many acres as they bought. Plaintiffs bought all of defendant's lands on the island before named. It included the tracts in question; also the lands not specifically described. The contradicted testimony of the defendant renders it clear in our view that it was not intended that defendant should be held to warrant the number of acres in each particular tract. The number of acres sold was 6,579. Plaintiffs are in possession of that number. They are not entitled to that number plus other lands owned by the defendant at that time. The deficiency is made up by the tracts containing a larger number than described in the deed and by other lands which the parties did not appear to have in contemplation at the time, but which they included, as we understand, in order to make it certain that defendant would have no right to claim other lands, if he owned other lands on the island. It was the purpose to buy

all the lands the vendor had in the locality before mentioned. In one instance (that is, in the Hill & Schlater deed) the number of acres of the tract is not given at all, as we have noted, negating the idea that each tract specially mentioned was bought with reference to the number of acres of the land. This would lead to the inference that all the tracts were sold with the view of making up a total number of acres, i. e., the total before mentioned.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and it is hereby, affirmed.

(107 La.)

STATE v. IKENOR. (No. 14,348.)

(Supreme Court of Louisiana. April 28, 1902.)

MURDER—SENTENCE.

Prior to sentencing a defendant in a capital case, he should be asked by the court whether he had anything to say why the sentence of the court should not be pronounced against him.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Bossier; John Thomas Watkins, Judge.

Joe Ikenor was convicted of murder, and appeals. Affirmed.

Joannes Smith, for appellant. Walter Gulon, Atty. Gen., and T. T. Land, Dist. Atty. (Lewis Gulon, of counsel), for the State.

NICHOLLS, C. J. The defendant, sentenced to be hanged under the verdict of a jury convicting him of murder, has appealed. The case was submitted to us on the face of the record. Our examination disclosed no error other than that no mention was therein made of the fact that, prior to sentencing the defendant, the court had asked him "whether he had anything to say why the sentence of the law should not be pronounced against him." The attorney general was thereupon directed to ascertain whether that formality had been omitted as a matter of fact, or whether the minutes were incomplete. Through due proceedings we have been informed that the question was, in point of fact, propounded to the defendant before sentence. Defendant and his counsel admitted this fact on being ruled into court to show cause why the minutes should not be corrected, and consented to the correction of minutes.

Finding now no reasons for setting aside the verdict or reversing the judgment, the judgment appealed from is hereby affirmed.

(107 La.)

STATE v. JOHNSON. (No. 14,382.)

(Supreme Court of Louisiana. April 28, 1902.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS—BILL OF EXCEPTIONS.

1. The charge of the court in a criminal case must be assumed, in the absence of proper recitals, to have been given under circumstances warranting it.

2. Bills of exception should be submitted to the district attorney for inspection prior to being handed to the court for signature.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; T. Don Foster, Judge.

Sampson Johnson was convicted of murder, and appeals. Affirmed.

Broussard, Dulaney & Broussard, for appellant. Walter Gulon, Atty. Gen., and Anthony N. Muller, Dist. Atty. (Lewis Gulon, of counsel), for the State.

NICHOLLS, C. J. The defendant appeals from the verdict of a jury, and a life sentence in the penitentiary, having been tried under an indictment for murder. The only bill of exception in the record is one taken to two detached sentences in the judge's charge to the jury, in which he said: "No person has a right to kill another because he was invited to enter into his house, and to follow and kill him without cause or provocation; and, if he does, it is murder. * * * No one has a right to assume that a party visiting his house is violating its sanctity, and kill him without cause or provocation; and, if he does, it is murder." The objection urged was that it was a statement to the jury touching facts and the view taken thereof by the judge. The charge itself is not in the record. Counsel makes no statement as to the circumstances under which the court made use of these two expressions. The charge must be assumed, in the absence of proper recitals, to have been given under circumstances warranting it. We cannot reverse a verdict and sentence upon the showing made in this case. The words used could just as well have been harmless as injurious. The practice of taking bills upon sentences in a charge, wrenched from the context, when it is so easy to require the entire charge to be made in writing, and to place the whole matter before us, is calculated to work injury either to the state or to the accused.

The attorney general and the district attorney object to the bill of exceptions taken. The latter claims that the bill should have been submitted to his inspection before being handed to the judge for his signature. We think this complaint well grounded. The state has a right to be heard before bills are signed. *State v. Laborde*, 48 La. Ann. 1492, 21 South. 87. We suggest to the district judges that, before signing bills of exception, they ascertain that they are presented to the district attorney.

The judgment is affirmed.

(107 La.)

KAISER v. NEW ORLEANS & C. R. CO.
(No. 13,923.)

(Supreme Court of Louisiana. April 28, 1902.)
STREET RAILROADS—INJURY TO PERSON ON TRACK.

Where a boy of 13 walks from one side of a street, on which there are double car

tracks, toward the other side, at night, and, without stopping, collides with a car, blazing with light, loaded with passengers, and moving at the rate of six miles per hour, which there was nothing to prevent his seeing and hearing, there can be no recovery for injury resulting from such collision.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by Charles Kaiser against the New Orleans & Carrollton Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Louis P. Paquet and Andrew J. Murphy, for appellant. Dart & Kernan, for appellee.

Statement of the Case.

MONROE, J. The plaintiff alleges that his minor son, for whose use and benefit he sues, had his foot cut off by one of the defendant's cars through the criminal negligence of the defendant and its servants, and he prays for damages. The answer is a general denial and a plea of contributory negligence. The evidence shows that, upon the evening of February 21, 1900, Peter Kaiser, the injured boy, with his elder brother, Charles, left their home, at the corner of Fourth and Franklin streets in this city, with the intention of going to Canal street, in order to see an illuminated procession which was expected to appear. They were city-bred, intelligent, school-boys, accustomed to electric cars and other perils incident to street travel, and were 13 and 14 years of age, respectively. Near the lower crossing of Perdido street, on Baronne, at about 5 minutes past 7 o'clock, Peter Kaiser's right foot was crushed under the wheel of car No. 185 of the defendant's Jackson avenue line, which was then going in the direction of Canal street, upon the eastward, or river side, track. The car was moving at about schedule speed, and was carrying a large number (70 or more) of registered passengers, who were packed in the seats and the aisle and upon both platforms; and it seems likely that there were others, not registered, upon the bumper, outside of the rear platform, and hanging upon the hand rails, with their feet upon the steps of one or both of the platforms. Neither the conductor nor the motor-man were aware at the time that any accident had occurred, nor can it be said that any of the passengers were aware of it, and the car proceeded on its way to Canal street. There seems to be no doubt that the little boy's foot was crushed by the front wheel on the left, or woods, side. Nungesser and Monaghan, two passengers, were occupying the front seat on that side; the former next to the aisle, and the latter next to the window, which was open. Nungesser testifies that about Poydras street, one square above the scene of the accident, two boys caught onto the car, with their feet upon the step of the front platform, supporting themselves, no doubt, by hanging onto the after hand rail, with their bodies swinging back, and

that, as the position was one of peril, by reason of the fact that they were liable to be knocked off by a car going up on the parallel and adjacent track, the situation attracted his attention, and he commented on it to Monaghan, and that, in passing Perdido street, he felt a jar, and remarked, "There is somebody run over," to which Monaghan replied, "No; the car would have stopped." Monaghan's testimony is somewhat peculiar. He at one time appears to testify that the boys were on the car, and that Nungesser called his attention to the fact, but is afterwards unable to say whether they were there or not, and is unable to recall any conversation with Nungesser on the subject, though he fully corroborates that witness as to the remarks above quoted. Bonaparte, a negro boy, was standing on, or just inside, the sill of the rear door of the car, and testifies that at Perdido street he heard someone outside of the car call out that a "boy got run over." Beyond this there is absolutely no evidence that any one on the car knew or suspected, or had any reason to suspect, that an accident had occurred.

The story that the injured boy tells is fairly included in the following excerpt from his cross-examination; the first question referring to his starting from his home at the corner of Fourth and Franklin streets, to wit: "Q. You walked on Fourth to Baronne, and on Baronne to Perdido? A. Yes, sir. Q. Did you pass many of these electric cars on Baronne street? A. Yes. Q. There were plenty of boys hanging on the cars? A. No. Q. You did not see any people hanging on them, on the back platform or the front? A. No. Q. But you saw plenty of these cars coming down the street loaded with people, didn't you? A. Yes. Q. And you saw plenty of them going uptown? A. Yes. Q. Both full of passengers? A. Yes. Q. On which side did you come down Baronne street? A. On the woods side. Q. When you got to Abbott's store, you looked in the window? A. Yes. Q. And you left your brother there, and you went on by yourself? A. Yes. Q. Until you got the lower side of Perdido street? A. Yes. Q. Did you go on the crossing there? A. Yes. Q. What crossing? A. Downtown crossing. Q. Did you walk or run over the crossing? A. I walked over. Q. You say you looked up and down the street? A. Yes. Q. What was that for? A. To see if a car was coming. Q. You knew that there was a car going to come there? A. Yes. Q. And you looked to see if the car was coming? A. Yes. Q. And you did not see it come? A. No. Q. And then you walked over? A. Yes. Q. Then what hit you? What was it that struck you? A. The car. Q. What part of the car struck you? A. The front part. Q. What part of the car? Was it the woods side of the car? A. Yes. Q. The woods side? A. Yes. Q. Which way was your face turned when you were struck? A. Toward the river. Q. You did not hear the car? A. No.

Q. And you did not see it? A. No. Q. And yet it hit you? A. Yes. Q. How came it that you did not see the car when it ran over you? A. I don't know. Q. There were electric lights burning in the car. Did not the car have a headlight in front? A. Yes. * * * Q. How did you get your foot under the front wheel? You were not on the track? A. I had this foot right on the track. Q. When you were struck, you had one foot on the track? A. Yes. Q. You had only one foot on the track? A. Yes. * * * Q. You had just put your foot on the rail when you were struck? A. Yes." Charles Kaiser testifies that Peter left him at Abbott's window, and went on to Perdido street, and that his attention was next attracted by the scream which followed the accident. He also testifies that he heard the witness Stagno call out, "There is somebody run over," and that the car went on. Both boys deny that they had caught on to the car. Stagno testifies that he was walking down the middle of Baronne street, with his wife and child; that about half way across Perdido street he fell behind his companions and, being between the two Baronne street tracks, he saw a boy crossing from the lower woods corner of Perdido street; that he turned his attention from the boy, and, a moment afterwards, heard a scream, and found that the accident had happened. He refuses, however, to identify the boy who was crossing the street with the boy who was injured. This witness also testifies that he called out, "There is a boy run over."

Abovitch, who is the only witness, besides the boy himself, who professes to have seen the accident, was on the woods side of Baronne street, above Perdido, walking down. He undertakes to give the facts with considerable detail, but falls into several errors. Thus, he testifies with great positiveness and reiteration, though his attention was repeatedly called to what he was saying, that the car which inflicted the injury passed him, going at unusually high speed, while he was in the middle of the square between Poydras and Perdido streets, walking in the direction of Perdido street, and, although he does not claim to have been walking very rapidly, he tells us that, when the accident occurred, on the lower crossing, he was within 10 feet of the upper corner. This statement he afterwards returned to the stand to correct, saying that he was 20 feet from the corner. He also testifies that he observed that the number painted on the side of the car was 180, though after the accident he could not have seen it, and before the accident there was no reason why he should have observed it, as there were cars passing and repassing every few minutes, and it is hardly likely that he noticed the numbers of all of them. Moreover, the number of the car was 185, while 180 was the number of the car that came up on the other track, and, because it was the only car that

was stopped at the corner just after the boy had been picked up, was supposed by some persons to have been the car by which the injury was inflicted. This witness also testifies that no bell was rung on the car that ran over the boy, and, although Stagno, who was much nearer, was unable, because of the darkness, as he says, to identify the boy who was injured with the boy whom he had, a second before, seen crossing the street in the direction of the car. Abovitch was able, while making the other observations which have been mentioned, to notice that Peter Kaiser had just extended his left foot forward onto the defendant's track when he was struck by the car. Another witness, Marks, who was walking up Baronne street on the woods side, and was a short distance below the corner of Perdido, speaks of having seen "the form of a boy tumbling into the street" near the passing car, and also of having seen a boy crossing from the corner he (the witness) was approaching, in the direction of the point at which the "tumbling" took place; but there appears to have been no such continuity of observation as to enable him positively to identify the boy who was "crossing" with the boy whom he saw tumbling a moment afterwards. This witness also states that he was on his way to supper and was walking rapidly. Being asked, "How fast do you suppose you were walking,—at what rate?" he replied, "About twenty miles per hour. Q. You were going pretty fast? A. Yes; maybe more than that," etc.

Ott, the conductor, testifies that he was on the rear platform; that, after passing Poydras street, his attention was called by the driver of a passing wagon to the fact that there was a boy hanging on the side of the car or platform, at that end; and that he saw the boy and told him to get off. He also speaks of having seen a boy approaching the car from the woods side on Perdido street, and of having seen a boy standing between the tracks; but he states that he heard no one hail him and say that a boy had been run over, and he was not aware at that time, and had no reason to believe, that an accident had happened. He further testifies that he has been a conductor for 13 years. Reiman, the motorman, testifies that the car was crowded; that there were four men on the front platform to his left, and one to his right; but that they stood back so far as not to obstruct his view of the street. The car, he says, was going at the usual speed, i. e., "five points, or about six miles, an hour," and that he was not aware at the time that any accident had happened. He was asked: "It is said that a boy about 13 years of age tried to go across Baronne street, at Perdido, and that he was struck by the front part of the car, just as he put his foot on the rail. Did such an accident happen to your car?" He answered: "No." He was asked: "Could it have happened without your knowing it?" He answered: "No; it

could not." He states that the four passengers to his left would have prevented his seeing a boy holding on to the "grab handle" of the front platform, and he does not know whether there was a boy so holding on. This witness was not in the employ of the defendant at the time that he testified. He had been a conductor for five years without causing damage to person or property, and had left the service and had gone to work for a cistern maker.

Perke is a motorman, who was in charge of car No. 180, which was coming up Baronne street, and had reached Gravier street, two squares below the scene of the accident, when the accident occurred. He testifies that as the downcoming car, being car 185, was leaving Perdido street, he saw a boy fall, and that as the car approached him he saw another boy hanging to the side, and called to him to get off. When he reached Perdido street, he slackened the speed of his car and heard somebody say "that a boy had got his leg cut off," and some one took the number of his car. Prester was the conductor of car 180. He also testifies that, on reaching Perdido street, some one said, "That was the car," referring to car 180, and that he then learned that an accident had happened. He also testified that there were boys hanging onto the car that passed down. This witness had likewise left the defendant's employ, after four years service, with a certificate of good character, and was working elsewhere when he testified. It is abundantly shown that the car by which the injury was inflicted was brilliantly illuminated, with an electric headlight and some 15 incandescent lights inside, and it is not suggested that there was anything which could have prevented the boy who was hurt from seeing and hearing it for several squares.

Opinion.

There are but two possible hypotheses as to the manner in which the accident occurred,—the one that the little boy walked from the "woods" side of Baronne street toward the river side, and that he crossed the defendant's uptown track in safety, and, having made one step onto the downtown track, was struck by the car on that track; the other, that he and his brother were hanging on by the "grab handle" of the front platform of the car, and that he fell off, or fell under the wheel after he had jumped off. And upon neither hypothesis can the plaintiff recover. Accepting the statement of the little fellow himself, and taking the view of the testimony most favorable to the claim which is made on his behalf, he walked, without stopping, from the banquette on the "woods" side of Baronne street, until he collided with the car or was struck by it. The moment before he took the one, and only, step which he had time to take onto the defendant's downtown track, it was entirely within his power to have stopped; and it was not to

have been anticipated, in view of the fact that the car, blazing with light, loaded with passengers, moving at the rate of six miles per hour, and making a noise that could have been heard a square or two away, was practically on him, that he would have taken that one step which placed his foot beneath the wheel, nor was it within the limit of human power, after that step had been taken, to have stopped the car in time to have avoided the accident, since the accident occurred before a second step could follow the first, and there is no great interval of time between the steps of a boy of 13, who is on his way to see a procession, the lights of which are reddening the sky just before him.

We need not deal with the theory suggested on behalf of the defense that the boy was one of those who had been hanging on the car. Nor is it necessary that we should enter into any extended discussion of the supposed presumption of negligence arising from the fact that the conductor and motorman did not know that the accident had occurred and failed to hear the calls afterwards. It seems to us to be reasonably certain, not only from the testimony of the defendant's, but from that of the plaintiff's, witnesses, that the boy was never in front of the car, where he might have been seen by the motorman, but that the point of collision was aft of the bumper and guard, and just forward of the front wheel. As to the calls of Stagno and Marks, that a boy had been run over, they were certainly uttered, not only after the fact, but after those witnesses had had time to realize what had happened, and in the meanwhile the crowded car was speeding down the street. It is not surprising, therefore, that the calls were not heard or understood.

The case was tried in the district court without a jury. The learned judge before whom it was tried reached the conclusion that the plaintiff was not entitled to recover. We are of the same opinion, and the judgment is accordingly affirmed.

(107 La.)

RUSSELL v. ALLEN et al. (No. 13,934.)¹
(Supreme Court of Louisiana. June 17, 1901.)
INJURY TO EMPLOYE—WARNING OF DANGER—EVIDENCE.

1. In an action for damages the testimony shows that the molding machine is not considered a dangerous machine.

2. While instructions should be given to all workmen in charge of machines, the extent of the instructions and the warning to be prudent are to be gauged by the necessity because of danger.

3. The onus of proof is with the plaintiff. The foreman swore that he did not put plaintiff in charge of the machine.

4. The workman who had charge of the machine just previous to the accident, and who gave up his charge to the plaintiff, swore that before leaving this machine, he gave full instructions to the plaintiff.

5. All the witnesses, save plaintiff, testify that it was a matter of physical impossibility for the accident to have happened in the way alleged in plaintiff's petition and as he claims.

6. The witnesses swore that the wooden strip, while being worked through the molder, will never jerk back into it and throw the hand in the interior of the molder onto the blades of the lower cylinder.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by G. H. Russell against Allen & Currey. Judgment for plaintiff. Defendants appeal. Reversed.

Thatcher & Welsh and Wise & Herndon, for appellants. Alexander & Wilkinson, for appellee.

BREAUX, J. Plaintiff, in his own right and for his minor son, sues to recover the sum of \$7,610 for the loss of three fingers, while the latter (the son) was working for defendant at their planing mill in Shreveport. Plaintiff avers that his son was employed as lumber carrier and stacker; that he was ordered by the foreman to assist another young man in operating a molding machine, which was dangerous; that its appliances were not properly protected, to the end of preventing the happening of accidents; that skilled workmen only should be employed in such work; that his son knew nothing about molding machines, and had always previously engaged in work not dangerous; that he was put to work without instructions regarding the dangerous work he was to perform. Defendants answered the petition, and denied all of plaintiff's averments of negligence, and specially alleged that the injury complained of was caused by the gross carelessness of plaintiff's son. Plaintiff's son, the injured party, was in his eighteenth year. He was inexperienced, and had never worked at the molding machine until a few minutes before the accident happened. He had, for about a month and a half, worked for the defendant.

One of the employes of the defendant testifies that on the morning of the accident, and just prior to it, the foreman directed him to call on the son of the plaintiff to assist him in carrying strips to the ripsaw. After this work had been done, and the strips prepared for the molder, they were taken by him to that machine to be molded into proper shape. The molder is a machine operating mostly of itself. The workman at the molder feeds or supplies the pieces of timber. This is done by pushing the small pieces or strips between the rollers. He (the workman) stands at the head of the machine, and the feeding is done by pushing the strips between the rollers, revolving toward the instrument referred to as knives, being blades attached to heads or cylinders. The blade near the front or head of the machine trims and smooths the top of the strip, and gives it shape on one side, and the other head or cyl-

¹ Rehearing denied May 12, 1902.

inder is near the end of the machine and planes the lower side of the strip; that is, it cuts and makes smooth the lower or bottom surface. We are informed that usually a molding machine has four heads or cylinders,—one in front and another at the tail end, as just mentioned, and one on each side. The functions of the side heads or cylinders is to trim the sides when such trimming is deemed necessary. The testimony shows that there were no blades on the side cylinders, and it follows that they were not in operation when the accident happened. Only the front and rear blades were in operation. From the time that the rollers clutch the slip, with which they are supplied or fed by the workman in front of the machine, until it passes through the machine, ordinarily, no necessity arises to touch the internal part of the machine. The molder has a board, which is known as the "pressure board," that is set or fixed, stationary, immediately above the knives, and extending beyond them. The son of the plaintiff took the place of the man at this machine, and alone, without experience, undertook the work of operating it. The strips which were being run through the molder were about 15 feet in length. He testified that the one whose place he took put one strip through the machine in his presence, and then said to him that in this work he had to run three or four strips through the machine, and then to step to the back or rear of the machine and see if the strips were smooth; that he complied with this instruction, and while in the rear or back of the machine, he took hold of the strip as it was being revolved out of the molder, and while he had his hand on the strip the machine jerked the strip back, and also his hand, throwing it onto the blades, by which his hand was severely cut,—that is, he was holding the strip with his left hand, and the machine in some way slipped back and pulled his hand into the knives or blades before mentioned as being at the tail end of the machine.

With reference to the employment of the plaintiff's son at the molder, and as to the instruction given to avoid the accident, the testimony is contradictory. No good reason suggests itself for us to conclude that he should not have undertaken the work at the molder. A fellow workman turned the work over to him and went elsewhere to perform other work. This was done, plaintiff's son testifies, with the knowledge of the foreman. We have before stated that the testimony regarding the instruction was conflicting. Plaintiff is flatly contradicted by the young man who left him in charge of the machine, as just stated. As this is an important point, we deem it proper to dwell at some length upon the facts, of which this is a summary: Just before the accident, Harry Bryan, a fellow workman, said to plaintiff that he must help in getting some strips ready for the molder machine; that the foreman said

that he (plaintiff) must help him (Bryan, the fellow workman). Plaintiff says that, passing by the foreman, he inquired of him if he had given the order as stated by Bryan, and that the foreman answered, "Yes." Plaintiff swears that he and Bryan moved strips from the rip-saw station to the molding machine; that they commenced to work at the machine, and immediately after Bryan turned over the work to him of feeding the molder machine; that Bryan directed him to run three or four of the strips through the machine, and then to leave the front and step to the back of the machine, and see if the strips were of the required smoothness. It was in doing this that he was maimed as before stated. Plaintiff testifies that he did not receive any special instructions. Bryan, on the other hand, testifies that he gave him complete instructions; that he specially pointed out every part of the machinery, and warned him not to put his hands near the cylinder. This witness said: "I showed him how to start the molder, and how to stop it, and how to feed it; and I said to him, 'George, be sure to keep your fingers out of the feed rolls.' I showed him the rolls and the heads. I said to him, 'There is a head' (or cylinder). After I had shown him all about it, he started to feed the molder, and I watched him run two or three pieces through the machine, and I went to the shop to do other work." Evidently, the jury did not believe this witness, and did believe plaintiff. This is unusual. We will state here that all the witnesses agree that a skilled workman is not required to operate this machine. It is not considered a dangerous machine, and no witness recalled that any accident of a serious nature had ever happened while operating it. An experienced mechanic testified: "I have taken them younger than that, and put them to work on molders, and they have made good feeders. None of them ever lost their fingers while working on molders."

This brings us to the last point in the case. At several different times while testifying, plaintiff stated that at the moment of the accident he was standing behind the machine; that he laid his hand upon the strip of wood that was being run through the machine to see if it was smooth enough. His hand was jerked back and thrown against the knives. All the other witnesses who testified upon the subject said that this was not possible, and gave their account of why it was not possible. As this, in our view, is the most important point in the case, we insert excerpts from their testimony. L. C. Allen, one of the defendants, testified: "I do not believe that his hand could get into the cylinder from the side and be cut in that manner." W. S. Currey, the other defendant, said: "It would be impossible for that piece of molding to be jerked back into the machine. There is no force to drive it back against the self-feeding apparatus, and the

hand could not slip into the space onto the knives." The foreman testified that, after an experience of some 15 years in handling those machines, he never knew of any accident, prior to this one, happening to the feeder of the machine, and, further, standing at the tail of the machine, grabbing the strip with the left hand, it would be absolutely impossible for the strips, by being jerked back, to draw the hand into the knives. Another foreman of the defendant, in answer to the question whether such an accident was possible, as stated by plaintiff, said, "No, sir; that is impossible," and gave reasons about similar to those given by the other witnesses. Not one of the witnesses testified that it was possible for the accident to have happened in the way mentioned by plaintiff. There was no attempt made to rebut the testimony on this point. From the verdict we infer that the jury concluded that in any event the defendants were liable, and that this conclusion is based upon the theory that plaintiff was not properly instructed; that it makes no difference, in view of that fact, whether plaintiff's account of the accident is or is not correct; that it was due to a want of instructions, for which the defendants are liable. We find ourselves unable to agree with that conclusion. The fact that plaintiff is contradicted by defendants' foreman, that he is contradicted by his fellow workman, and that he is contradicted by the facts regarding the possibility of receiving a wound in the manner he states, renders it, we think, impossible to reconcile the testimony sufficiently to support a judgment.

A close attention to the issue, and a careful review of contradicted statements at important points, results in forcing upon us the conclusion that plaintiff has not sustained his cause sufficiently to enable us to affirm the verdict. For the reasons assigned, the verdict and judgment of the district court are annulled, avoided, and reversed, at the cost of plaintiff in both courts.

(107 La.)

Succession of MILLER. (No. 13,993.)

(Supreme Court of Louisiana. April 28, 1902.)

ADMINISTRATION—FILING TABLEAU—NOTICE—JUDGMENT OF HOMOLOGATION.

In the publication of the 10 days' notice of the filing of the tableau of the administrator of a succession neither the first nor the last day of the publication can count, and, this notice being essential, a judgment of homologation of such an account entered up on the 12th of the month, where the first publication was on the 2d of the month, will be set aside.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Louisa Miller. From a judgment of homologation, defendant appeals. Reversed.

William S. Benedict and O. H. Simpson, for appellant. Dart & Kernan, for appellee.

PROVOSTY, J. The law provides that, before the account of the administrator of a succession can be homologated, 10 days' notice of its filing must be given. Civ. Code, art. 1064. And in the parish of Orleans this notice must be given by publication in two newspapers, published one in the English and the other in the French language. Act of 1888, No. 125, p. 186; Davidson v. Houston. 35 La. Ann. 492. As the notice is in the nature of a citation, the doctrine of the case of Catherwood v. Shepard, 30 La. Ann. 677, applies, and neither the first nor the last of the 10 days can count. The notice of the filing of the account in this case was published the first time on the 1st of April in the English language, and on the 2d of April in the French language, and the account was homologated on the 12th. The homologation was therefore one day too soon. This is fatal to the judgment of homologation. Taylor's Adm'rs v. Jeffries' Adm'rs, 1 Rob. 1.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside and annulled, and that this case be remanded for further proceedings.

(107 La.)

CITY OF NEW ORLEANS v. FREDERICKS et al. (No. 13,891.)

(Supreme Court of Louisiana. April 28, 1902.)

SUPREME COURT—JURISDICTION—AMOUNT INVOLVED—MUNICIPAL CORPORATION—TAX SALE.

On Motion to Dismiss Appeal.

Where, in an action for the recovery of real estate, the defendant by his answer denies the asserted right of the plaintiff, and in the course of the trial exhibits a title in himself, and at the same time disclaims title in the land, but insists upon his ownership of the buildings situated thereon, and there is judgment rejecting plaintiff's demand, and recognizing defendant as the owner of the buildings, the value of the land is not thereby eliminated for the purposes of appeal, and a motion to dismiss predicated upon that theory will not prevail.

On the Merits.

It is inadmissible that a political corporation exercising governmental functions should be disposed, by means of a tax suit against an individual, of a public work, not upon private property, constructed at the common expense, for the protection of the lives and property of its citizens; and it is a matter of no importance, for the purposes of such a question, whether, as between such corporation and other governmental authority, such work has or has not been properly located.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by the city of New Orleans against Hugo H. Fredericks and others. Judgment for defendant Fredericks, and plaintiff appeals. Modified.

Frank B. Thomas, Asst. City Atty. (James J. McLoughlin, of counsel), for appellant. Charles Louque, for appellee.

MONROE, J. The city of New Orleans sues to recover certain real estate, described as "a certain lot of ground designated by the number 9, and situated in the Seventh municipal district of the city of New Orleans, in the tract of land known as 'West End,' and fronting on the revetment levee in the said Seventh district, and measuring 75 feet front by 100 feet in depth between parallel lines." The petition alleges that the property in question is worth \$2,500, and that the petitioner has been the owner, in possession, for more than 10 years; that notwithstanding the fact that it is public property, not liable to taxation, it was erroneously assessed in the name of Mrs. Mary Mullen, who occupied as lessee, under a lease transferred to her by M. J. Carroll, who had leased from petitioner; that said property was sold under the erroneous assessment aforesaid about August 7, 1896, to Hugo Fredericks, who was put in possession by judgment of the civil district court in June, 1897, as against said lessee, Mrs. Mullen, and with reservation of petitioner's rights. There is a prayer for citation of the board of assessors, of Hugo Fredericks, of Mrs. Mullen and her husband, and of the state tax collector, and for judgment annulling the assessment, sale, and judgment mentioned, and decreeing petitioner to be the owner of said property, and putting it in possession of the same. The defendant Fredericks excepted on the grounds that the petition failed to disclose the title of the city, and that the suit, being one to annul a judgment, should have been assigned to that division of the court by which the judgment was rendered, and, the latter exception having been maintained, the case was transferred to that division. The defendant Fredericks thereupon answered, denying that the city had any title, and denying its right to annul a judgment to which it was not a party; and the other defendants pleaded the general issue. In the course of the trial on the merits, the city filed an amended petition, alleging "that her title to this property was acquired by reason of the fact that the said property is a part of the bottom of Lake Ponchartrain, having been raised to the surface in the construction of the protection levee; that it is far beyond the shore line of the said lake, and, being part of a public levee, constructed for public purposes under the supervision of the city and at her cost, the said levee being built to protect the city; that all the bottom of the lake, which was raised to construct the levee, is the property of the city, and said lot forms a portion of said levee, the city having no written title thereto, except in so far as the creation of the levee board and the drainage commission may be considered as such." The concluding paragraph of the reasons assigned for judgment by the judge a quo reads as follows: "The city has shown no title to the property described in the petition. The defendant has shown a deed of

sale to the buildings, not to the land. Defendant's counsel, in argument, disclaims ownership of the land. Upon filing a written disclaimer, judgment is rendered in favor of defendant for the buildings only, reserving the rights of the drainage board, the Orleans levee board, and the city, if any she has, to bring suit and have it decided whether or not the building is a nuisance." The disclaimer referred to was duly filed, and reads in part: "On motion of Charles Louque, attorney for defendant, and on suggesting to the court that the defendant disclaims ownership of the lot sued on, for the reason that the same is the bottom of Lake Ponchartrain, and is not, as such, susceptible of private ownership," etc. And thereupon judgment was entered, rejecting plaintiff's demand at its costs, and recognizing the defendant Fredericks as the owner of the improvements on the lot in question. From this judgment the plaintiff has appealed, and the said defendant moves to dismiss the appeal on the ground that the building of which he was recognized to be the owner was never worth as much as \$1,000, that it has been destroyed by fire, and that there is nothing left in contestation. This motion is supported by affidavits filed in this court, showing the value of the building to have been as stated in the motion, though they do not refer to its destruction, by fire or otherwise. The city, upon the other hand, has filed an affidavit to the effect that the property claimed in the petition is worth \$2,500.

It was shown by the evidence adduced upon the trial that, between 1872 and 1874, the city of New Orleans, at its own expense and with material obtained from the bottom of the lake, built a levee, something over 2,000 feet in length, extending westward from a point near the mouth of the new canal, and at a distance of 800 feet out from the southern shore of Lake Ponchartrain; the idea at the time being to extend the work, and to do certain other work, with a view to the drainage of the city and to its protection from inundation. The scheme, as a whole, was abandoned, and little or nothing more was done than the building of the levee in question, which is not connected with the shore at either end, and is therefore washed on both sides by the waters of the lake. There is no doubt, however, that this levee has been under the exclusive control and administration of the city since it was built, and in the exercise of that control the city appears to have divided its two edges into lots, with its crown as a roadway between them, and the water, either of the lake proper or of the channel between the levee and the shore, in their rear; the particular lot here in controversy being upon the inner edge of the levee, and designated as "Lot No. 9." In May, 1883, the city leased this lot to M. J. Carroll for 25 years for the sum of \$100, and for the further consideration that Carroll should cause to be erected thereon a building and other improve-

ments, according to a plan to be furnished by the city surveyor, which building, etc., were to become the property of the city at the expiration of the lease. We infer from the evidence that Carroll erected the building as contemplated by his lease, and he appears to have sold and transferred the lease and the building to Miss Minnie Wilson, who in turn sold and transferred to Mrs. Mary Mullen. In June, 1896, the property—that is to say, the lot as heretofore described—was sold to Hugo H. Fredericks by the state tax collector as property which had been adjudicated to the state for the state tax of 1890, and later in the same year Fredericks obtained a writ of possession, the execution of which was enjoined by Mrs. Mullen, who claimed to be in possession as the transferee of the lease to Carroll. There was judgment against her, which appears to have been affirmed by the court of appeals. Thereafter, in May, 1897, the city of New Orleans filed suit, alleging ownership and possession, and praying that it be protected by injunction, and its demands were also rejected, with a reservation of its "rights, in a petitory action or in a proper proceeding, to set up any title" it might have. Following this, Dennis Casey, claiming as sublessee under James Mullen, at a rental of \$150 per year, applied for an injunction to maintain him in possession, and the same was denied, and Fredericks was presumably put in possession. The city thereupon, in March, 1898, brought the present action.

On the Motion to Dismiss the Appeal.

The facts disclosed do not justify the dismissal of the appeal, since the allegations of the petition and the affidavit in support thereof, to the effect that the property claimed, i. e., the building and lot, is worth \$2,500, are not overborne by the affidavits filed on behalf of the defendant as to the value of the building alone. The fact that the defendant, in the course of the trial, disclaimed title to the lot, cannot, for the purposes of the appeal, affect the question of the value in dispute, inasmuch as no judgment was rendered, and no action was taken by the city whereby its claim was curtailed of its original proportions. "That," as has been said by this court in a somewhat similar case, "was only accomplished by the final judgment," from which the appeal has been taken. *Blache v. Aleix*, 15 La. Ann. 50. The motion to dismiss is therefore denied.

On the Merits.

The defendant, who claims under a tax title based upon an assessment made by the board of assessors, and under a sale made by the state tax collector for the parish of Orleans, is hardly in a position to deny, whatever may be the fact, that the property in question is within the limits of this parish, and hence within the limits of the city of New Orleans. The city acted either upon

that hypothesis, or upon some other basis of actual or assumed right, when it built and took possession of the public work of which that property formed, or was made, part. Whether the city required the permission of any other authority to build a levee in Lake Ponchartrain, to protect itself from inundation, or whether it did not, is a question of no importance here. The facts are that the levee was built for the purposes stated; that it was a public work, in the actual possession of the city authorities as such; and that it was not subject to taxation. Hence there could have been no valid sale of lot 9 for taxes. But the original lessee of the lot had an interest in the buildings thereon, upon which he was liable for assessment, as upon any other property; and, when the original lessee transferred that interest, it became liable to assessment as the property of the transferee, and to sale for the tax assessed, and there was no reason why the defendant Fredericks should not have become the owner as a purchaser at such sale. This was, however, a matter which did not particularly concern the city, and it is only in so far as the tax deed purports to convey the land, and in so far as there has been a denial of the city's authority as the administrator of a public work, if not as owner and lessor, that it has any right to complain, since the purchaser of the building acquired no greater rights as to the land than the owner of the building had possessed under his contract with the city. To the extent stated, however, the city has a right to complain. Nor do we think that, in determining as to the merits of the complaint which has been made, it is necessary that either the levee board, the drainage commission, or any other authority need be made party to the litigation. Those who are not made parties will not be affected by the judgment. It is sufficient for present purposes that we take the case as we find it; and, so taking it, we hold it to be inadmissible that a political corporation, exercising governmental functions, should be dispossessed, by means of a tax suit against an individual, of a public work, not on private property, constructed at the common expense, for the protection of the lives and property of its citizens.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, in so far as it rejects the demand of the plaintiff to be put in possession of 'lot No. 9, situated in the Seventh municipal district of the city of New Orleans, in the tract of land known as 'West End,' and fronting on revetment levee in said district, and measuring 75 feet front by 100 feet in depth between parallel lines,' and that there now be judgment in favor of the plaintiff, annulling and avoiding the adjudication of said lot, as made by Blayne T. Walshe, state tax collector, to Hugo H. Fredericks, upon the 10th day of June, 1896; and it is further ordered that the plaintiff be put

in possession of said lot, subject to the rights of the defendant, the said Hugo H. Fredericks, as owner of the buildings thereon, with respect to which, and to all other matters, save costs, said judgment is affirmed. It is further ordered and adjudged that said defendant pay the costs in both courts.

(107 La.)

STATE v. STAFFORD. (No. 14,349.)

(Supreme Court of Louisiana. April 28, 1902.)
CRIMINAL LAW—APPEAL—RECORD—AMENDMENT.

1. There was no bill of exceptions and no assignment of errors, and the inspection of the record shows no error.

2. The fact that the defendant was asked by the trial judge if he had any statement to make prior to sentence was made to appear of record. The minutes were amended nunc pro tunc. The part of the record in which it appears was supplied through certiorari.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Bossier; John Thomas Watkins, Judge.

Warren Stafford was convicted of murder, and he appeals. Affirmed.

Joe E. Johnston, for appellant. Walter Guion, Atty. Gen., and T. T. Land, Dist. Atty. (Lewis Guion, of counsel), for the State.

BREAUX, J. On the 27th day of January, 1902, an indictment was found against the defendant, charging him with having murdered Della Stafford. He was tried by a jury, and found guilty as charged, and sentenced to suffer the extreme penalty of the law. No bill of exceptions was taken, and no assignment of errors was filed.

After the record had been filed here, an examination found that it did not appear of record that the defendant had been asked by the presiding judge, prior to delivering his sentence, if he had any statement to make why sentence should not be passed upon him. To supply this, a writ of certiorari was applied for by the attorney general, and was issued by this court. The district attorney of the district filed a rule (after the certiorari had issued) on defendant and his attorney to show that the accused was asked by the trial judge before sentence, "if he had anything to say why judgment should not be pronounced against him," and he asked that corrections in the minutes be made accordingly. The defendant answered this rule, and denied that the question had been asked, and averred that justice could not be done without granting him a new trial. The trial judge, in answer to this rule, and in compliance with the writ of this court, said that in open court, just prior to sentence, he asked Warren Stafford whether he had anything to say why the sentence of the court should not be passed on him. He further answered that he ordered an amendment of the minutes so as to show this fact nunc

pro tunc. Evidence was taken on trial of a rule to correct the minutes. Several witnesses were examined, and it was shown that the question was asked as stated by the judge a quo. Before this court, the defendant, through counsel, urges that the proceedings had with the view of correcting the minutes are invalid, because the judge a quo did not determine or make the rule final; because the answer of the judge a quo, referred to above, and his affidavit, are ex parte and were prepared and sworn to in Webster parish three days before the rule was tried; because no issue has been decided.

Before taking up these grounds, we will state that the purpose of the court was, in a case of this gravity, to comply with every formality, usual or unusual. We find this rule laid down, in so far as our research went, only in 1 Archb. Cr. Prac. & Pl. (7th Ed.) note p. 676, viz., "In capital cases, before judgment is pronounced upon the defendant, it is necessary that he should be asked by the clerk or the court if he has anything to say why judgment should not be pronounced on him, and it is material that this appear on the record to have been done."

Returning to the objections here urged by the defendant, we think it sufficiently appears by the return that the rule was made final by the judge of the district court, by ordering the minutes to be corrected, and in his return under oath the judge said in substance that the formality had been complied with originally, and that the proper entry had not been made by the clerk. But defendant, in addition, sets up that no issue has been decided. The only issue was whether the facts warranted a correction of the minutes nunc pro tunc. To this the judge a quo returned an affirmative answer. The judge said upon his return that the facts warranted the correction. The defendant further takes the ground that the proceedings were had prematurely and ex parte. True, the judge prepared his answer in another parish of his district, but in this and in the other complaints in this connection we have not found ground to set aside the verdict and sentence. We have examined the record carefully, and have weighed the issues before us. There is no ground upon which we can possibly grant relief.

The law and the evidence being for the state and against the defendant, the judgment appealed from is affirmed.

(107 La.)

PERKINS v. LAPEYRONNIE. (No. 14,420.)

(Supreme Court of Louisiana. April 28, 1902.)
COURT OF APPEAL—JURISDICTION.

Query—Where the principal and surety on a conventional bond are joined as defendants in a case in which judgment is asked against the principal in a sum exceeding \$2,000 and against the principal and surety in solido for a sum less than \$2,000 (the surety's obligation

under the terms of the bond being less than \$2,000) and in which case a judgment is rendered against the principal and surety, in solido, for \$390, to which appellate court—supreme or court of appeal—must the appeal taken by the surety be carried? *Held*—To the court of appeals.

(Syllabus by the Court.)

Certified from the court of appeals, parish of Orleans.

Action by Robert J. Perkins against Jean Lapeyronnie and others. Judgment for plaintiff, and Lapeyronnie appeals to the court of appeals. Question certified to the supreme court.

BLANCHARD, J. Samuel J. Humphreys was the secretary of the Jefferson Building Homestead Association and, as such, gave bond for the faithful discharge of his duties in the sum of \$1,000, with J. M. Lapeyronnie as surety. The association went into the hands of a receiver. The latter instituted suit against Humphreys and Lapeyronnie, alleging a breach of the bond on the part of Humphreys and consequent damages to the association in the sum of \$5,000. Judgment was prayed for against Humphreys in the sum of \$5,000, and against the surety, Lapeyronnie, in solido, to the extent of \$1,000—the amount of the bond. There was judgment in favor of the plaintiff and against Humphreys and Lapeyronnie in solido for \$390. The surety applied for and obtained an order of appeal to the court of appeals for the parish of Orleans and duly lodged the record of appeal in that court. It does not appear that any appeal to any court was taken by Humphreys, nor has the plaintiff applied anywhere to have the amount awarded him increased.

Ex proprio motu the judges of the court of appeals raise a question as to the jurisdiction of their court, and propound the following: "Where the principal and surety on a conventional bond are joined as defendants in a case in which judgment is prayed for against the principal in a sum exceeding \$2,000 and against the principal and surety in solido for a sum less than \$2,000 (the surety's obligation under the terms of the bond being less than \$2,000) and in which case a judgment is rendered against the principal and surety in solido for \$390, to which appellate court—supreme or court of appeals—must the appeal taken by the surety be carried?" We answer:—to the court of appeals, whose jurisdiction extends to all cases, civil or probate, where the matter in dispute or the funds to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed \$2,000, exclusive of interest. Const. 1898, art. 98. Quoad the surety, the suit was on the bond for \$1,000, alleging breach thereof by the principal. From the bond sprang the obligation in solido of the principal and surety to the extent that they therein bound

themselves. The judgment was for an amount within the bond, in solido against the signers thereof. One of the judgment debtors, to wit:—Humphreys, the principal on the bond, as against whom a sum was also demanded over and above and beyond the bond, does not appeal. So far as he is concerned the amount claimed of him in excess of the bond, and outside of it, was rejected and the plaintiff acquiesces. So far as judgment was awarded against him within the limit of the bond, he acquiesces. We are not to assume either may yet appeal. The status of the case, then, as it appears on appeal is one upon the bond, which is for \$1,000, and for an amount as to which no one complains but the surety, who is appellant, and who could not have been sued and was not sued for an amount beyond the appellate jurisdiction of the court of appeals. "But," it might be asked, "had the plaintiff appealed where would his appeal have been taken?" We answer, to this court as to the \$5,000 he claimed from Humphreys, and to the court of appeals as to the \$1,000 he claimed from Lapeyronnie in solido. In which event the court of appeals would have postponed action upon its branch of the appeal until this court had acted, and then have been guided in its judgment by the action taken in the case against Humphreys here. If, for instance, on such an appeal, this court decided Humphreys was due nothing to plaintiff, it would follow that the court of appeals would enter up a judgment of release in favor of Humphreys' surety, who was sued on the bond, as to which the superior court had, necessarily, decreed, in releasing Humphreys, no breach. If Humphreys had appealed, his appeal would have come to this court because he was sued for more than \$2,000—a sum beyond the jurisdiction of the court of appeals. The appeal of his codefendant, sued for less than \$2,000, would go to the court of appeals and there await the action to be taken by this court on the Humphreys' appeal. Thus, a conflict of jurisdiction would be avoided, and each court would entertain the appeal as to which its jurisdiction attached under the authority of the constitution. It is only in cases where there is an appeal from a judgment rendered on a reconventional demand that the appeal lies to the court having jurisdiction of the main demand. Const. art. 95. We cannot stretch the authority of this article to give this court jurisdiction of an appeal on an original demand for less than \$2,000 against one defendant, because of the fact that his codefendant is sued for a sum exceeding \$2,000, even though the obligation of the former be dependent on a case being made out against the latter. If it be said that the plaintiff and Humphreys have both the right of devolutive appeal for 12 months from the date of the judgment in the court

below; that one, or the other, or both, may exercise this right and bring the appeal to this court; and that this court may render a judgment on such appeal, as between the plaintiff and Humphreys, different from the one which, meanwhile, the court of appeals may have rendered between the plaintiff and the surety Lapeyronnie on the appeal taken to it by the latter, we answer that while this is possible it is not probable, and even though this should be the case, the surety will have had "his day in court" before the tribunals, original and appellate, appointed by the laws of his country to determine his liability *vel non*, and would not be in a position justly to complain that the judgment of the court of appeals as to him is *res adjudicata*. If it would be such were he cast, so it would be such were the plaintiff cast on the appeal to the court of appeals. In such case, of appeal by Lapeyronnie to one court, and, later, of appeal by Humphreys or the plaintiff to another, the appropriate tribunal, vested with jurisdiction by the constitution according to the amount sought to be enforced against each defendant, will have sat upon the two branches of the case and reached judicial determination of the issue submitted respectively. It may be an involved situation, an awkward arrangement, and it appears to be such, but for this the constitution, not this court, nor the court of appeals, is to be held responsible. The conclusion heretofore reached as to the jurisdiction of the court of appeals is supported by *Villars v. Faivre*, 38 La. Ann. 898, 401. There defendant Faivre and his surety and codefendant Mathews were sued in solido for \$900 on a bond for that amount executed to obtain the release of some property of Faivre's which had been sequestered in a former proceeding, and in the same suit plaintiff asked a further judgment against Faivre individually for \$3,600. Plaintiff having been cast, an appeal on the whole case was prosecuted to this court. On the suggestion of want of jurisdiction over the demand for \$900 against Mathews, the surety, the court said Mathews could not be held for more than \$900, and the amount involved as to him was unquestionably the test of jurisdiction on appeal as to his interest in the litigation. It, therefore, dismissed the appeal in so far as it concerned the judgment in favor of Mathews.

It is ordered that the court of appeals for the parish of Orleans assume jurisdiction of the instant case and proceed to the determination thereof.

(107 La.)

WATT v. WILLIAMS. (No. 14,255.)

(Supreme Court of Louisiana. April 28, 1902.)

SALE OF LAND—BREACH OF CONTRACT—DAMAGES—ATTACHMENT—CURATOR'S FEE.

1. Defendant had written to a real estate agent, informing him of his willingness to sell a tract of land at a stated price. Two years

afterward, without communicating with defendant, and when it was apprehended by this agent, who informed plaintiff that there was reason to infer that he (defendant) would not accept the price offered, the agent undertook to sell the property and bind the defendant, although he had not been specially authorized to sell the property. When defendant received the letter informing him of the action of the real estate agent, he did not approve or decline. Shortly afterward it became known from defendant that he was not willing to sell at the price offered. Plaintiff had not deposited the whole amount of the price. He withdrew the amount deposited, which was less than the price, and plaintiff afterward sought to buy other lands. Having failed in the second attempt at buying lands, he sought to hold the defendant in damages. This claim for damages is too speculative and uncertain to serve as a valid basis for a judgment. Plaintiff acquired no title to the land he claims to have bought from defendant, for plaintiff never acquired a title to the land.

2. The fee of the curator appointed to represent defendant in the attachment proceedings, as fixed by the district judge, is not too large, and under a special statute the curator's fee may be increased to an amount corresponding with the value of the services.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

Action by John J. Watt against D. B. Williams. Judgment for defendant, and plaintiff appeals. Affirmed.

Cline & Cline, for appellant. S. D. Read, curator ad hoc, for appellee Williams. J. W. Bryan and R. P. Williams, intervening appellees.

BREAUX, J. Plaintiff, alleging that defendant failed to carry out his contract as vendor of land he claims to have purchased from him, sues him to recover \$3,240 as damages. The alleged price of the land is \$1,600, and August, in the year 1900, the date of the purchase. We are informed by the record that D. B. Williams, who is a citizen of and resides in Great Britain, sold the land through the agency of a real estate firm of Jennings, La.; that in a letter from his home in Great Britain, addressed to this firm, bearing the date of January 28, 1898, Williams informs this firm that he cannot accept \$5 an acre for the one-fourth mentioned in the letter which he had received from the real estate firm, but that if he could get \$5 an acre for the half section in one payment clear to himself he would sell, otherwise he wanted at least \$6.50 an acre for the northeast quarter of the tract, with the usual conditions, and \$7.50 an acre for the southeast quarter, and adds (copying verbatim from the letter), "Kindly list these prices." Having left England, and being in Canada, he, on April 8, 1898, again wrote to this firm, inclosing his address in case the real estate firm wished to communicate with him in regard to the sale of his land. In this letter he describes his land as the "E. ½, Sec. 30, T. 7 S." Plaintiff states that upon this authority the real estate firm offered the land, but, owing to depressed conditions at

the time, this firm obtained no offers for the land at the price fixed by Williams until August, 1900, when the price was offered by it to plaintiff, Watt, in a letter by it to Watt, stating that in looking over its correspondence with David Williams it found that it set forth in its last letter to it (the letter last referred to by us) in regard to the half section that, if he could get \$5 an acre cash net to him, he would sell, otherwise that he asked as the price of the northeast quarter, \$6.50 and the southeast quarter, \$7.50 per acre, on the usual terms. The firm, in this letter to Watt, said it supposed that the terms would be one-third cash, balance in one and two years at 8 per cent. interest. It also states that it had not written to defendant, Williams, in accordance to promise made to plaintiff, Watt (to quote from the letter), "because he certainly will take no less for it now, and the chances are about nine to ten that if we write him he will put that land at ten dollars an acre, as it has been some time since he wrote us, while, on the other hand, if you would be willing to close at these prices, we could close the deal, and he would be obliged to make the deed." In a few days Watt answered, and said that he was willing to take the land at \$5 an acre for the east one-half, and, three days after, the firm in question wrote to Williams, the defendant, that it had sold the half section of land to plaintiff, Watt, for the price mentioned in the latter's letter, and requested Williams to make out the deed, and send it to one of the banks at Jennings, or direct to it (the firm), and upon its receipt it would be signed by the buyer; that it held the amount of the price. This firm added in this letter: "The China neighborhood [in which this land is] looks rather deserted on account of the failure of the 'providence rice' for so long. A great many of these people had left that country, and moved to Jennings, onto lands that are irrigated. Hope that you will attend to this at once,"—and instructions were given regarding stamps required on the deed. Defendant swore that he had received a letter about June, 1900, from the real estate firm, stating that they had received \$5 an acre from Watt for the premises described, and that it was on deposit in the bank, but did not say that it had been placed in his (defendant's) name. The China (not Asiatic China, but China 16 miles northwest of Jennings) referred to in the letter was not unknown to the defendant, as he had at one time been a resident at or near the locality. One copy of the letter was addressed to the defendant at a post office in Canada, where he had directed the firm to address his letters, and another to him in Great Britain. The letter did not reach the defendant before the October following by reason of the fact that defendant had changed his post office. He (Williams) answered acknowledging receipt, and stated that he

would "attend to the matter in a few days." Plaintiff says, in substance, that deep wells for irrigation purposes proved successful at and near China, La., and that a number of persons sought to buy rice lands, and that, in consequence, the land he claimed to have bought advanced in value, and that defendant doubtless learned of the rapid enhancement in prices, and that, instead of signing a deed to him (Watt), he sought to convey it to B. F. Coffall on December 4, 1900, for the price of \$7 per acre; that plaintiff, hearing of this, withdrew the amount he had deposited with the real estate agent, and then it became evident to him that he could not buy land of equal value to the land in question for less than \$12 per acre; that, finding that Williams refused to confirm the sale made by the real estate firm to himself, he (Watt) filed suit on March 25, 1901, claiming damages; that the suit was dismissed on exception of no cause of action, and that then plaintiff filed the present suit. An attachment was issued against the land, and a curator ad hoc appointed. The curator first filed an exception, which was referred to the merits, and then his answer was filed. Coffall and the real estate agent intervened in the suit, and to their petition of intervention plaintiff filed an answer. There was judgment for the defendant and interveners, and plaintiff appeals.

Exceptions to rulings are urged upon our attention by plaintiff that he was not permitted to prove an arrangement which he claimed to have made with the agent he assumed had authority, and, in the second place, that he was not permitted to prove the agent's acceptance of the arrangement. As we do not consider that the real estate agent had authority to bind the defendant, we are not of the view that, if the evidence had been admitted, it would have a controlling bearing on the issues.

The amount allowed the curator for his services gave rise to another issue. Plaintiff submits that nothing should be taxed against him but the \$10. The statute also leaves it to the discretion of the court to increase the amount in proportion to the services rendered. And as to the fee, "the advocate is entitled to ten dollars as a fee, and on proof the court may increase the amount in proportion to the services rendered." Rev. St. § 108. The amount does not appear large. We do not think it should be reduced on appeal.

We are not convinced that consent was given by the defendant, the asserted vendor of the plaintiff, to the extent and in the manner required. He had, by letter to a real estate firm, expressed the willingness to sell the land at a price he mentioned. About two years after the real estate agent had received this letter, he conceived the idea that it would be possible for him to sell the land, and accordingly communicated with plaintiff

in terms which manifested a pronounced desire to effect the sale of the land of defendant. Plaintiff consented, and his contention is that he deposited the price of the land. It remains as a fact that there never was a delivery of the price in the manner required to enable the defendant to call upon any one for an amount deposited to his credit. If a right had been acquired by plaintiff to the title, it devolved upon him to complete the sale as far as he was concerned by depositing the price or offering to pay the sum representing the price. The defendant had not bound himself to sell the land to plaintiff through the agency of any one. No one was authorized to sign the deed, or to bind him as a vendor. Plaintiff and the real estate agent made no attempt to close the sale outright, but the deed was sent to the defendant at his home in England to be signed, and on its receipt defendant did not sign and return it, but wrote that the matter would receive his attention at once. We are not of the opinion that this was an acceptance in law, although, as a matter in *foro conscientie*, it should be different. Later he declined to sign, and sold the property to another, whose claim is set forth in a petition of intervention. There never was between plaintiff and defendant an absolute offer to sell on the part of the latter to the former and an acceptance of the offer. The consensus in *idem placitum* is wanting between these two. The asserted agency through which it is contended he bought has not so acted under the circumstances as to bind defendant. They (the agency in question) were not given the control of the property. Plaintiff says that he went into possession under authority received from this agency to go into possession. They had no authority to place him in possession. In fact, he never went into actual possession.

Although some little doubt may hang over the issue between plaintiff and defendant, there can be none as to the title of the interveners, whose right begins at a date prior to any recorded deed. True, the deed under which they own was passed after letters and *ex parte* declarations had been filed, and, even if it had been passed after the suit of plaintiff had been brought, the letters and declarations were not deeds, or equivalents to deeds. They did not convey notice of a sale, and the interveners cannot be held to have had the notice required to legally warn them not to buy. The suit between the plaintiff and the defendant is not such a notice of itself as the law requires. As we take it, interveners had no knowledge of the pending suit, and they had the right to transact on the face of the record in the clerk's office.

The law and the evidence being in favor of the defendant and interveners, the judgment appealed from is affirmed.

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BURNHAM et al. v. POLICE JURY OF CLAIBORNE PARISH. (No. 14,243.)

(Supreme Court of Louisiana. April 28, 1902.)

TAXING DISTRICT—BOUNDARIES—SCHOOL DISTRICTS—ESTABLISHMENT—ACCOMMODATION OF PUPILS.

1. The boundary line of a taxing district is designated with sufficient certainty by the following language: "Starting from the northeast corner of the northeast quarter of the southeast quarter of section 18, and running thence three miles west on the section line to the northwest corner of the northwest quarter of the southwest quarter of section 14." The termini and the direction of the line are unmistakable. The phrase "on the section line" is shown by the context to have the meaning of "parallel with the section line."

2. In considering the question of whether compliance with section 11 of Act No. 81 of 1888, requiring school boards to divide their parishes into school districts, was sufficiently formal, regard must be had to the connection in which the question is mooted,—whether in connection with the mere distribution of school funds, or in connection with the exercise of the taxing power; a much less strict compliance being sufficient in the former than in the latter case.

3. Residents of a school district who do not show that their own children are incommoded, or that their taxes are increased, by the manner in which the boundaries of a school district have been fixed, are without interest, and therefore without right to resist a tax levied in the district on the ground that the boundaries have not been so fixed as to accommodate the children of the parish.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Claiborne; Benjamin P. Edwards, Judge.

Action by C. A. Burnham and others against the police jury of Claiborne parish. Judgment for defendant, and plaintiffs appeal. Affirmed.

Richardson & Richardson, for appellants. McClendon & Seals and James Edward Moore, for appellee.

PROVOSTY, J. The school board of the parish of Claiborne having created a school district known as the "Haynesville School District, No. 11," and a tax having been voted in said district for the use of the school therein, the plaintiffs, who are resident taxpayers of the district, bring this suit to have said tax decreed null and void. The only grounds pressed upon our attention are: First, that the school board was without power to create said district until the entire parish had precedently been divided into districts, and that this division of the entire parish has never taken place; second, that the north boundary of the district is not fixed with sufficient precision; and, third, that this school district was not so formed as best to accommodate the children of the parish.

The first ground is sought to be sustained under section 11 of Act No. 81 of 1888, which reads as follows: "Sec. 11. That it shall be the duty of the parish board with the parish superintendent to divide the parish into school districts of such proper and convenient area and shape as will best accommo-

date the children of the parish. The parish board shall, as soon as practicable, proceed to the work imposed upon them, and upon completing this work, they shall make a report to the parish superintendent, which report shall contain the boundary and description of the said district designated by number. The parish superintendent shall record the same in a well bound book, kept by him for the purpose, which book shall be held by said parish superintendent and be at all times open to inspection. The parish board, if they deem it to the best interest of the schools, may divide the parish into districts without reference to the wards in the parish." It seems that the nearest the school board of Claiborne parish came to complying with this law was to pass a resolution each year locating the schools by wards, and directing the superintendent to apportion the school fund among the wards. In answering the question whether this was a sufficient compliance with the act, regard must be had to the connection in which the question is mooted. If merely in connection with the distribution of the school fund of the parish, required by section 7 of the same act to be apportioned among the several districts, we should say it was a sufficient, though an extremely informal and slipshod, compliance; but, if in connection with the creation of school districts for the purpose of taxation, we should say emphatically that it was not a sufficient compliance. Had the school board of Claiborne parish taken no further action than the above for the purpose of creating the district wherein has been imposed the tax resisted in this case, we should unhesitatingly have said that the district had not been created in a manner sufficiently formal to meet the requirements of the legal situation. Except in connection with and for the purpose of a distribution of funds, this general division of the parish is not required; and, if the proceedings for the creation of the particular taxing district in question are sufficiently formal, we do not see what ground there can be for complaint.

The regularity of the proceedings for the creation of the school district in question is not denied by plaintiffs, except in the two respects already pointed out, namely, that the entire parish was not divided, and that the north boundary of the district was not designated with sufficient precision or certainty. The northern boundary is, we think, designated with sufficient certainty. It is said to start from the N. E. corner of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 18, and to run "thence three miles west on section line to the northwest corner of the northwest quarter of the southwest quarter of section 14." Were the words "on section line" left out of this description, the same would be as precisely accurate as language could make it; but it is said that the presence of these words renders the designation of the line uncertain, as it is not possible for the line to

run from the one to the other of the points fixed for its termini, and yet run on the section line; that it would have to run on the quarter-section line. So evident is this, that the words "on the section line" can impart no ambiguity to the other descriptive words made use of. The preposition "on" has an almost inexhaustible variety of meanings. One is, "conforming to or agreeing with; as, on the line." Cent. Dict. verbo "On," 3b. Hence the preposition may be used to express relative as well as absolute position, and we think that the context sufficiently indicates that in this case it is used to express mere relative position, so that the meaning is that the line shall run parallel with the section line. To give it the other meaning would create, not ambiguity only, but contradiction. It is not to be supposed that the police jury intended that the line should occupy two positions.

The learned judge a quo properly ruled out all evidence on the question as to whether the boundaries of the district had been so fixed as to accommodate the greatest number of children. Plaintiffs, who are residents of the district, have no interest in urging the complaint. By this alleged improper fixing of boundaries their own children are not incommoded, and their taxes are not increased. It will be time enough to consider the question when the parents or guardians of the excluded children complain, though we surmise it will then probably be found that the matter of fixing the limits of school districts has been confided by the statute to the school boards, and that the discretion thus confided cannot be controlled by the courts.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed at the costs of the appellants.

(107 La.)

STATE ex rel. WOLFE v. ST. PAUL,
Judge, et al. (No. 14,135.)¹

(Supreme Court of Louisiana. Feb. 3, 1902.)
MUNICIPAL CORPORATIONS—INDEBTEDNESS—
LIMITATIONS—PUBLIC IMPROVEMENTS.

1. Act No. 30 of the Extra Session of 1877, prohibiting municipal corporations from incurring in any one year expenditures in excess of the revenues of the year, and requiring the revenues of each year to be devoted to the expenses of the year, and prohibiting municipal corporations from issuing evidences of indebtedness, precludes the city of New Orleans from entering into a contract by which the cost of paving a street is to be paid for out of the revenues of future years, and is to be settled for in the meantime by the issuance of interest-bearing certificates.

2. It makes no difference that the payments are to be made out of that part of these future revenues required by law to be reserved for public improvements. By being so reserved these revenues do not cease to be part of the revenues of the years in which they are collected, and, as such, required to be devoted to the expenses of those years.

¹ Rehearing denied May 12, 1902.

3. The case of *Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish*, 19 South. 282, 43 La. Ann. 331, distinguished.

Breaux and Blanchard, JJ., dissenting.
(Syllabus by the Court.)

Application by the state, on the relation of James J. Woulfe, for writs of mandamus, certiorari, and prohibition against John St. Paul, judge, to grant an injunction against the city of New Orleans and the Louisiana Improvement Company. Mandamus made peremptory.

Edward Rightor, for relator. Respondent judge, pro se. Samuel L. Gilmore, City Atty., for respondent city of New Orleans. McCloskey & Benedict, for respondent Louisiana Imp. Co.

PROVOSTY, J. Our supervisory powers are invoked to compel the respondent judge to grant an injunction restraining the city of New Orleans from entering into a certain contract with the Louisiana Improvement Company for paving with asphalt certain parts of Canal street,—the principal street of the city. Of the numerous grounds of injunction set forth in his petition, the relator presses upon our attention only two:

The first of these is that two-thirds of the work called for by the contract in question is to be met by means of an illegal assessment imposed upon the property abutting upon the parts of street to be paved, and that the relator, as owner of some of the property so abutting, has an interest in resisting the assessment; said assessment being illegal, for the reason that there exists a contract between the city and the Rosetta Gravel Company by which the said company is obligated to pave with gravel and keep in good order for 10 years, and at the end of 10 years to deliver in good order, the same parts of street now about to be again contracted for, and that the said contract, and also the assessment imposed under it, having two more years to run, the work of putting the said parts of street in good condition, and of keeping them so, should be done by means of the enforcement of the said contract, and not by means of a new contract and an additional assessment. This ground is not borne out by the facts. The evidence shows that the Rosetta Gravel Company has gone into the hands of a receiver, and that its contract is not enforceable; also that the city has made a bona fide, but fruitless, effort to put the parts of street in question in proper condition at her own expense, and that the present measure for putting the said parts of street in proper condition is wise and necessary. Evidently there is not here a case of abuse of power. There is no force in the contention that the city should pay for this work out of her general treasury. The taxes levied from the whole city are for the use of the whole city, and the discretion of the city authorities cannot be controlled by the courts, in the matter of determining

upon what particular streets the avails of those taxes shall be bestowed. In all probability, the city could not expend this large amount on the particular parts of street in question without detriment to other streets having equal claims upon the fund out of which the amount would be abstracted.

The other ground of injunction is that the city's portion of the cost of the work under the contract is proposed to be paid for in a manner prohibited by law. The work is to be done in 1901, and it is proposed to pay the city's portion of the cost of it out of the revenues of the years 1902, 1903, and 1904; and furthermore it is proposed to issue certificates of completion of work, which certificates are to bear 6 per cent. per annum interest.

Act No. 30 of the Extra Session of 1877 provides as follows:

"Section 1. That no police jury of any parish nor any municipal corporation in this state, shall make any appropriation of money for any year, which appropriation, separately or together with any other appropriation or appropriations of the same year, shall be in excess of the actual revenues of said parish or municipal corporation for that year.

"Sec. 2. That no police jury of any parish nor municipal corporation in this state shall approve any claim, or make any expenditure, which shall, separately or together with other claims approved or expenditures made, be in excess of the actual revenues of that year.

"Sec. 3. That the revenues of the several parish and municipal corporations of this state, of each year, shall be devoted to the expenditures of that year: provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years."

"Sec. 5. That no (evidence of indebtedness) or warrant for the payment of money shall, after the first day of October, eighteen hundred and seventy-seven, be issued by any parish or municipal corporation in this state, except against money actually in the treasury of said parish or municipal corporation. Any person violating the provisions of this section shall, on conviction, be punished by imprisonment, or fine, or both, at the discretion of the court: provided, that this section shall not apply to the certificates issued to jurors and witnesses for their services in the court."

Section 2 of this act provides that no municipal corporation shall make any expenditure in excess of the revenues of the year in which the expenditure is made. This contract proposes to make an expenditure in excess of the revenues of the year. Section 3 provides that the revenues of municipal corporations of each year shall be devoted to the expenditures of the year. This contract proposes to devote part of the revenues of 1902, 1903, and 1904 to an expenditure of the year 1901. Section 5 provides that no evidence of indebtedness shall be issued by

any municipal corporation. This contract proposes to pay for the work by issuing so-called certificates of payment, to bear 6 per cent. per annum interest. The contract, therefore, is proposed to be entered into right in the teeth of three of the express prohibitions of the act.

It is argued that because these certificates are not warrants, and because they are payable out of a portion of the revenues of the years 1902, 1903, and 1904 required by law to be reserved for improvements, therefore the certificates and the expenditure are not obnoxious to this law. But this law prohibits the issuance not alone of warrants, but also of evidences of indebtedness, and these certificates are most unquestionably evidences of indebtedness. They are issued for the very and express purpose of serving as such, and would not be issued at all if not to be useful as such; and this reserved portion of the revenues of 1902, 1903, and 1904 does not, by the fact of being reserved for public improvements, cease to be part of the revenues of those years. *Barber Asphalt Pav. Co. v. City of New Orleans*, 43 La. Ann. 464, 9 South. 484. So stringent and sweeping did the framers of this law consider it to be, that they thought that under its provisions it would not be possible to pay an expenditure of a previous year, even out of a surplus, and that it would not be possible to issue even certificates to jurors and witnesses; and, so thinking, they put special provisos in the act, to permit the doing of these things. But by this contract it is proposed to devote to an expenditure of a previous year not a surplus, but revenues reserved for the expenses of the year in which they are reserved; and it is proposed to issue, not mere certificates, but interest-bearing certificates. To permit this would be not to interpret this law, but to nullify it. The case of *Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish*, 48 La. Ann. 331, 19 South. 282, is distinguishable from the present one by the fact that there the expenditure involved was one as to which the police jury had no discretion,—an expenditure incurred under a mandatory statute requiring the police jury to provide a court house (section 2746, Rev. St.),—whereas here the expenditure, while useful and judicious, is entirely discretionary. The court may have been justified in holding in that case that the expenditure in question came within the spirit, if not within the express letter, of the proviso permitting certificates to be issued to witnesses and jurors,—a court house being about as indispensable for the administration of justice as are witnesses and jurors; but the court would be wholly and plainly unjustified in exempting from the statute an expenditure such as the one in the present case, coming squarely within both the letter and the spirit of the prohibition of the statute. The spending of revenues in advance, as is pro-

posed to be done by this contract, was the very evil aimed at by the statute.

It is therefore ordered, adjudged, and decreed that the mandamus prayed for herein be made peremptory at the cost of the respondent.

BREAUX, J. (dissenting). The purpose was to pay the contractor from a fund to be collected under provisions of law for needful improvements. This fund, the record discloses, is not in the treasury at this time. The contractor would perform the work, and the municipality would pay him as the amount is collected. Instead of cash, the contractor would wait until cash is realized. Judicial sanction has heretofore been given to such contracts. It is not the purpose to draw warrants on funds not in the treasury, in contravention of law, which directs that such warrants shall not be drawn. The warrants would be drawn on the funds as collected, and by this the statute would not be departed from. In the second place, this special fund from which "permanent improvements" are to be paid is derived from funds considered and in reality set aside as a fund for "improvements." *St. 1877, Ex. Sess. p. 47*, is not as prohibitory as may appear at first blush. There is some latitude left as relates to this fund. This statute provides "that an amount from the revenues may be applied to the payment of the indebtedness of former years." "May," of the statute, confers this discretion. *U. S. v. Thoman*, 15 Sup. Ct. 378, 39 L. Ed. 450, and *U. S. v. City of New Orleans (C. C.)* 44 Fed. 590. The municipality seeks to avail itself of this discretion in order to have permanent improvements constructed in accordance with the purpose which prevailed when the taxpayer was made to pay the taxes, and in accordance with the different budgets setting aside this fund as an amount to be expended as before mentioned. If the proviso of section 3 does not confer some discretion, and "may" must be read as "shall," then public improvements will be a very slow growth in the municipalities. The strictly cash basis, while desirable, is scarcely ever possible, in financeering a municipality. When the spirit of the law is complied with, and time, to a reasonable extent, and on a very safe basis, is taken advantage of to carry out a highly useful object, I do not imagine that the statute is violated. This law was directed against municipal extravagance and mismanagement, and not, as I understand, against expenditures usual in municipal government. My views being as before expressed, I am led to dissent.

BLANCHARD, J. (dissenting). The relator brought suit in the civil district court of the parish of Orleans against the Louisiana Improvement Company and the city of New Orleans, the object of which was to obtain an injunction restraining the city and the

improvement company from entering into a contract for paving a certain portion of Canal street in said city with asphalt, as authorized by Ordinance No. 821, New Council Series, adopted by the city council, and to have the said ordinance, and another on the same subject-matter known as No. 131, N. C. S., decreed null and void. When the application for the injunction was presented to the district judge he ordered a rule taken on the defendants to show cause why the writ of injunction should not issue. This rule coming on in due course for trial, was, upon trial had, discharged and the writ applied for refused. Whereupon the present proceeding was taken for a mandamus to compel the judge to grant the order for injunction. The relator alleges he is a citizen of New Orleans and a taxpayer thereof, and that he owns certain real estate fronting on that portion of Canal street where the proposed pavement is to be laid. In Ordinance No. 131, referred to, the city council ordered the pavement with asphalt of Canal street from Liberty street to Metairie road, levied an assessment of two-thirds of the cost thereof on the abutting property owners (the other one-third and the cost of paving the street intersections to be borne by the city), and directed the comptroller to advertise for bids for the proposed work. The Louisiana Improvement Company became the lowest bidder, and Ordinance No. 821 was adopted, awarding it the contract and directing the mayor to execute on behalf of the city with the said improvement company a written instrument by public act evidencing the contract. Then it was this taxpayer and front proprietor took steps by injunction to stop proceedings, averring damage and irreparable injury to himself in a sum exceeding \$2,000 should the contract be executed and the proposed work on the street be done. The grounds for the injunction he insists upon are (1) his rights under a former contract made by and between the city and the Rosetta Gravel Company, through which the street in question was paved with gravel at the expense, in the main, of the abutting owners, under a guaranty, with security, on part of the gravel company to maintain the work in good repair and the street in good condition for the space of 10 years, which period of time had still two years to run; (2) the city is without authority of law to enter into the contract, in this, that it is proposed to pay for the city's proportion of the cost of the paving in a manner and by means prohibited by law.

1. The city did in 1891 enter into a contract with the Rosetta Gravel Company to pave the portion of Canal street in question with Rosetta concrete gravel, and the work was completed and accepted by the city in October, 1893. This contract did contain the stipulation that the work should be guaranteed and maintained in good order by the contractor for and during the period of 10 years

from the date of acceptance, and should be left in good order at the expiration of the term of maintenance. It did stipulate that the contractor should give bond for the construction and maintenance of the work, and this bond in the sum of \$16,400 was executed, with Abraham Rosenfield as security. And the expense of graveling the street under this contract of 1891 was borne as follows:—The city of New Orleans paid for the street intersections and one-fourth of the cost of the paving in front of the property abutting on the street, and the remaining three-fourths was made a charge against the owners of the property so abutting. It is also true that when the city took the action, now under review, for paving the street with asphalt, the maintenance obligation of the Rosetta Gravel Company was not yet expired by two years. These things being so, can the city now take action to pave the street with asphalt; or, before taking further steps for its improvement, must it await the expiration of the maintenance term of the Rosetta Gravel Company's contract, and, meanwhile, either keep the graveled street in good order itself, or enforce against the Rosetta Company the performance of its contract obligation to do so? The evidence taken on the rule nisi in the district court, in the suit of Wouffe against the Louisiana Improvement Company et al., shows conclusively that the street in question is in bad condition and that the gravel pavement upon it is thoroughly out of repair. It is also shown that the city authorized an expenditure of \$10,000 looking to its repair, and the work was started, but, owing to the local conditions and the character of the material with which the street was originally paved, it was found it would not be possible with twice that amount of money to substantially repair it, and, in consequence, the work was stopped. Subsequently, it seems, the policy of endeavoring to repair the gravel pavement, and make a decent street or roadway out of that kind of material, was abandoned and another adopted—that under discussion, to wit:—paving the street with asphalt. There was also evidence on the rule nisi showing that the city had authorized the expenditure of the \$10,000 in repair of the gravel pavement because it was found impossible to compel the contractor (the Rosetta Gravel Company) to comply with its obligation to maintain the pavement in good condition. So, the city decided to undertake to do the repairing and then to seek to hold the contractor responsible on its bond. The work was abandoned on the advice of the city engineer, who stated it would be a useless expenditure of public funds, since the street repaired in this way would not remain in good condition; the work could not be made substantial and lasting. And upon his recommendation the paving with asphalt was adopted as being the only means by which the street could be put in satisfactory condition that would be substantial and perma-

nent. More than this, the records of this court show that difficulties, and perhaps insolvency, overtook the Rosetta Gravel Company and its surety, Abraham Rosenfield (who was also president of the company), for in 1900 the company was placed in the hands of a receiver. *State v. Judge of Division B, Civ. Dist. Ct., 104 La. 473, 29 South. 18.* It thus appears that the Rosetta gravel pavement on the street was a failure; that the expenditure of money by the city to keep it in repair would have been useless; and that it would have been equally useless to have proceeded against the Rosetta Company or its surety. The street is the principal thoroughfare of the city, and its paving with a substance that would meet the requirement of a "good street," and be durable, is a public necessity. Section 102 of the city charter (Act No. 45 of 1896) vests the city council with discretion to provide for the paving of the streets at the expense of the whole city, or partly at its expense and the remainder at the expense of the abutting property holders on the street. The council exercised this discretion in ordering the paving with asphalt, and considering the circumstances under which it was done it cannot be said there has been an abuse of its power in the premises, and, as a consequence, no ground of just complaint on this score by the relator of invasion of his rights can be urged. See *Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 South. 24; City of New Orleans v. Steinhardt, 52 La. Ann. 1043, 27 South. 586; Municipality No. 2 v. Dunn, 10 La. Ann. 57.* So far I am agreed with the majority opinion.

2. Is it proposed to pay for the city's proportion of the cost of this paving in a way prohibited by law? The ordinance (No. 821) directing the contract to be entered into with the improvement company recites that the city's portion of the cost is to be paid for as follows:—"\$60,000 out of the reserve fund of 1902, \$50,000 out of the reserve fund of 1903, and the balance out of the reserve fund of 1904, and that certificates are to issue upon completion of the work to the contractor, bearing 6 per cent. per annum interest. The draft of the proposed contract, predicated upon this ordinance, in its section 26 recites that "certificates of payment will be issued by the city engineer and commissioner of public works on the completion and acceptance by them of the entire work." And, further, that "the city's portion of the cost of the work will be paid in accordance with section No. 102 of Act No. 45 of 1896, out of the reserve fund of 1902, \$60,000; out of the reserve fund of 1903, \$50,000; and balance out of the reserve fund of 1904." So far as the proportion of the cost of the work chargeable against the abutting proprietors is concerned, the city may issue to the contractor "certificates of payment" in the literal sense of that term; but so far as the portion of the cost due by the city is concerned the city

may not issue to the contractor certificates of payment in the sense that the same are orders for the payment of money, for the reason that it is prohibited by law to issue any warrant for the payment of money except against money actually in the treasury, and for the city's portion of the cost of this pavement the money will not be in its treasury until 1902, 1903 and 1904 as set forth. No certificate of payment, therefore, in the sense that the same is an order or warrant for the payment of money, for the city's share of this indebtedness, may lawfully issue until those years. But "certificates of payment," in the sense that the same set forth the work has been done and accepted, and so much is due thereon by the city, to be warranted for and paid in 1902, 1903 and 1904 out of the reserve funds of those years, may without violation of law be issued. And this is the construction I place upon the language used in the ordinance and in the draft of the contract relating to this subject. *Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish, 48 La. Ann. 331, 19 South. 282; Snelling v. Joffrion, 42 La. Ann. 886, 8 South. 609.*

But it is insisted that the designation of the city's reserve fund for 1902, 1903 and 1904 as the source whence shall come the money to meet the city's portion of the cost of the pavement, is a violation of law, and section 113 of the city charter (Act No. 45 of 1896) is particularly pointed to as the statute prohibiting the same. That section reads:—"That the city council be and is hereby prohibited from making any contract with reference to or payable out of any appropriation of the surplus fund of any year, except to the extent that such surplus fund shall exist in cash in the city treasury at the time of the making of the said contract or appropriation." The inhibition of this section applies to "the surplus fund of any year." The city, it seems, draws a distinction between its reserve fund and its surplus fund, and this is the rule long followed. The "surplus" fund of any future year may not be anticipated, for there is no certainty about it—there may never be any—it may never exist—and, hence, it will not do to predicate present indebtedness upon. Herein lies the reason of the inhibition of the law as to this fund. The "reserve" fund of a future year, on the other hand, may be anticipated, for it is certain to exist and the minimum sum thereof may be estimated, and this being so present indebtedness may be predicated upon it. This is the contention of the city. Its soundness vel non depends upon the construction to be placed upon those parts of the city's charter referring to the funds of the city. These parts are mainly sections 93, 94, 95 and 113. The first relates to the annual "budget" or detailed estimate of the various items of liability and expenditure for the year, which is required to be made out before deciding upon the amount of taxes

and licenses to be assessed for the year. The second, after declaring the council, in fixing the budget of revenue and expenses, shall not consider and adopt as revenue miscellaneous or contingent resources and affix thereto either arbitrary or nominal value or amount, expressly prohibits the council from estimating for expenditures funds to be derived from any uncertain or indefinite source, cause or circumstance. It then goes on to direct that the council shall, by proper ordinance, provide for the receipt and disbursement of any sums of money, interests, rights or credits that may accrue to the corporation by behest, grant or any cause whatever; "and all such sums, rights, interests or credits so received," it declares, "shall be and are hereby appropriated for the purpose of public works and improvement, the manner and details of such appropriations to be ordered by the council." Then follows section 95 which declares:—"The council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the estimated revenues, but shall reserve 20 per cent. of such estimated revenues, which reserve, and all sums, rights, interests and credits received from miscellaneous or contingent sources, shall be appropriated by the council for the purpose of public improvements, as herein provided for." (*Italics ours*). I think the two sections, 94 and 95, embody a well-defined distinction between the two funds—surplus and reserve. The surplus fund is that described in section 94; the reserve fund is that described and denominated such in section 95. The origin of the two differ. The one (the surplus fund) is derived from uncertain or indefinite sources, causes or circumstances, and as to the same—yet to be realized and the realization problematical—the council is prohibited from estimating, or considering in the estimates, for expenditures. It is surplus because not permitted to be included in estimates for expenditures. But funds accruing in this way, to wit:—"by behest, grant, or from any cause whatever," are directed to be received and are by law dedicated to, and ordered to be disbursed for, purposes of public works and improvements. And right here section 113 interposes and says to the council "You shall not make any contract with reference to this fund, or payable out of it, except to the extent that the money itself is in the treasury at the time of the making of the contract." The reason is the sources of the fund are too contingent, too uncertain—its existence too problematical—to justify predicating liability upon. I hold that the fund mentioned and dealt with in the latter half of section 94 is the "surplus" fund named as such in section 113. The reserve fund is derived in this way:—It is certain that the revenues of the city will amount each year to a minimum estimated sum. The council are to arrive at this estimate, and when they do they are not to cover the

whole in the budget they make up of the year's expenditures. No; they are to cover only 80 per cent. of the sum in their budget, and the remaining 20 per cent. is directed by the law to be set aside as a reserve fund, which can be appropriated by the council only for purposes of public improvements. Thus, the city has two funds available for public improvements—the surplus fund and the reserve fund. The first is contingent and uncertain both as to existence and amount; the second certain as to existence, uncertain but estimative as to amount. Because of this difference, section 113 of the charter mentions only the surplus fund, confining its restraints and inhibitions to it, leaving the city a freer hand in respect to the reserve fund, thus enabling the city to contract liability predicated on it, as is now proposed in the contract with the Louisiana Improvement Company.

I cannot assent to the conclusion of the majority of the court that the proposed work of improvement may not be undertaken until the funds to pay for the city's portion of same is actually in the treasury; that the city is without power to contract for improvements with reference to its reserve fund of future years; that its hands are tied in the matter of public improvements so far as future revenues, arising from the reserve fund provided for by its charter, are concerned; that it cannot at all anticipate such revenues in its contracts for public improvements. This construction of the statute cited in the majority opinion is too narrow. Besides, the statute referred to is modified, I think, in the matter of public improvements in the city of New Orleans by the city charter's express designation of the reserve fund of all years for such purpose. The decree of the majority opinion paralyses the arm of the city in respect to undertaking works of public improvement on a scale of any magnitude. And it is, besides, in direct conflict with the views expressed by this court, and the decision it handed down, in *Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish*, 48 La. Ann. 331, 19 South. 282, where it was distinctly held that a police jury has authority to appropriate, for a parochial improvement, the excess of revenues of a parish, and to set apart such anticipated excess for future years, subject to future collection, to pay the installments as the same mature under the contract. That is exactly what the city of New Orleans has done in the instant case—no more and no less. The distinction which the majority opinion makes between the case referred to and that under consideration will not, I respectfully submit, bear analysis. To improve a great thoroughfare of the city is as much a duty incumbent upon the municipality as is the duty of parochial authorities to provide a court house. If a police jury may make a contract for the erection of a court house and validly stipulate that the contractor may be paid out of

the revenues of future years, a fortiori may the city of New Orleans contract for public improvements and provide for payment of the same out of the revenues to be derived from collections in the future for account of its reserve fund, because such reserve fund is specially created by its charter and set apart for such improvements. No such fund, out of the revenues of any other parish, is created and set apart by law for public improvements. Yet this court as late as the year 1896, established by its judgment in the Bienville Parish Case, cited supra, that "for the building of useful and necessary public buildings, there is no law prohibiting them (the parochial authorities) from setting apart a portion of the ten-mill tax in future years." It seems, however, in the majority opinion herein, a law is found prohibiting the city of New Orleans from doing the same thing (only the city's case is stronger) as this court permitted the police jury of Beville parish to do in 1896. Yet the very statute now cited by the majority and construed as restraining the city was fully considered in the former case, and the construction now maintained deliberately rejected. And the Bienville Parish Case is not alone. The opinion of the court therein refers to *Snelling v. Joffrion*, 42 La. Ann. 886, 8 South. 009, as sustaining the doctrine announced. The decision in the Beville Parish Case has, since, been accepted as good law by parochial and municipal authorities throughout the state, and has, indeed, become the law of contract in the matter of public improvements ordered by cities, towns and parishes, and in such contracts property rights are involved. The decision now handed down imperils, if it does not invalidate, such contracts and impairs their obligation.

I respectfully dissent.

(107 La.)

SWORDS, Sheriff, v. DAIGLE. (No. 14,369.)

(Supreme Court of Louisiana. April 28, 1902.)

**POLICE JURIES—PUBLICATION OF ESTIMATES
—LICENSES—POLICE REGULATION.**

1. The law requiring police juries to publish their estimates of expenditures during 30 days preceding the imposition of the tax applies as well to license as to ad valorem taxation, and is not substantially complied with, as to the former, when the license ordinance is adopted at the same meeting as the estimate, although the ad valorem tax ordinance may not be adopted until after the expiration of 30 days.

2. Where, under the law, license may be imposed upon the retail liquor business, either for revenue, or by way of police regulation, or for both purposes, the question as to what is the main purpose is one the solution of which depends upon the circumstances surrounding the imposition of the license. And where it is imposed by the same ordinance as the licenses for revenue, it would be a strained construction of the law to single it out and hold it to be in the main a police regulation, and hence valid, and at the same time, to hold the others to be intended for revenue, and invalid, merely because the liquor license is higher, and the business

of liquor selling is subjected to some restrictions not imposed upon other callings.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Edward T. Lewis, Judge.

Action by M. L. Swords, sheriff and ex officio tax collector, against Joseph Daigle. Judgment for defendant. Plaintiff appeals. Affirmed.

W. J. Sandoz and E. B. Dubuison, for appellant. Charles Frederick Garland, for appellee.

MONROE, J. The plaintiff claims from the defendant \$2,100 for state and parish licenses as retail liquor dealer during the year 1900 (being \$2,000 for the parish and \$100 for the state license), with 2 per cent. per month interest from March 1, 1901, and 10 per cent. upon the aggregate amount as attorney's fees. The defendant admits that he owes the state license, and deposits the same in court, with interest, penalties, and costs. He denies that he owes the parish license, for the reason, as he avers, that the police jury did not publish its estimate of expenditures for 30 days, as required by law, before adopting the license ordinance, but, on the contrary, adopted said estimate and ordinance at the same meeting, and that the ordinance is therefore void. The fact is, as stated in the answer, that the budget of expenses and the license ordinance were adopted at the same meeting, to wit, the meeting of December 5, 1900. This was followed, upon January 22, 1901, by the adoption of the ordinance imposing the ad valorem parish tax for the year. Section 2745 of the Revised Statutes requires the police juries of the different parishes to adopt and publish their detailed estimates of expenditures at least 30 days before meeting to decide upon the taxes to be assessed. It has been held that this law is mandatory, and not directory, and that an injunction will lie to restrain the collection of taxes imposed in violation of its provisions. *Wilson v. Anderson*, 28 La. Ann. 261. It has also been specifically held that it applies to license taxes imposed upon liquor dealers, and our predecessors in this court have said: "The powers conferred upon police juries relative to the licensing of drinking saloons are very ample. There is, however, a restriction upon the power of police juries to lay taxes of any kind, the application of which is invoked here. Before a police jury can lawfully meet and decide on the amount of taxes to be assessed for a current year, it must cause an estimate of the parish expenses to be made, and published at least thirty days, before it decides on the amount of taxes to be raised. * * * It is a wise law that requires the taxpayers to be advised of the intention of the police jury to assess a certain sum upon them and their property; to fix an aggregate amount to be raised by tax-

ation in any given year. It advises them of the quantum and objects of burthens that are about to be imposed upon them for parochial purposes, and gives them an opportunity to exercise a healthful and restraining influence upon their local legislature. We are not disposed to relax the rule which has been imposed upon the police jury, even if we had power. The imposition of the tax was illegal, because the estimate of the expenditures had not been published." *Parish of Lincoln v. Huey*, 80 La. Ann. 1244. See, also, *Police Jury v. Bouanchaud*, 51 La. Ann. 866, 25 South. 653; *State v. Lockett*, 52 La. Ann. 1620, 28 South. 157; *Constant v. Parish of East Carroll*, 105 La. 286, 29 South. 728.

The learned counsel representing the plaintiff argue that there was a substantial compliance with the law, in that the ordinance imposing the ad valorem tax was adopted in accordance with its provisions, i. e., after 30 days' publication of the estimate. This argument would be as strong if the case were reversed, and the ordinance imposing the ad valorem, instead of that imposing the license, tax, had been adopted at the same meeting as the estimate, and, if accepted as the basis of jurisprudence, would produce the singular result that a law which by its terms applies to all taxes would be held to apply in one case only to license taxes, and in another only to ad valorem taxes.

It is also contended that the license in question is not a tax, and hence not within the meaning of the provision of the law which we are now considering, but is a police regulation. There is, no doubt, authority for the proposition that the police power may be exercised through the medium of the power of taxation, and that in such case it is not subject to the limitations imposed upon the latter. But whether, in a given case, the main purpose of an ordinance imposing a liquor license is to obtain revenue, or that the ordinance shall operate as a restraint upon the traffic in liquor, is a question the solution of which depends, where either hypothesis is admissible under the law, upon the surrounding circumstances. In the instant case, assuming that the police jury of St. Landry might legally have imposed the license for either purpose or both, the amount fixed, and the prohibition of the issuance of licenses for less than that amount, and against the carrying on of the business without license, suggest the idea of a police regulation. Upon the other hand, for aught we know, the parish may have found that it collects more money, at less expense, with high licenses than with low, and, as the liquor license was fixed by the same ordinance by which the revenue licenses were fixed, and as we know that the latter were not intended as police regulations, it would be a strained construction, merely because of the prohibition mentioned, to single out the liquor license as a police regulation, and therefore validly imposed, and yet to hold, as we

should be compelled to hold, that the other licenses imposed by the same ordinance were invalid.

Upon the whole, we concur with the views expressed by our learned Brother of the district court, and the judgment rendered by him is affirmed.

(107 La.)

RUSH et al. v. LANDERS (LANDERS, Intervener). (No. 14,003.)¹

(Supreme Court of Louisiana. April 14, 1902.)

FRAUDULENT CONVEYANCE—HUSBAND TO WIFE—EVIDENCE OF WIFE—TITLE OF INTERVIEWER—INTERROGATORIES—IMMOVABLE PROPERTY—CONSIDERATION—COMMON LAW—JUDICIAL NOTICE.

1. Where immovable property in this state purports to have been sold by a husband to his wife for a certain sum of money, the title is invalid on its face, the apparent consideration not being within the exceptions provided by Civ. Code, art. 2446, as essential to the validity of a sale in such case, and the property is liable to seizure by the creditors of the husband.

2. Where property so situated is seized upon a claim against the husband, and the wife intervenes, setting up title, and the seizing creditor propounds to her interrogatories on facts and articles, her answers thereto are entitled to no greater effect, as against such creditor, than her testimony, or that of any other witness, given orally.

3. Where the seizing creditor, in propounding such interrogatories, takes the initiative, and attempts to show that the consideration of the putative sale was other than as stated, either in the intervener's title or in her intervention, and thereafter fails, in this court, to ask for any ruling upon his objection, made during the trial, to the introduction of parol evidence to show the real consideration of such sale, it will be presumed that the objection is abandoned.

4. Where the answers to such interrogatories show that property in another state had been conveyed by the husband to the wife, for a particular consideration, arising under the laws of that state, this court will not assume, even though it should be made to appear that such consideration was inadequate, that a different consideration, testified to as moving in the matter of the conveyance of the Louisiana property, was therefore included and exhausted for the purposes of the conveyance in such other state.

5. The validity of the conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other with respect thereto, is to be determined by the law of Louisiana.

6. A sale of such property between husband and wife can be made only in the cases and for the consideration as provided in Civ. Code, art. 2446, and if, apparently, made for some other consideration, is invalid on its face; and if attacked by a party showing sufficient interest, the burden of proof, if proof be admitted, rests upon the party seeking to maintain the validity of such sale to show that the real consideration was within the exceptions provided in said article.

7. If in such case the claim be that the consideration was an indebtedness of the husband to the wife for money said to have belonged to the wife, and to have been received and used by the husband, it must be shown, where the parties are domiciled in another state, that by reason of such receipt and use the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and

¹ Rehearing denied May 12, 1902.

that the property was conveyed in satisfaction or in part satisfaction of such debt.

8. Whether, in such case, the husband becomes the debtor of his wife, depends upon the law of their domicile.

9. The courts of Louisiana will take judicial cognizance of the prevalence of the common law in a sister state, and of the rule of the common law that a married woman cannot possess personal property independently of her husband except where a trust has been created for her separate benefit. But statutory modifications of the common law, or the creation of such trust, must be proved, if either be relied on.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermillion; Minos T. Gordy, Jr., Judge.

Action by Fred. P. Rush and others against Franklin Landers. Martha E. Landers intervened. Judgment for defendant and intervener, and plaintiffs appeal. Reversed.

Wilson & Townley (W. B. White and W. W. Edwards, of counsel), for appellants. Walter Augustus White, for appellee.

MONROE, J. Fred. P. Rush and George E. Townley, residents of Indiana, and original plaintiffs herein, in February, 1900, obtained judgment in the circuit court of Marion county, Ind., against the defendant Franklin Landers, also a resident of that state, in the sum of \$4,745.58, representing the principal and interest of a debt said to have been contracted in 1895; upon which judgment, in March, 1900, they instituted suit in the district court for the parish of Vermillion, and caused to be seized, by attachment, a rice farm lying in that parish, which they alleged belonged to the defendant. The defendant, appearing through the curator ad hoc appointed by the court to represent him, answered, disclaiming title. Thereupon Martha E. Landers, his wife, intervened, claiming to be the owner of the seized property by virtue of a conveyance made by her husband in January, 1894, in part satisfaction of an alleged debt for a larger amount, said to be due for separate funds belonging to her, which had been delivered to and used by him, and praying that her title be recognized, and the attachment dissolved. About the time that this intervention was filed, George E. Townley died, and Morris M. Townley, his administrator, was made party plaintiff in his stead, and he and Rush answered the intervention in effect as follows, to wit: That the property seized belonged to the community between Landers and his wife, and that the transfer of title to the wife, as set up by the intervener, was null and void, because not within any exception to the prohibition contained in the law of this state against sales between husband and wife, and because the property was worth \$10,000, whereas the cash consideration of the alleged conveyance purports to have been \$2,000, and for the balance the wife undertook to bind herself with respect to certain mortgages bearing upon the prop-

erty in the name of her husband, or, if it be held that she did not so undertake, then that the price is "vile"; and that the debt claimed by plaintiffs is a debt of the community, for which said property remains liable. The answer concludes with a prayer that interrogatories on facts and articles be propounded to the intervener, and for judgment, etc. Interrogatories were accordingly propounded to and answered by the intervener under a commission executed at her residence in Indiana, and the commission was duly returned, and made part of the record. The intervener was also sworn as a witness in her own behalf, and testified orally. Other evidence was adduced, and the case was argued and submitted, and decided in favor of the intervener on the question of title and in favor of the defendant by judgment of nonsuit, and from the judgment so rendered the plaintiffs prosecute this appeal. In the course of the execution of the commission under which the intervener answered the interrogatories on facts and articles, the point was reserved on behalf of the plaintiffs that the answers were read from a paper which had been prepared in advance, and that the intervener declined to answer in any other way, and declined to state by whom the paper had been prepared. The point thus reserved was not, however, insisted upon in the district court, and has not been referred to by counsel for plaintiffs, who rely in their argument before this court upon their ability to show that the answers given by the intervener to the interrogatories and in her oral testimony are self-destructive, and are overborne by other testimony. We take it, therefore, that the answers to the interrogatories on facts and articles are to be accepted subject to the conditions last mentioned, since they can hardly be used for the purposes of an attack upon the oral testimony given by the intervener if they are to be excluded from the record. As to the effect of those answers, counsel for the intervener contends that it can be destroyed only by the testimony of two witnesses, or of one witness and strong corroborating circumstances, which, he claims, has not been produced; whilst counsel for plaintiffs insist that such effect should be determined in this case by the rules applicable to ordinary testimony, for the reasons: (1) That the law governing the answers of the defendant in a case is inapplicable where interrogatories "are answered by one who, as intervener, has the burden of proof"; (2) that certain of the answers of the intervener as to the value of the real estate in Indiana transferred to her by her husband are merely expressions of opinion upon matters concerning which it does not appear that she was qualified to judge; and they further insist that as to certain mortgages, which are said to have borne upon the Indiana property at the time of its transfer, the answers are contradicted

by official certificates from the mortgage records; and, finally, that they are overborne throughout either by the testimony of two witnesses or its equivalent.

The Code of Practice provides that "both plaintiff and defendant" may propound interrogatories on facts and articles (article 347), and the answers are given the same effect whether made by the one or the other, and irrespective of the burden of proof. The plaintiffs correctly assumed that, as they occupied the position of defendants quoad the claim set up by the intervener, they were entitled to propound such interrogatories to her; and, if this be true, there can be no reason why her answers should not be given the effect that would be accorded to those of a person occupying the position of plaintiff *eo nomine*. Prior to 1870 article 354 of the Code of Practice read as follows: "The answers of the party interrogated are evidence, but do not exclude adverse testimony, and may be destroyed by the oath of two witnesses, or of one single witness corroborated by strong circumstantial evidence, or by written proof." *Fuqua*, Code Prac. art. 354. And the case of *Hynson v. Texada*, 19 La. Ann. 470, to which we are referred, was decided under the law as thus expressed. The present article 354 reads: "The answers of the party interrogated are evidence, but do not exclude adverse testimony, and shall be weighed by the judge as other testimony." And for general purposes, to which the article applies, there can be no doubt that the answers referred to are to be dealt with as therein provided. It is true that under the Code of Practice as now written it is well settled, as it was well settled before the amendment, that, as between the parties to a sale of real estate, there are but two ways of impeaching the title, which is required to be in writing,—the one, by means of a counter letter, and the other by interrogatories on facts and articles,—and that, when answers to such interrogatories are substituted for the counter letter, the title thus established can no more be impeached by parol testimony than if established in any other written form. *Semere v. Semere*, 10 La. Ann. 704; *Godwin v. Newstadt*, 42 La. Ann. 735, 7 South. 744. This rule of exclusion applies, however, only to the parties to the instrument attacked, and does not apply to third persons. *Westholz v. Retaud*, 18 La. Ann. 285; *Blake v. Hall*, 19 La. Ann. 52; *Finley v. Bogan*, 20 La. Ann. 444; *Cary v. Richardson*, 35 La. Ann. 505. We conclude, therefore, that for the purposes of this case the answers of the intervener to the interrogatories on facts and articles are entitled to no greater effect than her oral testimony given in her own behalf.

Counsel for plaintiffs also objected in the course of the trial to the proof of any other consideration for the conveyance to the intervener of the property in controversy than

that evidenced by the written instrument, and the objection was overruled. But as the counsel themselves appear to have opened the door to such proof by their interrogatories on facts and articles, and as they do not refer to the matter in their argument before this court, we assume that the objection in question, like the other, has been abandoned, and for this reason we make no ruling concerning it.

Proceeding upon the basis thus established, it appears that in January, 1894, Franklin Landers, the husband of the intervener, conveyed to his wife a number of pieces of real estate in Indiana, consisting of farms, town lots, etc., concerning which it is claimed on behalf of plaintiffs that the aggregate value was \$158,051, and that the mortgages with which they were burdened amounted to \$86,865, leaving a margin of value, carried by the conveyance to his wife, of \$71,186; whilst the intervener claims that the property was worth \$110,080, and that the mortgages equaled or exceeded its value, and the defendant also, upon January 22, 1894, conveyed to his wife the farm seized in this case, which is said to be worth \$10,000, and which was then burdened with mortgages amounting to \$7,500, exclusive of interest, etc. These different conveyances, evidenced by written instruments, duly recorded, purport to have been sales for money in hand paid. But the interrogatories on facts and articles were propounded by the plaintiffs for the purpose of enabling them to show that the consideration for the conveyance of the Indiana property was something other than cash, and that it must have included and have extinguished the alleged debt, if any such debt existed, in part payment of which the intervener alleges that the Louisiana farm was conveyed to her. In her answers to those interrogatories, however, and also in her oral examination, the intervener states that the Indiana property was conveyed to her in fulfillment of the verbal promise of her husband that he would in that way make good an interest in that and other property, which interest, secured to her by the law of Indiana, she had parted with at his request, and in order to facilitate him in paying his debts. And in her oral testimony she also states that the Louisiana farm was so conveyed in part satisfaction of her claim against her husband, represented by his note of \$10,324.87, for personal funds belonging to her, which had been delivered to and used by him, together with accumulations of interest. As to the consideration for the conveyance of the Indiana property, it appears that by the law of Indiana, which plaintiffs have proved, tenancies by curtesy and in dower have been abolished, and a married woman is given one inchoate one-third, one-fourth, or one-fifth interest, varying, quoad the creditors of her husband, with the value of the property, in all real estate acquired by her husband during the marriage, or in

which he may have an equitable interest at the moment of his death, which inchoate interest becomes absolute upon the death of the husband, or upon the forced alienation of the property during his life, unless the wife has previously joined him in such alienation, or in imposing incumbrances importing the right to alienate; provided that the wife may elect to take under the will of her husband, if there be one, and provided, also, that in case of judicial sales of such real estate where the value exceeds \$20,000 her interest becomes absolute only up to that value. Rev. St. Ind. §§ 2482, 2483, 2491, 2499, 2508, 2509. As to the consideration for the conveyance of the Louisiana property, it is shown that the intervener was first married to Washington Conduitt, who died in 1862, leaving her \$4,000 by his will, together with \$1,400, which he had given her shortly before his death; that in 1865 the \$5,400 thus received had increased to \$7,200, and that she then married Franklin Landers, to whom, at one time or another, she turned over the whole of that amount, taking his notes therefor; that by reason of the accumulation of the interest allowed by Landers the \$7,200 had increased by January, 1883, to \$10,324.87; that he then substituted a note for that amount in place of the notes previously given; and that, whilst interest had been paid on said note from time to time, little or nothing had been paid in reduction of the principal amount up to the date of the conveyance of said Louisiana property, and that said property was conveyed to her in part satisfaction—that is to say, up to the sum of \$2,000—of the claim represented by said note. It is admitted by the argument that the intervener had a valuable interest, under the law of Indiana, as above recited, and it is not denied that she parted with it in joining her husband in mortgaging or selling the property to which it attached. Nor is it denied that it was competent, under the law of Indiana, for the husband to make that interest good by the conveyance to the wife of real estate there situated. It is also virtually admitted that this court will be justified, from the evidence in the record, in holding that the intervener had placed in the hands of her present husband \$5,400, with the accretion thereto, which she had received from her first husband and his estate, and that the same had not been returned to her, or otherwise accounted for, prior to the month of January, 1894. And from these premises counsel for the plaintiffs present an argument involving several propositions of law, which may be conceded with certain modifications not material to the plaintiffs' case. Thus it is conceded that the validity of a conveyance of real estate lying in Louisiana is to be determined by the law of Louisiana, and that the capacity of persons occupying the relation of husband and wife to deal with each other with respect thereto is to be determined by

the same law. It is also conceded that under the law of Louisiana a sale between husband and wife can take place only for the considerations stated in the law itself; that, where such sale purports to have been made for some other consideration, it is invalid upon its face, and, if attacked by a party having sufficient interest, the burden of proof, whenever such proof is admissible, rests upon the party seeking to maintain its validity to show that the real consideration was within the exceptions provided by law; and, if the claim be that the real consideration was indebtedness by the husband to the wife on account of money said to have belonged to the wife and to have been received and used by the husband, it must be shown, where the parties reside in another state, that by reason of such receipt and conversion the husband became the debtor of the wife, that the debt existed at the time of the conveyance of the property, and that such conveyance was made in satisfaction, or part satisfaction, thereof. It is further conceded that the intervener and her husband, having been residents of Indiana, the question as to whether the husband became indebted to his wife by reason of his receipt and conversion of money said to have belonged to her prior to his conveyance to her of the real estate in Louisiana must be determined by the law of Indiana. The learned counsel then proceed as follows: "(1) It having been shown that the common law has been adopted in Indiana, and it not having been shown that it has, in that respect, been modified by statute, this court will assume, agreeably to the common-law rule, that the husband of the intervener owed her nothing on account of any money belonging, or said to have belonged, to her, which may have been received and converted by him; and hence that there was no consideration, which the law of Louisiana will recognize, to validate the conveyance of the property here situated. (2) If the position, as thus stated, be not sustained, then that the verbal promise of the husband to make good, by conveyance of real estate in Indiana, the interest of which the intervener had divested herself for his accommodation, was not enforceable, in view of the provisions of the Indiana statute of frauds (which the counsel have offered in evidence) on the subject of verbal contracts relating to real estate. And (3) that the net value, after deducting the mortgage debt, of the Indiana property conveyed to the intervener exceeded the value of the interest which she claims it was intended to make good, and hence that it should be held that such conveyance also operated to extinguish the claim for money received and converted."

The propositions 2 and 3 will first be considered in their order as stated above. In support of proposition 2 we are referred to the case of *Worth v. Patton*, 5 Ind. App. 272, 31 N. E. 1130, in which it appeared that the

husband desired to convey certain lands to the children of a former wife, and that he verbally promised the wife that, if she would join him in such conveyance, thus releasing her inchoate interest, he would convey to her certain other real estate, which promise was accepted and acted on by the wife; but that the husband died without fulfillment on his part. It further appeared that the widow then made a claim against the estate of the deceased, asking to be made good with respect to the interest with which she had thus parted, which claim was resisted on the ground that the promise was void under the statute of frauds. It was held by the court that, if the action had been brought for specific performance, or for damages for breach of contract, the defense might have prevailed, but that the widow was entitled to recover the fair value of the interest with which she had parted upon the faith of a promise which had not been fulfilled, and which could not be enforced. This decision appears to us to be equally sound in law and in morals, but we are unable to perceive in what way it supports the proposition of the learned counsel. It was not held that the husband could not, under the statute of frauds, have complied with his promise, nor was it held that, if he had complied with it, a creditor to whom he contracted a debt 18 months later could have successfully attacked the conveyance upon the ground that the consideration was inadequate.

Proposition No. 3 appears to us to involve a non sequitur, since, assuming that the net value of the Indiana property conveyed to the intervener exceeded that of the interest which she claims it was intended to make good, it would not follow that the parties intended the excess in value to be attributed to the extinguishment of the claim for personal funds had and converted by the husband. There are other hypotheses to be taken into account. Landers may have intended to convey the property to his wife for an inadequate consideration, or he may have believed—the opinions of the witnesses who have been examined in this case, or the fact, if it be a fact, or both the opinions and the fact, to the contrary notwithstanding—that the property was not worth more than the claim in satisfaction of which it was transferred. There is nothing to indicate that any creditor was left unsatisfied at the time that the conveyances in question were made, and those conveyances certainly inflicted no injury on plaintiffs, whose debt had not then been contracted, and was not contracted until a year or more later. But if the purpose had been to place the property of the husband, both in Indiana and Louisiana, beyond the reach of the husband's future creditors, it is not apparent why the claim of the wife for the restitution of her personal funds, which claim, there was reason to believe, might serve as a valid consideration for the conveyance to her of the Louisiana property, should have been exhaust-

ed in Indiana, when, as we infer from the fact that plaintiffs appear to have made no attack on them, the consideration for the conveyances in Indiana, as stated by the intervener, was sufficient to enable her to hold the property there conveyed.

Passing to some other questions, there is no doubt that the Louisiana farm, having been acquired during the marriage, was community property, though Landers and his wife resided in Indiana. Civ. Code, art. 2400. But that did not prevent its conveyance to the wife, provided there was a consideration, which, under the law of Louisiana, would be sufficient to support a sale or dation en paiement from husband to wife. The position taken in the answer to the intervention that the intervener, as part of the price, assumed the mortgage debts resting upon the property, and due by the husband, is not sustained by the fact. The intervener did not assume the mortgage debts, but took the property subject to the mortgages, and only for its supposed value over and above the debts thus secured. So, also, with regard to the position that property worth \$10,000 was conveyed to her in extinguishment of her claim to the extent of only \$2,000, and that the price was "vile," etc. Such was not the fact. The property was conveyed subject to mortgages amounting to \$7,500, exclusive of costs, interest, attorney's fees, etc., for which it may be liable, and hence the interest acquired by the intervener seems to bear but a just proportion to the claim for which it is said to have been given in satisfaction. *Colvin v. Johnson*, 104 La. 655, 29 South. 274.

The question which remains is, was there a consideration for the conveyance of the Louisiana property from husband to wife, such as can be recognized under Louisiana law? The conveyance purports to be a sale for \$2,000, and is invalid upon its face. A contract of sale between husband and wife can take place only in the three following cases: "(1) When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights. (2) When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated. (3) When the wife makes a transfer to the husband of property, in payment of a sum promised him as dowry." Civ. Code, art. 2446. The burden of proof is on the intervener to show that the conveyance, which appears upon its face to be invalid, because the consideration expressed is not within the exceptions of the law, is based upon another and a different consideration, which is within those exceptions. She has undertaken to accomplish this by showing that she turned over to her husband certain funds, which, in this state, would be considered paraphernal, and that the property in question was conveyed to her by her husband in part satisfaction of the debt

which he incurred in receiving and using said funds. But she has not shown that her husband thereby incurred any debt, for that is a matter which is to be determined by the law of their domicile, where the funds were received and converted. The plaintiffs have proved the adoption of the common law by the state of Indiana,—a fact of which we might have taken judicial notice, as we now take judicial notice of what the common law is, though we do not take such cognizance of the statutory modifications of that law. *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Kling v. Sejour*, 4 La. Ann. 130; *Ripka v. Pope*, 5 La. Ann. 63, 52 Am. Dec. 579; *Gates v. Gaither*, 46 La. Ann. 292, 15 South. 50; *Lambert v. Insurance Co.*, 50 La. Ann. 1031, 24 South. 16; *Roehl v. Porteous*, 47 La. Ann. 1582, 18 South. 645; 13 Am. & Eng. Enc. Law (2d Ed.) 1058. At common law a married woman cannot possess personal property independently of her husband except where a trust is created for her separate benefit, and the promise of the husband to repay money received from the wife during coverture would be without consideration. 15 Am. & Eng. Enc. Law (2d Ed.) 820; *Henderson v. Trousdale*, 10 La. Ann. 548; *McCall v. White*, Id. 547; *Eager v. Brown*, 14 La. Ann. 885; *Quigly v. Muse*, 15 La. Ann. 197. There is no evidence in the record that this rule has been modified by statute in Indiana, and hence we have no basis upon which to hold that the receipt of money from his wife and its conversion by Landers imposed any obligation upon him the discharge of which could serve as the consideration for the conveyance to her of property in this state. Even if it had been shown that, by reason of statutory modification in Indiana of the common law otherwise prevailing there, Landers became the debtor of his wife with respect to her personal funds received and converted by him, and that he also owed interest thereon under an agreement to that effect, such obligation would not be held, in this state, to stand upon the same footing as the debt of a citizen of Louisiana to his resident wife for paraphernal or dotal funds received by him. Nor would a conveyance of property, made in this state, in satisfaction of the one debt, be here given the effect which, under our law, is accorded to the dation en paiement in satisfaction of the other. *Prats v. His Creditors*, 2 Rob. 501; *Stewart v. His Creditors*, 12 La. Ann. 89; *Hyman v. Schlenker*, 44 La. Ann. 118, 10 South. 623. The counsel for the intervener contends, however, that a creditor can proceed by the seizure of property, the title to which is in another person than his debtor, only where such title is a pure simulation. Correctly stated, we take the rule upon this subject to be that, "when immovable property has been sold by authentic act, valid on its face, and accompanied by actual delivery, and continuous possession and control by the vendee, as owner, a creditor of the vendor cannot

seize the property in disregard of the transfer; and, when enjoined by the vendee, such seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation. * * * The title of the vendor under such circumstances can only be attacked in a direct action in avoidance of the sale. And in such direct action, whether revocatory or en declaration de simulation, the plaintiff must aver and prove that the act sought to be avoided operated injuriously to him." *Willis v. Scott*, 33 La. Ann. 1026; *Cochrane v. Gibert*, 41 La. Ann. 735, 6 South. 731; *Thompson v. Hering*, 45 La. Ann. 991, 13 South. 398. In the case last above cited the syllabus reads in part: "If the act of sale evidenced a real transaction, whatever its character, the administratrix could not ignore it, or attack it collaterally, but could only claim its judicial revocation by direct action." But in the case at bar the putative sale from husband to wife, purporting to have been made for money in hand paid, is not valid upon its face, but is distinctly invalid, as being apparently in violation of a prohibitory law. It cannot, therefore, be said to evidence a real transaction, but leaves the title to the property, apparently, in the vendor, and subject to seizure at the suit of his creditor.

Our learned Brother of the district court, after a conscientious and exhaustive review of the case, concludes his opinion as follows: "It seems, so far as I am advised, that under the law of Indiana the husband and wife have almost unlimited power to contract with each other. Under our own law, restitution to the wife by the husband is looked upon with favor. * * * The sale in controversy in this case was an accomplished fact long before the plaintiffs ever became creditors of the defendant, Landers, and the intervener, by virtue of that sale, had accepted that property, and gone into actual possession of the same. For the foregoing reasons, and after a prolonged and thorough study of the question and all the law and facts bearing upon it, I am forced to conclude that the transaction or transfer in controversy vested title to the property in the intervener, and she is accordingly declared to be the true and lawful owner," etc. We infer from this that something may have been conceded in the argument in the district court as to the statutory modifications of the common law in Indiana in so far as that law bears upon the relation of husband and wife, but we have been unable to find in the record any proof of a modification whereby the husband becomes the debtor of the wife by reason of his receipt and conversion of her personal funds. Our conclusion, therefore, upon the case presented, is that the intervener has failed to make the proof necessary to establish her claim, and that her intervention should be dismissed as in case of nonsuit.

Since the submission of the case the death of Franklin Landers has been suggested, and his legal representatives have been made par-

ties hereto. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiffs Fred. P. Rush and Morris M. Townley, administrator of George E. Townley, deceased, and against the intervener, Mrs. Martha E. Landers, dismissing the intervention of said Mrs. Landers as in case of nonsuit, and at her cost in both courts.

(107 La.)

**METHODIST EPISCOPAL CHURCH,
SOUTH, v. CITY OF NEW OR-
LEANS et al. (No. 13,990.)¹**

(Supreme Court of Louisiana. March 31, 1902.)
**TAXATION—PROPERTY SUBJECT—EXEMPTIONS
—BACK TAXES—REDUCTION OF
ASSESSMENTS.**

1. All property is liable to taxation, unless shown to be within some exemption established by law. Hence, in a proceeding to annul an assessment, the exemption relied on must be affirmatively established.

2. Property liable to taxation, which is entered upon the assessment rolls as "exempt," and which is not assessed, is "omitted" from the assessment as effectually as if it were not entered at all, and is therefore within the meaning of the law providing for the assessment of property which has been omitted.

3. Taxes for the current year are not included in the term "back taxes," as used in section 12 of Act No. 170 of 1898, providing that "no back taxes for more than three years shall be assessed"; hence taxes may be assessed for three years preceding that in which the assessment is made. Nor does it affect the question that the supplemental tax roll is not recorded or the notices of assessment given until the following year.

4. A suit, the purpose of which is to relieve property of the taxes assessed against it for one or more years, is a proceeding "for the reduction of assessments," within the meaning of the law providing that in such cases the attorney of the tax collector shall be compensated by receiving 10 per cent. on the amount collected.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by the Methodist Episcopal Church, South, against the city of New Orleans and others. Judgment for plaintiff. Defendant city appeals. Modified.

H. Garland Dupré, Asst. City Atty., for appellant. William S. Benedict, for appellee.

MONROE, J. The plaintiff alleges that certain real estate belonging to it, to wit, lots 6, 7, 8, 9, and 10 in square 242, bounded by Jackson, Brainard, Josephine, and Carondelet streets, in the city of New Orleans, have recently been assessed for the taxes of 1895 and 1896 without authority of law, said property having been, under article 207 of the constitution, and contemporaneous jurisprudence and custom, exempt from taxation, as used for religious purposes; that said assessment was made upon a so-called supplemental roll, made up, it is claimed, in consequence of a

decision of the supreme court, which decision was, however, rendered in a case to which petitioner was not a party, and by its terms exempts like property for said years; that the assessment in question is said to have been made under the authority of section 12 of Act No. 170 of 1898, but that said law was not complied with or is inapplicable, for this: that said property was not "omitted" from, or "erroneously" or "improperly" assessed on, the regular rolls, but was entered thereon as exempt, and hence the statute relied on confers no authority on the assessors to make a new assessment, and the same should be decreed null and void. It is further alleged that the property has been assessed in globo under the numbers 6, 7, and 8; lots 9 and 10 not being named, though included in the measurement. The prayer is that the board of assessors, the state tax collector, and the city of New Orleans be cited, and that plaintiff have judgment annulling the assessment of which it complains. The defendants have answered, denying generally the allegations of the petition, and the board of assessors and state tax collector pray that they be allowed attorney's fees. There is nothing to show that the property in question is now, or has ever been, used for any purpose which would entitle it to exemption from taxation. The assessor states that it belonged to "this church association," and that it was at one time used as a parsonage, and at another as a boarding house. Being the property of a religious corporation, he had, however, entered it on the rolls as exempt during the years in question. It is admitted that the supplemental assessment roll for the year 1895 was filed December 29, 1898, and recorded in the mortgage office April 5, 1899; and it is shown that the taxes of 1897, 1898, and 1899 have been paid upon similar assessments. There was judgment in the court a qua in favor of the plaintiff as to the year 1895, and against it as to the year 1896. The city of New Orleans alone has appealed, and the plaintiff joins in the appeal "in so far as to complain of the judgment of the lower court in allowing the claim of the attorneys of the state tax collector for ten per cent. upon the amount of the taxes due for the year 1896, the cancellation of which had been prayed for and rejected, whilst that for the year 1895, likewise embraced in the prayer, had been allowed."

Section 12 of Act No. 170 of 1898 is identical with section 11 of Act No. 106 of 1890, and reads as follows: "That if any tract or lot of land or other property shall be omitted in the assessment of any year, or series of years, or in any way erroneously assessed, the same, when discovered, shall be assessed by the assessor or tax collector for the whole period of which the same may have been omitted or improperly assessed, and shall be subject to the state, parish and municipal taxes which have been or may hereafter be assessed against said property, in accordance

¹ Rehearing denied May 12, 1902.

with law: provided, no back taxes for more than three years shall be assessed against said property: and provided further that such assessment shall appear upon a supplemental roll and be filed in the same manner as regular tax rolls. A notice by mail shall be given of the completion of said assessment rolls and that it is exposed for examination in the office of the assessors, whether the tax is on movables or immovable property, and that ten days are allowed said parties to make to the assessor any complaint they may wish to urge against said assessment. And in the case of unknown owners notice shall be published twice, during a period of ten days, in a daily newspaper published in the city of New Orleans, and, in other parishes, as provided by section 21 of this act, and, in case of no complaint, said assessment, without any further requisite or formality of any kind, shall be final and conclusive on the parties assessed. In the event of any such complaint, the decision of the assessors thereon shall be promptly made, and shall be final; and said assessment, without any further formality or requisite of any kind, shall be binding and conclusive on the parties assessed, saving, however, to the parties assessed, an appeal to the courts within five days from the decision of the assessors on said complaint, which decision shall be deemed notice, and said delay of five days shall begin from the day of the entry by the assessors on said supplemental roll of the words 'Appeal rejected.' Property liable to taxation which is entered upon the assessment rolls as "exempt," and which is not assessed, is "omitted in the assessments" as effectually as if it were not entered at all, and is therefore within the meaning of the law providing for the assessment of property which has been omitted. As all property is liable to taxation unless it be shown to be within some exemption established by law, and as no such showing is made in this case, we must assume that the property in question was liable to taxation. The admission that the supplemental roll for 1895 was filed on December 29, 1896, is conclusive as to the time of the assessment. The law provides that no "back taxes for more than three years shall be assessed;" but, as was held in the *Stempel Case*, taxes for the current year are not "back taxes." *State ex rel. Stempel v. City of New Orleans*, 105 La. 770, 30 South. 97. During the whole of the year 1898 the only back taxes were those for preceding years, and it was competent for the assessors to go back as far as 1895 for the purposes of a supplemental roll. The fact that the roll was not recorded in the mortgage office, and that the plaintiff was not notified of the assessment until later, does not affect the question, as the assessment had been made within the time prescribed. The question of the attorney's fees was also disposed of in the *Stempel Case*. It was there held that the attorney representing the tax collector "in all proceedings for the reduction of

assessments," etc., is entitled to "ten per cent. of the amount collected," and that a proceeding the purpose of which is to relieve the property from liability for taxes for certain years is an action for the "reduction of assessment." Neither the tax collector nor his attorney are complaining, however, and no change will be made in the judgment, from which the city alone has appealed, as to the matter of attorney's fees.

The only remaining question relates to the description of the property. It is sufficient for the purposes of identification, and the plaintiff has since then paid the taxes for several years, based upon a similar description. The case, upon the whole, is with the appellant.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as it directs the cancellation of the assessment of the property in question for the purposes of city taxation for the year 1895, and in all other respects that said judgment be affirmed; the plaintiff to pay all the costs.

(107 La.)

STATE v. NEW ORLEANS DEBENTURE
REDEMPTION CO. OF LOUISIANA,

Limited. (No. 14,047.)

(Supreme Court of Louisiana. April 28, 1902.)
CORPORATIONS—RIGHT TO DO BUSINESS—IN-
JUNCTION—RECEIVERS.

1. Where an association is carrying on business, claiming corporate capacity and corporate protection, the state has the right by judicial action to test its claims, both as to its organization and as to the business it is conducting being such as falls within the permissive terms of statutes authorizing the creation of corporations.

2. It has the right to hold matters in abeyance by injunction for the protection of all parties in interest until the termination of such a suit. Its duty ends when it has caused to be set aside the association's claim to corporate capacity and protection. It is not charged with the duty of protecting rights of parties placed in position to protect themselves.

3. The mere fact that the affairs of such an association have been prematurely or irregularly settled by those having actual control of its assets furnishes no ground for the appointment of a receiver at the instance of the state itself, when all debts have been paid, and all parties in interest are satisfied, and the business in the state has ended. The state is no longer concerned in the matter.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by the state against the New Orleans Debenture Redemption Company of Louisiana, Limited. Judgment for plaintiff. Defendant appeals. Reversed.

Pierson & Pierson and Walter H. Rogers, for appellant. Walter Gulon, Atty. Gen. (Milton Joseph Cunningham and Frank E. Rainold, of counsel), for the State.

NICHOLLS, C. J. The judgment of the district court was in favor of the plaintiff,

the state of Louisiana, and against the defendant, decreeing "the pretended charter, under color of which the defendant claims corporate existence, to be null, void, and of no effect," and that "the president, secretary, and general manager, and the officers, agents, directors, and members, of said so-called corporation, are and have ever been without legal authority to act in a corporate capacity in the name of the New Orleans Debenture Redemption Company of Louisiana, Limited, and under color of its pretended charter." It further ordered that "the injunction heretofore issued, prohibiting and restraining said company, its officers, directors, agents, and representatives, from removing the assets and funds of said company from this state, or beyond the jurisdiction of this court; from receiving any money or installments from its debenture holders; from paying out any money on surrender or withdrawals, or on redemption of debentures; from making loans on and from forfeiting any of said debentures, or the rights of any of the holders thereof,—be now confirmed and made absolute. And it is further ordered and adjudged that said company, so called, its officers, agents, and representatives and members, be further perpetually enjoined and restrained from acting in a corporate capacity." After this judgment was rendered, on motion of the attorney general the district court recognized the appointment and commission of the governor issued to August M. Benedict, and ordered that a commission issue to him as liquidator. These judgments were appealed to the supreme court. The supreme court affirmed the first judgment, but annulled the order issued by the court recognizing Benedict as liquidator, and left at large the question of the appointment of a receiver. 26 South. 588. On rehearing this court said: "The whole question as to the appointment of liquidator or receiver was left at large, and to be considered as an original question. Whether the appointment of liquidator or receiver lies with the governor, or of receiver with the court, or the parties in interest, we do not determine. It is left an open question." 26 South. 592. In April, 1901, the state, through the attorney general, filed a petition in the district court, in which, after referring to the fact that the order recognizing Benedict liquidator had been vacated, and to the decree of the supreme court on that subject, it alleged that the cause was remanded for further proceedings, with the express reservation to the state of Louisiana, and all other parties in interest, of all rights under the law relative to the appointment of a receiver or liquidator; that since the rendition of the judgments in the case the legislature had passed Act No. 26 of 1900, giving the court the right and power, on application of any party in interest, or on application of the attorney general, to appoint a receiver to take charge of the property and effects of any corporation which has ceased to exist,

or whose charter has been repealed, without providing for the liquidation of its affairs; that therefore the appointment of Benedict by the governor as liquidator should be confirmed, but that if it should be held that Act No. 26 of 1900 is applicable to this cause, and has repealed section 731 of the Revised Statutes, then a receiver should be appointed to take charge of and liquidate the affairs of the defendant company. The prayer of the petition was that Benedict be recognized as the liquidator of the New Orleans Debenture Company of Louisiana, Limited, under the appointment of the governor; that he be directed to take charge of the affairs of the defendant company, and to liquidate them, and, in the alternative, should it be held that Act No. 26 of 1900, or any other law, has repealed section 731 of the Revised Statutes, a receiver be appointed, with such powers as may be necessary and proper; that an inventory be made of all the property and effects belonging to the defendant company, and that the officers of said defunct corporation be directed to turn same over to the liquidator or receiver, and to likewise turn over to either of them the books, documents, papers, etc., of said defunct corporation or company; that the entire question of the liquidation of the defendant's affairs be considered and determined; that all the interveners, as well as the defendant, be ordered to show cause why the prayer of the petition should not be granted; and for such other and general relief as the nature of the cause may demand. This petition was ordered to be filed, and notice entered in the receivership order book of the court, and the defendants were ordered to show cause why the prayer of the petition should not be granted. The petition and order were ordered to be served upon J. F. Pierson, attorney of record of all the interveners. The New Orleans Debenture Redemption Company of Louisiana, Limited, filed an answer, through Pierson & Pierson, signing as attorneys for defendant. It excepted: (1) That the defendant company was an unincorporated association, without the capacity or authority to appear or defend in the rule. (2) That the necessary and proper parties had not been joined or notified, or made parties to defend the rule; that all the individuals parties to the record who were before the supreme court, whose rights were there reserved, and with whom contradictorily to be tried this issue was remanded, should be notified, and joined as defendants in the rule. (3) That same are the real parties in interest, and judgment could not properly be rendered without notifying and making them parties. Should these exceptions be overruled, defendants further excepted: (4) That the state exhibited no interest in herself to these proceedings. (5) That section 731 of the Revised Statutes had been repealed by the constitution of 1898 (articles 16, 17, 133), and by Act No. 159 of 1898, and the rule

taken was not authorized by any law of the state. (6) That the appointment as liquidator made by the governor on March 6, 1899, had been annulled and set aside by the supreme court on appeal, and could not be recognized or confirmed by the court. (7) That said appointment was made by the governor in violation of the articles stated by the constitution, and there was no law authorizing the governor to appoint a liquidator or receiver in this case.

Under reservation and benefit of these exceptions, defendant answered, pleading first the general issue; and, further answering, it averred that all of its affairs and liabilities had been settled, at least as far as it was practicable to do, and as far as any liquidator or receiver could do, and there was practically nothing that a liquidator or receiver, if appointed, could do in this case, and no legal reason or necessity existed for the appointment of such; that full and adequate provision for the full liquidation and settlement of all the affairs and liabilities of the association had long since been made, by the mutual consent and joint action of all the parties in interest, and same had been carried into effect, and full adjustments and settlements of all its liabilities and affairs had been made mutually between all the persons and parties in interest, except a small and insignificant amount of liabilities in favor of a few parties, whose whereabouts, after due and continued advertisement in the daily newspapers of this city, could not be ascertained; that such liabilities did not amount to more than three or four hundred dollars, as to which due and adequate provision had been made for the payment on presentation, and as soon as said parties could be located said liabilities would be settled, and the defendant association was ready and willing to enter into and give any necessary bonds and securities which the court might require for the prompt settlement and payment of all said outstanding liabilities on presentation thereof to H. B. Bayne, of New Orleans, or other suitable person to be designated by the lawful owners and holders thereof; that a liquidator or receiver, if appointed, could do no more than had already been done in the liquidation or settlement of said affairs and liabilities, and the appointment by the court at that time of a receiver was not authorized or warranted by law, and could only result in the accumulation of unnecessary and useless court costs and attorney's fees. In the event, however, the court should hold that the appointment of a liquidator was necessary or proper, which was denied, then and in that event only it averred that H. B. Bayne was the most competent and fit person to be appointed; that he was in every way more familiar with the affairs of the association than any other person, and was in every way a competent and suitable person to be appointed receiver. The defendant prayed that the demand of the plaintiff in

rule be rejected, and the rule be dismissed, but contingently that Bayne be appointed receiver. W. H. Rogers, who was president of the defendant corporation at the time of the institution of the suit against it by the state, and at the time of the final judgment in the cause, first excepted, and, under reservation of the same, answered. The exceptions were substantially those already referred to. The answer consisted of a general denial, followed by special allegations, contesting the right and necessity of appointing a receiver. He averred that by final judgment the defendant corporation had been perpetually enjoined from acting as a corporation; that all its corporate franchises at any time exercised by it had been annulled and set aside, and in all respects defendant had acquiesced in the judgment; that the corporation was not, and never had been, insolvent, but was able and prepared to respond to any claim or charge that might be legally presented; that it was not without personal representation in New Orleans and in the state, and, either through the president or stockholders residing in New Orleans, might at any time and all times be reached; that all its obligations were represented in written contracts and obligations, and beyond said written contracts and obligations it had and could have no outstanding claims against it; that, as it was its right and was its duty to do, it had, without charge or expense to those having claims against it, liquidated and discharged its said indebtedness; that as expeditiously as possible it was liquidating and retiring its outstanding claims; that it appeared from an account and affidavit of J. P. Williams, secretary and treasurer of the defendant company, which he annexed, of date April 1, 1901, there were 46 debentures, upon which there were dues to the sum total of \$1,042, and since that date, as appeared from the affidavit of the president, \$538.59 had been paid, thus leaving at the date of the answer debentures representing a total of \$503.58, which amount defendant holds, payable on presentation; that all the acts of the defendant in the premises were in strict accordance with its rights, and, in addition thereto, they were urged and granted by 90 per cent. of those who held and owned the said obligations. A supplemental answer and exceptions were filed by the defendants, to the effect that the New Orleans Debenture Redemption Company, Limited, was never a corporation authorized under the laws of Louisiana, nor one organized according to law in the state, and the state was barred and estopped from asserting or contending judicially or otherwise, that the same was or ever had been a corporation, by the judgment of the district court, rendered at the instance and procurement of the state, and which judgment was affirmed by the supreme court, decreeing that the association was not authorized by law, or organized according to law, which judgment formed *res judicata*, and

stopped the state from pleading or asserting to the contrary. They excepted de novo that the state was without interest in the subject-matter involved in the rule, or authorized by any law to take the action it did; also they denied that any law of the state authorized or warranted the appointment of a receiver or liquidator in the cause under the rule filed, or the allegations or facts declared therein. The district court rendered judgment making absolute the rule taken by the state, and appointed William C. Dufour receiver of the New Orleans Debenture Redemption Company of Louisiana, Limited, and defendants appealed.

Section 731 of the Revised Statutes of 1870 declares that, whenever the charter of any corporation in this state shall be declared forfeited by any competent court, the district attorney of the district shall forthwith inform the governor of the state of the fact, who shall thereupon appoint a liquidator to take charge of and liquidate the affairs of the corporation, as in case of insolvencies of individuals. In 1898 the general assembly passed Act No. 150 of that session, entitled "An act to authorize and regulate the practice of appointing receivers of corporations under articles 109 and 133 of the constitution." The act is composed of 11 sections. The first section declares that the several district courts of the state are empowered to appoint receivers to take charge of the property and business of corporations domiciled therein, and of the property of foreign corporations actually located therein; enumerating in 11 clauses the conditions under which the power can be exercised. In none of these cases does the court act of its own motion. In all of these cases judicial action is predicated upon application made to it either by one or more creditors or one or more stockholders, and the state is nowhere mentioned. In 1900 the general assembly enacted Act No. 26 of the session of that year,—an "Act to authorize the appointment of receivers in all cases of different corporations." It provides that in all cases where any corporation possessed of property rights or credits has ceased to exist, or its charter has been repealed without providing for the liquidation of its affairs, the district court having jurisdiction of the place where said corporation was in existence shall have the right and power, on the application of any party in interest, and where no individual is personally interested, and on the application of the attorney general, to appoint a receiver to take charge of the property and effects of the corporation: to collect whatever debts, claims, or rights it may have; and to pay the debts of said corporation, and finally liquidate the same. The third section of the act declared that all laws or parts of laws in conflict therewith were repealed. The third clause of Act No. 150 provided for the appointment of a receiver when the property of the cor-

poration was abandoned, or when, by failure of the stockholders to elect, or the refusal of the officers to serve, there was no one authorized to take charge of or conduct its affairs. In such case the appointment was to be made by the court at the instance of any stockholder or creditor. The seventh clause provided for the case of a receiver where the corporation had been adjudged not organized according to law, or pursuing any business, calling, or avocation contrary to law. In such case the appointment was to be made by the court at the instance of any stockholder or creditor. The association, to take charge of whose assets and to liquidate its affairs a receiver is asked in this case, never held the status of a corporation. It pursued a business, under a claim of being such, which was against public policy, and for the carrying on of which no law of the state authorized the creation of a corporation. The parties who organized it did not hold a legislative charter, but thought proper to assume themselves that, under the general law authorizing citizens to create corporations by notarial act, the purposes they had in view were of a character such as to fall under permissive provisions of the statutes. So soon as the state officials were advised that it was pursuing business, claiming to act under the authority of the law, and under its protection, an injunction was issued to prevent the further continuance of business as a corporation by it; and at their instance it was judicially decreed that it was not such business as would authorize the creation of a corporation to carry it on, and the association had never been legally such. As this court declared in *State v. Judge of Civ. Dist. Ct.*, 51 La. Ann. 467, 25 South. 65, the state had no pecuniary interest in the subject-matter of the action. The interest which it had was that which every person has, to uncover and terminate the action of another who should be professedly acting under and by virtue of his authority,—particularly when such action is injurious to third parties. The state had the right, as this court declared, to take the action it did, and to hold matters in abeyance by injunction, for the protection of all parties in interest, until the termination of the suit. When that point had been reached, and those parties had been placed in position to guard individually their own interests, free from any question of estoppel, the state had performed its whole duty in the premises. It is not charged with the duty of championing the rights of parties who are themselves able to take care of them. The effect of our judgment was to establish judicially that the so-called corporation was then nothing more, and had been nothing more ab initio, than a number of private individuals engaged in the business they were carrying on, under false pretensions to corporate rights and protection; that the assets of the concern were

individual and not corporate assets, and the liabilities were individual and not limited corporate liabilities. *Stark v. Burke*, 5 La. Ann. 741; *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 289; *Fleitas v. City of New Orleans*, 51 La. Ann. 17, 24 South. 623. Every stockholder became liable at once to direct action at the instance of parties who had dealt with the association as a corporation. *Williams v. Hewitt*, 47 La. Ann. 1061, 17 South. 496, 49 Am. St. Rep. 394. The property and the liabilities being those of individuals, the state had no control over them through civil proceedings, unless under some special conditions which are not claimed to be presently existing. Had the persons who attempted to form a corporation, and to have it engage in business as such, not done this, but engaged in precisely the same business which the corporation would have carried on had it been organized, and had they incurred precisely the same liabilities and held the same assets, it would not be claimed that the state, of its own motion, could initiate civil proceedings to guard or protect the rights of individual creditors or stockholders. It is not charged that the parties connected with the association have attempted to act as a corporation, or done business as such, since the institution by the state of its action to have it declared that there was no such corporation as the New Orleans De-benture Redemption Company, nor that it has at present any outstanding liabilities; and, had such allegation been made, the evidence in the record would have disproved it. It is not pretended that the action of the state was based upon any application to the attorney general or to the court for relief. There is no stockholder or creditor seeking redress as required by clause 7 of Act No. 159 of 1898, nor has the property of the association been abandoned by those having charge of it. The evidence shows that all debentures issued have been surrendered, and all liabilities met and discharged, except for an insignificant amount, which has not been discharged simply because not presented, and that the parties concerned are able and willing to pay the same. It is claimed, however, that this liquidation has been brought about irregularly and prematurely; that all the parties should have waited until a receiver had been appointed, and permitted him to liquidate. If the parties in charge of the affairs of the association had, in making the liquidation, done so unjustly or improperly, and there had been complaints on that score, there might have been some ground for interference, but such is not the case. All parties are satisfied. Assuming that the liquidation was premature, and even irregular, the penalty for an irregular and premature liquidation is not a useless and costly receivership. If there was a violation of the injunction in any way by the action of the parties in

charge, the remedy was a proceeding for contempt, taken in time. Receivership, after everything has been settled and liquidated, is not a substitute for a proceeding for contempt. We see no useful purpose to be subserved by a receivership, and we see no legal interest in the state to act in the matter.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered and decreed that the demand of the state be rejected, and the rule taken in its behalf herein be dismissed.

SULLIVAN v. STATE.

(Supreme Court of Florida. March 11, 1902.)

FALSE PRETENSES—INFORMATION—SUFFICIENCY.

1. Informations for obtaining property by false pretenses must, in general, describe the property alleged to have been obtained with the same particularity and fullness as would be required in informations for larceny of the same property.

2. An information for obtaining property by false pretenses, describing the property alleged to have been obtained as "seven dollars and fifty cents in currency of the United States, of the value of seven dollars and fifty cents, the money of" a person named, with no allegation that a more particular description of such property is unknown, is had upon motion to quash or motion in arrest of judgment.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; John L. Doggett, Judge.

Irvin S. Sullivan was convicted of obtaining money by false pretenses, and brings error. Reversed.

Geo. U. Walker, for plaintiff in error.
William B. Lamar, Atty. Gen., for the State.

CARTER, J. On August 27, 1901, an information was duly presented and filed in the criminal court of record of Duval county, charging plaintiff in error with obtaining money by false pretenses. The defendant was arraigned, pleaded not guilty, and a trial was had, resulting in a verdict finding him guilty as charged. He thereupon moved in arrest of judgment, but the motion was denied, and from the sentence pronounced upon the verdict this writ of error is taken.

The only error assigned questions the propriety of the ruling upon the motion in arrest of judgment. One ground of that motion is as follows: "The information does not sufficiently describe the said money in said information mentioned, failing, as it does, to state of what denomination said alleged currency was, whether or not it or any of it was paper money or coin, how much of it of either kind, or whether silver or gold." As this ground of the motion is found sufficient to reverse the judgment of conviction, other grounds of the motion need not be considered.

The information alleges that the defendant, by means of the alleged false pretenses made to one J. H. Moody, did obtain from him, the said J. H. Moody, \$7.50 in currency of the United States, of the value of \$7.50, the money of the said J. H. Moody. No other description of the property alleged to have been obtained is given, nor is it alleged that a more particular description is unknown. The authorities held in indictments for this offense the description of the property obtained must, in general, be as full and complete as the description of the property alleged to have been stolen in indictments for larceny. In *Porter v. State*, 26 Fla. 56, 7 South. 145, it is said that the first count of the indictment there considered sufficiently described the kind and value of the property charged to have been stolen as "one lot of silver coin of the denomination of one dollar each, of the currency of the United States, of the value of twenty-five dollars, of the goods, moneys, and chattels of one J. H. McLendon." It was admitted that by the common law and by some of the American authorities such description would be insufficient, but the court inclined to the view that the rule laid down by other American authorities holding such description to be sufficient was the correct one. The second count in the indictment in that case described the property as "one lot of silver coin of the United States currency, of the denomination of dollars, half dollars, quarters, dimes, and five-cent pieces, of the value of twenty-five dollars, a more particular description of which coin is to the jurors unknown, of the goods," etc., and this description, by reason of the allegation that a more particular description of the coin was unknown to the grand jury was held to be sufficient beyond all question of doubt. In *Ex parte Prince*, 27 Fla. 196, 9 South. 659, 26 Am. St. Rep. 67, the indictment charged larceny of "divers bills, commonly known and denominated 'national currency of the United States of America' of divers denominations, to wit, one bill of the denomination of twenty dollars, of the value of twenty dollars, two bills each of the denomination of ten dollars, each of the value of ten dollars, one bill of the denomination of five dollars, of the value of five dollars, a more particular description of which said bills is to the jurors unknown, and which said bills circulated and passed in the said state of Florida as money, and which were then and there the property of one John G. Collins." It was held that the sufficiency of the description of the property in the indictment was not of such a character as that it could be inquired into on habeas corpus. In *Lang v. State*, 42 Fla. 595, 23 South. 856, it was held that an indictment charging the larceny of "one hundred dollars of the currency of the United States of America, the denomination of which is to the grand jurors unknown, of the value of one hundred dollars," was not

so defective in reference to the description of the property as to amount to no indictment, and that a judgment of conviction upon such indictment would be affirmed where the sufficiency of such indictment was first questioned in the appellate court.

It will be observed that the descriptions of the property stolen given in the indictments considered in the cases cited are either much more definite than the description we have in this case, or a more perfect description is excused by allegations showing a reason for not giving it. In this case no reason is stated why a more particular description is not given, and the property obtained is alleged to be simply \$7.50 in currency of the United States, without stating whether it was gold, silver, or paper, or the number or denominations of the pieces of currency obtained. According to the rulings in *People v. Smith*, 5 Parker, Cr. R. 490; *Com. v. Lincoln*, 11 Allen, 283; *State v. Knowlton*, 11 Wash. 512, 89 Pac. 906; and perhaps *State v. Reese*, 83 N. O. 637,—the description contained in this indictment would be sufficient; but according to the better opinion and the weight of authority, without a statute dispensing with a more particular description, the description here given, unaided by an allegation that a more particular description is unknown, is not sufficient as against objections taken by motion to quash or in arrest of judgment. *Leftwich v. Com.*, 20 Grat. 716; *State v. Hurst*, 11 W. Va. 54; *Smith v. State*, 33 Ind. 159; *Treadaway v. State*, 37 Ark. 443; *Jamison v. State*, Id. 445, 40 Am. Rep. 103; *Bish. Dir. & Forms*, § 423, note 2; 2 *Bish. New Cr. Proc.* § 173. See, also, *Redmond v. State*, 35 Ohio St. 81; *State v. Segermond*, 40 Kan. 107, 19 Pac. 370, 10 Am. St. Rep. 169; *Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314; *Leonard v. State*, 115 Ala. 80, 22 South. 564; *Merrill v. State*, 45 Miss. 651; *Dukes v. State*, 22 Tex. App. 192, 2 S. W. 590; *State v. Tilney*, 38 Kan. 714, 17 Pac. 606; *Territory v. Shipley*, 4 Mont. 463, 2 Pac. 313.

The court erred in denying the motion in arrest for the reasons stated, and the judgment of conviction will be reversed, with directions to the court below to arrest the judgment.

BROWN v. STATE.

(Supreme Court of Florida. March 11, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—MURDER—EVIDENCE—COSTS ON APPEAL.

1. Parties are not permitted, in an appellate court, to avail themselves of objections to questions propounded to witnesses in the trial court, upon grounds not mentioned in the objections interposed to such questions in the trial court.

2. A conviction for murder may be had upon the voluntary extrajudicial confession of the accused that he committed the crime, where the corpus delicti is proven by other credible evidence, and the jury believe that such confes-

sion was made by the accused, and that it is true.

3. The stenographer's report of testimony filed by him in the trial court forms no part of the record for the appellate court upon writ of error, and, if copied into the transcript, the cost of same will not be taxed against the state or county in the appellate court, in criminal cases.

4. Evidence examined, and found sufficient to support the verdict.

(Syllabus by the Court.)

Error to circuit court, Putnam county; William S. Bullock, Judge.

J. B. Brown was convicted of murder, and brings error. Affirmed.

Geo. P. Fowler (John E. Marshall, on the brief), for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. Plaintiff in error at the fall term, 1901, of the circuit court of Putnam county, was indicted for, and tried and convicted of, murder in the first degree, and, from the death sentence imposed, sued out this writ of error.

The defendant was a witness in his own behalf, and, on cross-examination, admitted that he was examined as a witness at the coroner's inquest held over the body of Harry E. Wesson, the deceased. He was asked if certain stated questions were not propounded to him at that time, and if he did not answer them in certain stated language, which he answered in the negative. Miss Grace E. Rep Logie, the stenographer who took the testimony at the coroner's inquest, was offered as a witness by the state, and the state also offered the testimony of the defendant given at that time, which had been written out in full, and to which defendant had appended his signature, for the purpose of contradicting the testimony of defendant given at the trial. Defendant claiming that the written report of his testimony was inaccurate, and there being some evidence tending to show that he signed it under a misapprehension, the court struck it out, and also the testimony of Miss Rep Logie, based upon the written report, but ruled that she might be examined by the state with respect to such matters relating to defendant's testimony at the coroner's inquest as she might remember, independently of the written report of the testimony. Thereupon the state propounded to her certain questions, which she answered over defendant's objection. The state then propounded to her four questions, in each asking if certain questions, stated in full, were not propounded to defendant as a witness at the coroner's inquest, and if he did not give a certain answer (stating it). The witness answered the first question, "Yes, sir; I heard that question and answer given;" and the other three, "Yes, sir." Defendant objected to each of these last questions propounded to Miss Rep Logie, "because the attorney was reading and answering them from an imperfect record."

The objections were overruled, and defendant's exceptions noted. No other exceptions were taken to any evidence introduced, and no objection was interposed to the questions above referred to, except the one stated. An assignment of error is based upon the exceptions above referred to. There is nothing in the bill of exceptions which shows that the attorney was reading and answering the questions from an imperfect record, or, indeed, from any written memorandum at all, as contended by the objection. For aught that appears, the attorney was repeating the questions propounded to, and the answers of, Brown, while being examined as a witness at the coroner's inquest, from memory. As there is nothing to show that the ground of objection interposed by defendant was in fact true, this assignment of error must be overruled. It is argued in this connection that the questions were leading, and therefore improper; but that objection was not interposed in the circuit court, and cannot be first taken in an appellate court. *Camp v. Hall*, 39 Fla. 535, 22 South. 792.

The defendant moved for a new trial upon grounds questioning the sufficiency of the evidence to support the verdict, and upon the exception taken to the ruling denying this motion another assignment of error is taken. The court has carefully considered the evidence, and finds that, under the well-settled rules of law, the ruling denying the motion for a new trial must be affirmed. There is ample testimony to prove the corpus delicti; that is, that the deceased, Harry E. Wesson, came to his death by the criminal agency of another. The dead body was found and identified, and the proof shows that deceased came to his death from a pistol-shot wound by the hand of another. There is very little testimony to connect the defendant with the crime, aside from his extrajudicial confession; but, as the corpus delicti was proven by other evidence, this confession of the defendant, if believed by the jury to have been made and to be true, is sufficient to authorize his conviction. *Gantling v. State*, 41 Fla. 587, 26 South. 737. The confession attempted to be proven in evidence is full and complete. The jury evidently believed that defendant made it, and that it was true. They have acted upon it by finding the defendant guilty, and the verdict has been approved by the circuit judge. Under these circumstances, an appellate court will not interfere with the verdict, unless it can see that the jury acted from improper motives or influences in reaching it. Such does not appear to be the case here, and this assignment of error must also be overruled. This disposes of the only questions presented.

We find that the stenographer's report of the testimony, consisting of 110 typewritten pages, is incorporated in the transcript. The testimony must be, and is in this case, evidenced by bill of exceptions. This report, therefore, has no proper place in the tran-

script for this court, and the clerk will exclude the cost of this matter in taxing the costs of this case. *Tarrance v. State*, 43 Fla. —, 30 South. 685; *Mitchell v. State*, 43 Fla. —, 31 South. 242.

The judgment of the circuit court is affirmed.

GASS v. STATE.

(Supreme Court of Florida. March 19, 1902.)

CRIMINAL LAW—CONTINUANCE—DISCRETION—INSTRUCTIONS.

1. To justify an appellate court in holding the trial court in error in its ruling denying an application for a continuance in a criminal case, all facts necessary to show a clear abuse of discretion, to the injury of the accused, must be presented; and, whenever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling.

2. No abuse of discretion in the ruling denying an application for a continuance on the ground of the absence of a material witness is shown, where the application admits that the witness has not been served with subpoena because not found, and that at the time of the application such witness is in another state, and where the application does not state that the witness is a resident of this state, and only temporarily absent in such other state, or other facts showing that, if the case is continued, his presence can be secured at the next term of the court.

3. A general exception to the refusal to give two or more requested instructions asserting separate and distinct propositions of law will be overruled if it appears that any one of such instructions was properly refused.

4. An instruction that: "The court instructs the jury that it is incumbent upon the state to prove every material allegation of the indictment as charged therein. Nothing is to be presumed or taken by implication against the defendant. The law presumes him innocent of the crime with which he is charged until he is proven guilty, beyond a reasonable doubt, by competent evidence; and, if the evidence in this case leaves upon the minds of the jury any reasonable doubt of defendant's guilt, the law makes it your duty to acquit him and find him not guilty,"—is properly refused.

(Syllabus by the Court.)

Error to circuit court, Alachua county; William S. Bullock, Judge.

William Gass was convicted of murder, and brings error. Affirmed.

Jackson & Thomas, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. On December 11, 1901, in the circuit court of Alachua county, an indictment was found by the grand jury charging plaintiff in error with murder in the first degree. He was tried at the same term of the court, found guilty as charged, with recommendation of mercy, and, from the sentence imposed, sued out this writ of error.

I. The first error assigned is based upon the ruling denying defendant's motion for a continuance. In the affidavit filed with the motion it is averred that defendant was arraigned on the day the indictment was pre-

sented, viz., December 11th, and that the trial of the case was then set for Tuesday, December 17th; that being the day the trial was begun, and upon which the continuance was applied for. It is also averred that, immediately after the cause was set for trial, defendant had subpoenas issued for his witnesses, including one John Gardner, and that the sheriff had made his return that Gardner could not be found in the county, and therefore service could not be perfected upon him. It is further alleged "that said witness is out of the limits of the state of Florida, and in the city of Montgomery, Alabama"; that the witness was absent without defendant's consent; and that defendant expected to have him present, and to have his testimony given, at the next term of the court. The affidavit fails to state whether the witness is a resident of the state of Florida, or whether he was located permanently, or only temporarily, in Montgomery, Ala. It does appear inferentially that at the time of the alleged homicide, September 15, 1901, the witness was living in Alachua county; but, for aught that appears, at the time the indictment was found the witness was not a resident of the state of Florida. Of course, if the witness was not a resident of the state, he would not be subject to the process of the court, and the defendant, to obtain the benefit of his testimony, would have to take his depositions under the statute. No steps looking to that end were ever taken by the defendant, and, under the circumstances, it does not appear that the court abused its discretion in denying the application. In *Ballard v. State*, 31 Fla. 266, 12 South. 865, it is held that all facts necessary to show a clear abuse of discretion, to the injury of the accused, must be presented, and, wherever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling denying the motion. As it affirmatively appears from the affidavit that the witness had never been subpoenaed, because not found; that he was at the time of the application in another state, and therefore beyond the jurisdiction of the court; and as nothing was shown, beyond the bare expectation of defendant, to indicate that the witness' presence could be secured at the next term, either voluntarily or in obedience to the process of the court,—to say nothing of other defects in the affidavit,—this court is not justified in reversing the ruling denying the application for a continuance.

II. The second assignment of error complains that the court erred in refusing to charge the jury as requested by defendant, as complained of in the second, third, and sixth grounds of the motion for a new trial. The three instructions the refusal to give which is made the basis of the stated grounds of the motion for a new trial were numbered 2, 8, and 10, and they assert separate and distinct propositions of law. The exception taken

to the refusal to give them was general, and, under the uniform rulings of this court, if any one of them was properly refused the general exception to the refusal to give them all will fail. The second of these requests is as follows: "(2) The court instructs the jury that it is incumbent upon the state to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendant. The law presumes him innocent of the crime with which he is charged, until he is proven guilty beyond a reasonable doubt by competent evidence; and, if the evidence in this case leaves upon the minds of the jury any reasonable doubt of defendant's guilt, the law makes it your duty to acquit him, and find him not guilty." This instruction was properly refused, as has been held in *Thalheim v. State*, 38 Fla. 169, 20 South. 938.

III. The third assignment of error is that the court erred in admitting the testimony of the state's witness H. G. Mason as to a confession made by the defendant. The witness Mason stated that he saw the defendant on the evening of the day of the homicide, and also the next morning, and that he heard defendant make statements with reference to the homicide. After proving by the witness that the statements were free and voluntary, and that no improper influences induced them, he was asked by the state attorney to state what the defendant said, to which he replied: "He said he shot Carrie Bellamy [the deceased], and killed her." The defendant objected to the question upon the ground that the foundation for the admission of the testimony had not been laid, and, to the ruling admitting the testimony, excepted. The objection urged is that it was not shown that the statement was voluntarily made, so as to admit it as a confession; but, as we have stated above, the witness did show that the statement was perfectly free and voluntary. This assignment of error is therefore not well taken.

IV. The fourth assignment of error is not argued, and will be treated as abandoned.

The judgment of the circuit court is affirmed.

KNIGHT v. STATE.

(Supreme Court of Florida. March 4, 1902.)

WRIT OF ERROR—LAW OF CASE—CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—ASSAULT WITH INTENT TO KILL—INDICTMENT—INSTRUCTIONS—EVIDENCE.

1. Where the ruling upon demurrer to a plea in abatement was held to be free from error upon writ of error taken to the appellate court, such ruling is not open for reconsideration upon a subsequent writ of error in the same case sued out in behalf of the same party, though upon the former writ of error the judgment was reversed for other errors found.

2. It is discretionary with the trial court whether it will permit the plea of not guilty in a criminal case to be withdrawn in order to allow a plea in abatement to be filed.

3. Neither a battery nor a wounding is an essential element of the offenses denounced by section 2103, Rev. St.

4. An indictment alleging that one W. J. K., in a named county and upon a named date, "in and upon one B. B., with a deadly weapon, to wit, a certain pistol, which was then and there loaded with gunpowder and leaden bullets, and by him, the said W. J. K., then and there had and held in his hand, unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said B. B., did make an assault, and he, the said W. J. K., did then and there unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said B. B., shoot off and discharge the said pistol, so loaded with gunpowder and leaden bullets aforesaid, at and upon the said B. B., with intent then and there unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said B. B., to kill and murder the said B. B., contrary to the form of the statute," etc., sufficiently charges the offense of assault with intent to commit the felony of murder in the first degree.

5. Parties to a cause have no absolute right to dictate the order in which their requested instructions shall be given; for example, that they shall be given immediately before or immediately after the general charge of the court or the instructions given at the request of the opposite party. The matter lies in the discretion of the court; and if this discretion can be controlled by an appellate court at all, it is only in cases where the discretion is abused.

6. Where a portion of the charge of the trial court is excepted to and assigned as error, the appellate court, in considering such assignment, will look to the entire charge, and if the portion objected to, when read in connection with the balance of the charge, is not erroneous or misleading, such assignment must fail, even though the portion objected to, if it stood alone, would be erroneous or misleading.

7. Evidence examined, and found sufficient to support the verdict.

(Syllabus by the Court.)

Error to circuit court, Alachua county; William A. Hocker, Judge.

William J. Knight was convicted of assault with intent to kill, and brings error. Affirmed.

B. A. Thrasher, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. At the spring term, 1900, of the circuit court of Alachua county, plaintiff in error was tried and convicted upon an indictment found at that term, charging an assault with intent to commit the felony of murder in the first degree. Before pleading in bar defendant filed pleas in abatement, which, upon the state's demurrer, were held bad. From the sentence imposed a writ of error was taken to this court, where the judgment was reversed and a new trial awarded for error found in an instruction given by the court at the trial. *Knight v. State*, 42 Fla. 546, 28 South. 759.

Thereafter, at the spring term, 1901, defendant moved the court for leave to withdraw the plea of not guilty, and for permission to file a plea in abatement. This motion was overruled, and defendant excepted. During the same term defendant filed his motion to quash the indictment upon the following

grounds: (1) It is vague, indefinite, and uncertain; (2) it does not charge the offense in the language of the statute; (3) it charges no offense against the laws of Florida; (4) it does not set forth the name, or particularize the manner of the commission, of the offense claimed to have been committed; (5) it does not charge how, or in what manner, or at what place, or upon what portion of the person of Ben Brown the defendant shot off and discharged the pistol; (6) it does not set forth the offense sufficiently plain to enable defendant to properly make his defense thereto; (7) it is not so framed, nor is the offense sufficiently specified and described, as that defendant would be able or permitted to plead former jeopardy; (8) it is not so grounded, nor is the offense sufficiently specified or set forth, as that defendant would be able or permitted to plead *autrefois acquit*. This motion was overruled. Thereafter, at the same term, a trial was had, and the jury rendered their verdict finding defendant guilty of an assault with intent to commit manslaughter, and recommending him to the mercy of the court.

From the bill of exceptions it appears that after the parties had concluded their testimony the defendant requested the court, in writing, "to give certain instructions in behalf of defendant, after giving the charges for the state"; that the court gave such requested instructions, before any other charges were given, and then proceeded to give the jury certain instructions set out in the bill of exceptions of his own motion. The requested instructions so given are not incorporated in the transcript of the record or bill of exceptions, and it does not appear that any instructions were requested on behalf of the state. The defendant excepted to the action of the court in giving his requested instructions prior to giving those on its own motion. By the charges numbered 1 to 6, given by the court of its own motion, the jury were instructed that the indictment against defendant embraced the charges of an assault, an assault with intent to commit murder in the first degree, an assault with intent to commit murder in the second degree, an assault with intent to commit manslaughter, and an aggravated assault, and each of these offenses was fully defined. Then follows the seventh instruction, by which the jury are told that if they believe from the evidence that the defendant assaulted Brown with a deadly weapon, to wit, a pistol, and shot and wounded him, then they should next examine the evidence to discover if Knight was justifiable or excusable in such shooting. The circumstances under which the act would be justified or excused in law are then stated with particularity, and the instruction then proceeds as follows: "If the jury, after examining the evidence, are satisfied beyond a reasonable doubt that the defendant, Knight, assaulted Ben Brown with a deadly weapon, to wit, a pistol, and shot and wounded him

therewith, in Alachua county, Florida, and within two years before the finding of this indictment, and that he was not justifiable or excusable in doing so, then the jury should convict the defendant of either assault with intent to murder in the first degree or assault with intent to murder in the second degree, or assault with intent to commit manslaughter, or of aggravated assault, according as they may determine that the facts in evidence make out one or other of these offenses, as I have defined them in the foregoing charges." By instructions Nos. 8 and 9 the court defined a reasonable doubt, told the jury that defendant was presumed to be innocent until proven guilty beyond a reasonable doubt, and that he was entitled to the benefit of every reasonable doubt; and that the jury were the sole judges of the credibility of the witnesses and of the weight and sufficiency of the evidence.

The defendant moved for a new trial upon the following grounds: (1) The verdict is contrary to the evidence and the weight of the evidence; (2) the verdict is contrary to the law and the charge of the court; (3) the court erred in refusing to give the instructions asked for by defendant, after the court had given the charges for and in behalf of the state; (4) the court erred in giving instruction No. 7; (5) the court erred in giving that portion of instruction No. 7 specially quoted above. This motion was overruled, and an exception taken.

Thereafter, in due course, the defendant moved in arrest of judgment upon grounds questioning the sufficiency of the indictment, which motion was overruled. Most of the grounds of this motion are substantially the same as grounds embraced in the motion to quash; but other grounds of the motion in arrest are to the following effect: (2) The indictment fails to allege that defendant shot off and discharged the leaden bullets upon the body, limb, or person of Ben Brown; (7) the indictment is insufficient in law, form, and substance upon which to base a judgment, and does not charge in sufficient language the description of the commission of the offense of murder as to show from the face of the indictment that murder was intended, or that death could have resulted from the shooting off or discharging of the pistol named therein. The court entered judgment upon the verdict, sentencing defendant to imprisonment in the state prison at hard labor for two years, and from this judgment the present writ of error is taken.

The assignment of errors complains that the court erred in the following rulings: (1) Sustaining the state's demurrer to defendant's plea in abatement; (2) overruling the defendant's motion to withdraw his plea of not guilty and to file a plea in abatement; (3) overruling defendant's motion to quash the indictment; (4) overruling defendant's motion for a new trial; (5) overruling defendant's motion in arrest of judgment; (6) entering

the judgment and sentence against the defendant.

I. The ruling upon the demurrer to the defendant's plea in abatement having been assigned as error upon the former writ of error taken in this case, and then held by this court to be free from error, is not now open for reconsideration. The first assignment of error must, therefore, be overruled.

II. It is discretionary with the trial court whether it will permit the plea of not guilty in a criminal case to be withdrawn in order to allow a plea in abatement to be filed, and in some of the decisions of this court so holding doubts are expressed as to whether an appellate court will ever interfere with that decision. *Savage v. State*, 18 Fla. 909; *Adams v. State*, 28 Fla. 511, 10 South. 106; *Hodge v. State*, 29 Fla. 500, 10 South. 556. If it be that such discretion will be controlled by an appellate court where it has been abused, no abuse is shown in this case. Pleas in abatement had at a former term been interposed, which, upon demurrer, were held bad, and without asking leave to amend them the defendant submitted to arraignment without objection, interposed his plea of not guilty, and went to trial on the merits. No motion to withdraw the general issue or to file another plea in abatement was made until the cause was again called for trial after the judgment of conviction on the former trial had been reversed by this court, and the plea which it was desired to file was not tendered with the motion, nor was its nature indicated to the court. Under such circumstances no abuse of discretion is shown. *Hodge v. State*, supra.

III. The third and fifth assignments will be considered together. The objections to the indictment urged under these assignments of error are that it does not specifically allege that the pistol was discharged upon the person of Ben Brown, but only that it was discharged at and upon Brown; that it does not allege that a wound was inflicted upon Brown, nor name any part of the body or limb at or upon which the pistol was discharged; that it fails to allege that the intent or premeditated design existed at the time of the commission of the offense; that it does not charge the offense with such certainty that a conviction or acquittal thereunder could be pleaded in bar of another indictment for the same offense; that it does not set forth the manner of the commission of the offense, the intent with which the assault was committed at the time and place of committing the same, and does not charge an attempt to commit murder in any degree. The statute under which this indictment was found is as follows: "Whoever commits an assault on another with intent to commit any felony punishable with death or imprisonment for life shall be punished by imprisonment in the state prison not exceeding 20 years. An assault with intent to commit any other felony shall be punished," etc.

Section 2403, Rev. St. It will be perceived that neither a battery nor a wounding is an essential ingredient of the offense denounced by this statute. The offense is complete where one person commits an assault on another with intent to commit a felony (*Peterson v. State*, 41 Fla. 285, 26 South. 709), and an assault may be committed without either a battery or a wounding. Neither a battery, striking, or wounding being an essential element of the offense, it is not necessary to allege either, and of course, it being unnecessary to allege them at all, it is unnecessary to allege the particular part of the body or limb upon which they were inflicted. *Bish. Dir. & Forms*, § 558, note 6. All the other objections urged to this indictment are fully covered by its language. It alleges that defendant made an assault in and upon Brown with a deadly weapon,—a loaded pistol; that defendant shot off and discharged the pistol at and upon Brown, and that the assault was so made and the pistol was so discharged and shot off unlawfully, of defendant's malice aforethought, and from his premeditated design to effect the death of Brown, with intent unlawfully, of defendant's malice aforethought, and from his premeditated design to effect Brown's death, to kill and murder Brown. Its precise language is that defendant, in Alachua county, on a particular date named, "in and upon one Ben Brown, with a deadly weapon, to wit, a certain pistol, which was then and there loaded with gunpowder and leaden bullets, and by him, the said William J. Knight, then and there had and held in his hand, unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said Ben Brown, did make an assault, and he, the said William J. Knight, did then and there unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said Ben Brown, shoot off and discharge the said pistol, so loaded with gunpowder and leaden bullets aforesaid, at and upon the said Ben Brown, with intent then and there unlawfully, feloniously, of his malice aforethought, and from a premeditated design to effect the death of the said Ben Brown, to kill and murder the said Ben Brown, contrary to the form of the statute," etc. These allegations are sufficient to charge the offense of an assault with intent to commit the felony of murder in the first degree, as against every objection presented under the assignments of error now being considered, and such assignments must, therefore, be overruled.

IV. Under the fourth assignment of error it is contended that the evidence was not sufficient to sustain the verdict found; that the court erred in giving defendant's requested instructions before, instead of after, its own charge; and that the seventh instruction given by the court was so framed as to confuse and mislead the jury, and to

be in conflict with other instructions given by the court. (1) There is sufficient testimony to support the verdict. It is true that there is a direct conflict between the witnesses produced by the state and the defendant, but the jury gave credence to those who made out a case for the state, and nothing appears that will justify an appellate court in holding that the trial judge erred in refusing to set aside the verdict. (2) The court gave the instructions requested by the defendant before any instructions were given. The defendant's request was that his instructions be given "after giving the charges for the state." As a matter of fact no charges were given at the request of the state, but after giving defendant's requested instructions the court proceeded to give his general charge to the jury. We are not advised as to the nature of the requested instructions so given. If they were so framed that the jury could best understand and apply them when given immediately following the court's charge, that fact is not made to appear, nor is there anything in the record which justifies us in saying that the court committed an error in giving its own charge after, and not before, giving defendant's requested instructions. The parties to a cause have no absolute right to dictate the order in which their requested instructions shall be given. This is a matter in the discretion of the trial court, and if its discretion in the matter can be controlled by an appellate court at all, it is only in cases where the discretion is abused, which does not appear in this case. (3) The objections urged to the seventh instruction given by the court relate exclusively to that portion which we have embraced within quotation marks. Considered in connection with the previous instructions defining the offenses included in the indictment, the seventh is not erroneous, confusing, or misleading, nor is it in conflict with the other instructions. Under the evidence, if an assault was committed at all, it was committed with a deadly weapon, to wit, a pistol, and by shooting and wounding Brown with the pistol. If this assault was unlawful, that is, not justifiable or excusable, the defendant would be guilty either of an aggravated assault or an assault with intent to commit the felony of murder or manslaughter, depending upon the question of intent. The court, in preceding instructions, had told the jury that to constitute the offense of assault with intent to commit the felony of murder in the first degree it must have been perpetrated from a premeditated design to effect Brown's death; that, to constitute the offense of assault with intent to commit murder in the second degree or manslaughter, it must have been committed with intent to take Brown's life, but that if it was committed with a deadly weapon, the defendant not having a premeditated design to effect Brown's death, the offense would be aggravated assault. These instructions correctly

stated the law. *Williams v. State*, 41 Fla. 295, 26 South. 184. The specific objection to the seventh instruction urged in argument is that it told the jury to convict defendant if they believed the assault was committed with a deadly weapon by shooting and wounding, if they found that defendant was not justifiable or excusable, and that this authorized the jury to convict of an assault with intent to commit the felony of murder or manslaughter, though defendant had no homicidal intent. We think this construction of the language of the charge cannot be legitimately adopted. The language is that the jury, upon finding that an assault was committed in the manner stated, and that defendant was not justifiable or excusable, should convict defendant of either assault with intent to commit murder in the first or second degree, or manslaughter, or of aggravated assault, according as the jury should determine that the evidence made out one or the other of such offenses, as the court had defined them in preceding charges. Taking all the instructions together, no valid objection can be found to the one complained of, and the court did not err in giving it.

The sixth assignment of error is not argued, and must, therefore, be treated as abandoned.

The judgment of the circuit court is affirmed.

GULF COAST ICE MFG. CO. v. BOWERS.

(Supreme Court of Mississippi. June 2, 1902.)

STREETS—USE FOR ELECTRIC LIGHT POLES—ABUTTING OWNERS—RIGHT TO ADDITIONAL COMPENSATION—PRELIMINARY MANDATORY INJUNCTION.

1. A city having condemned private property for street purposes has the right, without making additional compensation to the abutting owners, to erect poles therein and string wires and the other necessary appliances along them for lighting the same, or to authorize some other party to do so, and such action on its part is not a taking of the property for a new use.

2. Code 1892, § 557, provides that an injunction shall not be granted unless the judge shall be satisfied of complainant's equity by oath or other means. *Held*, that a preliminary mandatory injunction requiring an electric light company to remove its poles from a public thoroughfare should not issue unless the right to it is so satisfactorily shown that there can be no reasonable doubt of its propriety.

Appeal from chancery court, Hancock county; Stone Deavors, Chancellor.

"To be officially reported."

Injunction of E. J. Bowers against the Gulf Coast Ice Manufacturing Company. Order granting a preliminary mandatory injunction, which was subsequently modified in part, and from the court's refusal to entirely dissolve the injunction defendant appeals. Reversed, and injunction dissolved.

W. J. Gex and Harper & Harper, for appellant. McWillie & Thompson, for appellee.

TERRAL, J. The municipal authorities of the city of Bay St. Louis was empowered by its charter (section 42, c. 279, Laws 1886) to light the streets of the city for the public benefit, and on the 21st day of December, 1890, they made a contract with the appellant company for that purpose. In pursuance of this authority and contract, the appellant erected poles on and along the streets of said city, and attached to them the wires and other necessary appliances for lighting the streets with electricity, and inaugurated and put in operation an electric light plant, which lighted the streets of the city in conformity with their authorization and contract. The appellee is the owner of four or more properties abutting on Front street, which is the principal street of the city, and its crowning glory, and along said street and adjacent to the lots of appellee, and without his consent, the appellant erected its poles and strung its wires, to the great disfigurement, as is said, of the view from said several properties of appellee. The properties or lots of appellee upon Front street extend to both sides of the street, and a considerable element of their value, it is alleged, consists of an open and unobstructed view of the Mississippi Sound. Appellee, alleging in his bill of complaint the inauguration by appellant of said electric plant and the erection of its poles along the streets abutting his several properties, without his consent, and to his great injury and annoyance, sought and obtained a preliminary mandatory injunction requiring appellant within 24 hours to remove from his lots, as a nuisance, its poles, wires, and other appliances for lighting the streets. The injunction was subsequently modified so as to restore the poles, wires, and appliances removed thereunder; but from a refusal of the court to dissolve the injunction entirely the appellant brings its appeal.

The authorities are quite uniform that a city or town may light its streets as a means of making them more safe and convenient for public travel. The right to light the town is presumed to have been acquired and paid for, as incident to the right of public passage, when the property was condemned or dedicated for public use. In other words, the taking of the land for use as a street includes not only the right of passage, but of securing a convenient and safe passage; to light it, if you please, for that purpose. It is not a new taking of property for public use, but a completing to that extent of the uses of the first taking by adding appliances included within it, and now constructed by reason of the public need. *Keasby, Electric Wires* (2d Ed.) §§ 29, 76, 77, 82, 84; *Lewis, Em. Dom.* (2d Ed.) § 126; *Palmer v. Electric Co.* (N. Y.) 52 N. E. 1092, 43 L. R. A. 672; *In re Public Lighting* (Mass.) 24 N. E. 1084, 8 L. R. A. 487; *City of Newport v. Newport Light Co.*, 84 Ky. 166. While the lighting of the streets of a city may be a great con-

venience to the travelling public, especially under some conditions, the poles, wires, and other necessary appliances for so doing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public (*Theobold v. Railway Co.*, 66 Miss. 279, 6 South. 280, 4 L. R. A. 735, 14 Am. St. Rep. 564), are greatly modified by the rights of the public, which is entitled to a free passage over the street, and to the benefit of lights constructed and operated for that end. And if a town or city may light its streets, as being an object for which the street is opened, without paying the abutting property owner damages for the erection of needed appliances therefor, it must follow that the municipal authorities may authorize some other person to furnish such lights. *Keasby, Electric Wires* (2d Ed.) § 111; *Johnson v. Electric Co.*, 54 Hun, 469, 7 N. Y. Supp. 716. It is said the poles and wires of appellant are unsightly, and are a disfigurement to the property, and an especial injury in that it obstructs the open view of the sea. Similar erections in all cities and towns present, though perhaps in a less degree, like inconveniences to the owners of palatial residences, but disfigurements of this kind to property are not the subjects of compensation, or, if so, they are conclusively presumed to have been paid for upon the opening of the street and its dedication to public use.

It is further said that the poles used by appellant are green pine poles, with the bark peeled, and, from rapid decay, are dangerous, and not lightwood poles, as required by the city ordinance; but this grievance, if true, is not made a subject of controversy under the allegations of the bill of complaint herein, which are not framed to present it.

It is also complained that the electric light system of appellant is partly used for private purposes, but it appears from the record that all the poles set by appellant are necessary for executing the objects of public convenience, and in such case a mandatory injunction is not an appropriate remedy. *Johnson v. Electric Co.*, 54 Hun, 469, 7 N. Y. Supp. 716; *Keasby, Electric Wires* (2d Ed.) § 30.

2. The contract of the authorities of the city of Bay St. Louis with appellant, as disclosed in this proceeding, is a valid contract, and authorized the latter to make the erections for lighting the streets of the city, and we see nothing in the mode of construction or operation of the plant that authorizes an injunction of any kind. An injunction may not be granted in this state except where right and justice demand it, and then only when the grounds for its issuance have been satisfactorily shown to the officer granting the writ. Code 1892, §§ 557, 916. Our statute makes no distinction in respect to the several kinds of writs of injunc-

tion; but in respect to mandatory injunctions, which partake of the character of judicial process, it is a sound rule that a writ of this character should not issue unless the right to it is so satisfactorily shown that there can be no reasonable doubt of its propriety. The case made should be such that there can be no probability that the defendant can make a valid objection to it. Unless the grounds for a preliminary mandatory injunction be inexpugnable, it is the safer rule to hear both sides, before directing its issuance. Pom. Eq. Jur. § 1350; High, Inj. § 2; Story, Eq. Jur. c. 23.

The grant of the preliminary mandatory injunction in this case was error. In fact, the case presented by the bill does not warrant an injunction of any sort; wherefore the injunction is dissolved, and the case is remanded for further proceedings. Reversed and remanded.

SAVINGS BUILDING & LOAN ASS'N et al. v. TART.

(Supreme Court of Mississippi. May 26, 1902.)

GUARDIAN'S BOND—LIABILITY OF SURETY—LIMITATIONS—DEATH OF SURETY—ENFORCEMENT AGAINST HIS LAND—INNOCENT PURCHASERS.

1. The liability of a surety on a guardian's bond is not a probatable claim, and is not barred by any statute of limitations relating to such claims, but can only be barred by the statute which could bar the ward if he did not sue, after age, within the time prescribed by statute.

2. The liability of a surety on a guardian's bond is a debt, within Code 1890, § 2026, providing that the lands of a decedent's estate shall be chargeable with his debts, over and above what his personal estate may be sufficient to pay.

3. Parties who purchase land from the heirs of a deceased surety on a duly recorded guardian's bond are not innocent purchasers, but take with constructive notice of the liability of the land in case the decedent's personal estate is insufficient to meet the claims against him on the bond.

Appeal from chancery court, Lauderdale county; Stone Deavors, Chancellor.

Bill by Elnathan Tart against the Savings Building & Loan Association and others. Decree for plaintiff, granting insufficient relief, and defendants appeal, and plaintiff prosecutes a cross appeal. Affirmed on direct appeal, and reversed on cross appeal.

In 1877 J. P. Walker became the guardian of Sallie and Elnathan Tart. He received \$12,000 for them, and gave a single bond, in the penalty of \$18,000, as guardian. One of the sureties on his bond was Peter Higgins. Higgins died intestate in 1881. His estate was administered upon, notice to creditors given, the debts probated and paid. The administratrix made her final account, which was approved, and she discharged. The lands belonging to his estate were sold to various parties. One of the wards (Sallie Tart) became of age, and Walker settled with her. Walker died in 1899, without

making any settlement of the guardianship of appellee, Elnathan Tart. A few months after appellee became of age he filed the bill in this case against the heirs of Peter Higgins and their vendees. The purpose of the bill was to charge on these lands the amount of the debt, and statutory penalty of compound interest thereon, due by the guardian, Walker, to appellee, Tart. The bill does not state what interest appellants have in the land, but states that they asserted some sort of claim, which it prayed might be canceled. Section 2025 of the Code of 1890 provided that the lands of a decedent's estate should stand chargeable with the debts, over and above what the personal estate might be sufficient to pay. The defendants, in their answers, do not deny that they purchased from the heirs of Peter Higgins; nor do they deny that the guardian was in default to complainant, as guardian, to the amount claimed. They set up as defense the 3, 4, 6, and 10 years' statutes of limitations. It was further pleaded that one McClellan was one of the sureties who signed the bond with Higgins, and that afterwards his name was scratched, and another inserted; but it does not appear by whom this was done, but it appears that it had neither the authority nor approval of the court. To certain portions of the lands three several defenses were interposed, to wit: It is contended that some of lands are not liable because the defendants had acquired title to them through a tax sale; that another portion was not liable because it was a homestead at the death of Peter Higgins; that still another portion was not liable to the lien because it had passed into the hands of innocent purchasers for value, without notice. On these issues a large amount of testimony was taken, and the cause was heard on bill, answers, and proof. There was a final decree rendered in favor of complainant, except as to the portion claimed under tax sale. From that decree defendants appealed, and complainant prosecutes a cross appeal.

Miller & Baskin, T. G. Lewis, and Alexander & Alexander, for appellants. S. A. Witherspoon and W. T. Houston, for appellee.

WHITFIELD, O. J. The liability of the surety on the guardian's bond is not a probatable claim. Hence none of the statutes of limitation which would bar such a claim have any application. There is a statute which would bar this debt, and but one; and that is the statute which would bar Tart if he did not sue, after age, within the time prescribed by statute. Yandell v. Pugh, 53 Miss. 301; Gillespie v. Hauenstein, 72 Miss. 838, 17 South. 602. There ought to be no other bar, and it is doubtless the fact that there ought not to be which accounts for the pregnant fact that the legislature never has prescribed one for a debt like this. The minor cannot act till he is of age. It would

be in the highest degree unjust to infants to have any other bar. The liability of the surety is a debt, within the meaning of our statute charging the debts of a decedent upon his lands. The heirs take the lands thus charged with this positive statutory lien, and cannot alien these lands, except subject to the charge. The guardian's bond is required to be recorded. This one was recorded in Lauderdale county and the city of Meridian. The purchasers from the heirs were charged with the knowledge which the records imparted,—the records of the guardianship proceedings and the bond. There is no room here for the play of the doctrine of innocent purchasers. In no just legal sense can these purchasers from the heirs (charged with constructive knowledge of all the record disclosed) of lands which the heirs themselves took charged with the debt here sued for, by positive statute law, be called innocent purchasers. They bought caveat emptor. They got the lands, just as the heirs held them, subject to this charge,—the payment of this debt. These purchasers, it must be noted, have not been in possession for 10 years. That period has not elapsed, since their purchase, before the filing of this bill. What is asserted here is not a mere equity. It is a legal charge fixed by statute. A most ingenious and very able argument has been made to show this to be a mere secret equity, a mere claim, not a debt, within the meaning of the statute; and the great hardship of this sort of case has been most earnestly pressed. All these contentions are unsound. The hardship would be quite as great against minors, on the other view. And the decisions of this state fully and clearly sustain the views set out.

We see no error in the method of computing the amount. The statutes are plain, and they, with the authorities, are all set out in briefs of appellee's counsel, and need not here be cited again.

The tax sale was void, and on the cross appeal the case must be reversed as to that. Affirmed on direct appeal. Reversed as to tax sale on cross appeal, and cause remanded, to be proceeded with in accordance with this opinion.

ROTHROCK CONST. CO. et al. v. PORT GIBSON MFG. CO.*

(Supreme Court of Mississippi. June 2, 1902.)

NONJOINDER OF PARTIES—FAILURE TO OBJECT—FOREIGN ATTACHMENT—PERSONAL DECREE.

1. The nonjoinder of a necessary party will not be regarded on appeal, when not complained of in the pleadings.

2. Under Code, §§ 486, 487, relative to attachments of debts owing to foreign creditors, and not authorizing a personal decree, no such decree can be had in foreign attachment in

chancery; the proceeding being purely statutory.

Appeal from chancery court, Claiborne county; W. O. Martin, Chancellor.

Suit by the Port Gibson Manufacturing Company against the Rothrock Construction Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

McWillie & Thompson, for appellants. H. O. Moulner, for appellee.

CALHOON, J. This is a proceeding by attachment in chancery instituted by appellee, a brick manufacturing company, against the appellants, the Rothrock Construction Company, a nonresident, and the Chamberlain-Hunt Academy. Its purpose was to subject a debt averred to be owing from the academy to the construction company to the satisfaction of its claim for about \$900 against the nonresident construction company, under the provisions of Code, §§ 486, 487. The proof showed that the academy never had any contract whatever with the Rothrock Construction Company, an incorporated concern of New York, and never owed it anything. The academy did have a contract with one Samuel W. Rothrock, who is not made a party, although necessary to the full and complete protection of the academy; and yet the final decree in the cause is simply a personal decree for money, and against the construction company and Samuel W. Rothrock and the academy. We disregard the nonjoinder of Samuel W. Rothrock, because not complained of in the pleadings. The proceeding is purely statutory, and there is power only, under Code, §§ 486, 487, to subject the indebtedness, and there is no warrant for personal decree. Even in proceedings to foreclose a mortgage there could be no personal decree for the balance unsatisfied from the proceeds of the sale of the mortgaged property, but for a statute authorizing it. There is no statute authorizing such decree in cases of foreign attachment in chancery, as this case is.

We do not decide now whether the lien of mechanics and material men can be enforced except by the machinery prescribed by chapter 77, Code 1892, and in the circuit court only, by section 2702, which machinery is full and ample for all purposes as to residents and nonresidents. We do not find that this question is yet decided in our courts, and it is not touched by *Otley v. Haviland*, 36 Miss. 19, or by *Watkins v. Owens*, 47 Miss. 593. The trouble in the case before us is that complainant was under the necessity to prove that the academy owed the nonresident, and has not done so. There is not even proof that it owed Samuel W. Rothrock. In fact, the only evidence is to the contrary.

The case is reversed and remanded.

*For opinion on suggestion of error, see 32 South. 484.

LOPEZ v. JACKSON.

(Supreme Court of Mississippi. June 2, 1902.)
**ASSAULT—CIVIL ACTION—MALICE—PECUNIARY
 CONDITION OF DEFENDANT—INSTRUCTIONS.**

In a civil action for assault, where the testimony as to malice conflicted, it was error to charge that, if the jury found for plaintiff, they could take into consideration, in estimating the damages, the pecuniary condition of defendant.

Appeal from circuit court, Harrison county; J. I. Ford, Special Judge.

Action by C. O. Jackson against L. Lopez for damages for an assault and battery. Judgment for plaintiff for \$1,500. Defendant's motion for a new trial was overruled, and he appeals. Reversed.

W. A. White and McWillie & Thompson, for appellant. Geo. S. Dodds, E. M. Barbour, and Frank Johnston, for appellee.

CALHOON, J. The testimony as to malice in the assault conflicts, and yet the court gave the following independent instruction at plaintiff's instance: "If the jury find for the plaintiff, they have the right to take into consideration, in estimating the damages, the pecuniary condition of defendant." This was error, and may explain the amount of the verdict.

Reversed and remanded.

ADAMS, State Revenue Agent, v. COX et al.
 (Supreme Court of Mississippi. May 26, 1902.)

**LIQUOR DEALER'S BOND—ACTIONS ON—COM-
 PROMISE—VALIDITY—STATE REVENUE
 AGENT—POWERS.**

1. Acts 1894, p. 29, provides that the state revenue agent may have power to proceed by suit "against all officers, county contractors, persons, corporations, companies and associations of persons . . . for damages growing out of the violation of any contract with the state, county, municipality or levee board," and "shall have a right of action in all cases where the state, or any county, municipality, or levee board may sue." *Held*, that where, in an action on a liquor dealer's bond, judgment was rendered, and half the amount thereof paid to the informer, and a release executed by the county supervisors, without authority, for the other half, the state revenue agent could sue the bondsmen to recover the amount so released.

2. Code 1892, § 1582, provides that, for a breach of a liquor dealer's bond, "recovery of the full penalty may be had by the county, and one-half of such recovery may be paid to the informer." In an action on a liquor dealer's bond, judgment was rendered, and pending appeal the bondsmen, by agreement, paid the informer half the judgment, and procured from the county supervisors a relinquishment of all claims to the other half. *Held*, that the compromise was void.

Appeal from chancery court, Jackson county; Stone Deavors, Chancellor.

Action by Wirt Adams, state revenue agent, against L. E. Cox and others. Decree for defendants, and complainant appeals. Reversed.

Chas. E. Ohlsey, for appellant. Green & Green and Miller & Ford, for appellees.

CALHOON, J. The right of the state revenue agent to bring this suit is clear. Acts 1894, p. 29.

The action at law on the liquor bond of L. E. Cox was an action by the state through the informer. *Albrecht v. State*, 62 Miss. 517; Code 1892, § 1582; Code 1880, § 1104. If the sum for which judgment was rendered had been obtained by the sheriff on execution, it was his duty to give half of it to the county, and half to the informer. The parties could not validly pay voluntarily any other way.

Judgment was rendered, and pending appeal the defendant bondsmen, by arrangement, paid the informer half the judgment, and procured from the county board of supervisors a relinquishment of all claims to the one-half coming to the county. They thereupon ceased to prosecute their appeal. This compromise,—for such in fact it was,—giving the informer all, was beyond the power of either the informer or the county. Any other view would put it in the power of informers or boards of supervisors to nullify the policy of section 1582, to prevent riotous and disorderly dramshops.

The admissions of the answers to the bill in the record before us entitled the revenue agent to a decree. Reversed, and decree here for complainants against L. E. Cox, B. J. Jane, W. M. Canty, and John Y. Morgan for \$1,000, with 6 per cent. interest per annum from April 29, A. D. 1899, the date of the judgment at law, and costs.

(107 La.)

LEVY v. LEVY et al. (No. 13,697.)

(Supreme Court of Louisiana. Dec. 3, 1900.)

**APPEAL—CITATION OF APPELLEE—SERVICE—
 DISMISSAL—TAX SALE—VALIDITY—RATIFI-
 CATION BY DEED—PAROL EVIDENCE.**

On Motion to Dismiss.

1. Appellee should be cited personally or at his domicile when he resides in the state. If, after diligent search, he cannot be found by the sheriff, and if he has no domicile at which to make a domiciliary service, citation served on his (appellee's) attorney will save the appeal from absolute dismissal. Delay will be granted in order that a regular service of appeal may be made.

2. The transcript having been filed in due time, and all requirements having been complied with, except the service of citation of appeal, which was not made, because appellee could not be found, a citation of appeal may be served after 12 months have elapsed since the judgment of the lower court was rendered.

3. Another citation of appeal ordered, and time granted.

On Second Motion to Dismiss.

1. Grounds of the motion were set forth by the appellee and decided by the court in denying the first motion.

2. The same grounds cannot form the basis of a second motion to dismiss the appeal.

On the Merits.

1. The owner ratified by notarial act a tax sale of her property, as legal, owned by plaintiff under the tax deed. If there was an ulterior purpose, as alleged, in the ratification, not disclosed by the deed confirming the tax deed, and in reality the ratification was made because it was expected that the property conveyed still remained, despite the tax sale, the property of the tax debtor, the purpose cannot be shown, over the purchaser's objection, by oral testimony.

2. The suit is, in its effects, *inter partes*. It is not a suit by forced heirs seeking their legitime, or by creditors to set aside a sale, but by the parties themselves who are personally bound, and also bound as heirs of the former owner of the property.

On Rehearing.

A tax sale was made in 1890 in enforcement of state taxes of 1889 on property assessed in the name of the original owner, who had died in 1876. His succession had been opened in 1881, when his sons were recognized as his sole heirs. His widow remained in possession as owner of one half, and usufructuary of the other half. The only notices recited as having been given were notices addressed to the original owner. The validity of the tax sale was put at issue in 1894. The widow ratified the sale. *Held*, her ratification extended only to her undivided half. The sale, as to the other half, was set aside as invalid.

Breaux, J., dissenting.
(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by Herman Levy against Ella Levy and others. Judgment for plaintiff, and defendants appeal. Modified.

William S. Benedict, for appellants. Benjamin Rice Forman, for appellee.

On Motion to Dismiss.

BREAUX, J. From a final judgment signed on the 30th day of June, 1899, an appeal was taken. The petition for the appeal was filed on the 25th day of June, 1900, and on the same day an appeal bond was filed, and the appeal was made returnable on the first Monday in November, 1900. In his petition for an appeal, appellant prayed that appellee be cited. The citation is addressed to plaintiff, Herman Levy, the appellee. The return of the sheriff on the citation sets out that on July 2, 1900, due citation was made on the appellee by service on B. R. Forman, his (appellee's) attorney; that he (Herman Levy, appellee) was absent from the state. Appellee moves to dismiss the appeal on the ground that he has not been served with citation of appeal as required by law.

The affidavit of appellee filed before this court sets out that his residence and domicile have for many years been in New Orleans, and that during the months of June and July, 1900, he was at No. 2423 Magazine street, where citation of appeal could have been served upon him at any time from June 30, 1899, the date of the judgment appealed from, to the date the appeal was made returnable, in November, 1900. His place of

business was at 528 Canal street, where he could have been personally served with citation. The attorney for appellee states that when the deputy sheriff handed him the citation of appeal, addressed to Herman Levy, he told the deputy that he (affiant) had no authority to accept service; that Herman Levy lived in New Orleans, and could be served personally at his domicile. On the other hand, on the part of the appellants, Ella Levy et al., Lythe, the deputy sheriff, deposes that all efforts to find Herman Levy at his domicile, No. 2426 Magazine street, proved unavailing; that he was then directed to serve it at his place of business (Levy, Loeb & Co., on Canal street); that upon calling at that place he was informed by one apparently in authority that Levy was absent from the state, and was then in Europe. The affidavit of the other deputy also sets out that he failed to find the appellee after diligent inquiry, and that domiciliary service, for the reason stated, was not possible.

The appeal must be taken within 12 months after the date of the judgment. The order of appeal was obtained and the appeal bond was given within the 12 months, and the transcript was filed before the return day.

Appellee, for a dismissal of the appeal, urges, in the first place, that citation of appeal must be served on the appellee personally or at his domicile when he resides in Louisiana, and on the appellee's advocate when he resides out of the state. True, as urged by the appellee, the citation of appeal must be served on the appellee personally or at his domicile when he resides in the state; but it does not always follow that the appeal must be dismissed in all cases of failure to comply with the laws' requirements. The failure or inability of the sheriff to make the service of citation, or an irregular service of citation of appeal, may render it proper and legal to order citation to issue, and service to be made. The contention of the appellee, for the dismissal, is that he was in the state, and that, in consequence, service should not have been made upon his attorney. The appellee may have been present. None the less he could not be found, although diligent search was made for him by the deputies. It was equally impossible to make a service at domicile, for the reasons stated in the affidavit of these officers. A service made upon the attorney under these circumstances, although not an entirely legal service, is not absolutely void. In *Marshall v. Watrigan*, 13 La. Ann. 619, the appellee had not been cited at all. Service was made on the attorney, and sustained on the ground that, as the appellee had removed from the jurisdiction of the court in violation of law, appellant was not obliged to search for her beyond that jurisdiction, and that service upon her counsel was as good as if the appellee had departed from the state.

We take it, in the case before us for decision, that due search was made for this appellee, and that he could not be found. It was the duty of the sheriff to serve the citation and make his return. He exercised his best endeavors to execute the duty, and failed, because the appellee could not be found. It was never within the law's contemplation that appellees should be benefited because of the sheriff's inability to find them, or a domicile at which to make service upon them. The alternative in such a case—service on the attorney—may not be complete and sufficient, and yet be complete enough for the appellant to bring up his appeal. It must be borne in mind that the irregularity is due to the appellee himself, who could not be found, and who had no domicile at which service could have been made. It was not an irregularity for which the sheriff or the appellant could be held responsible. It would be different if the sheriff had made passing inquiry for the appellee, which had not resulted in his finding him, and had then called at the office of his attorney, and served citation of appeal upon the attorney. There was, as we take it, diligent inquiry made, and it became thoroughly well known to the sheriff's department that no service could be made as required by the rules. It was only after this was well understood that service was made as before stated.

As to the objection that citation of appeal was served on the attorney after the 12 months had elapsed after the date of the judgment, we will remark that it has been held that this, also, is not sufficient to dismiss the appeal, when it does not appear that the delay is imputable to the appellant, and when the service is made a sufficient number of days to be in time before the return day. In *Lewis v. Hennes*, 13 La. Ann. 259, the court said that the appeal had been regularly taken, and the bond was given in due form. The first citation was not served because of the absence of the appellee. It did not appear that the defect, error, or irregularity was imputable to the appellant; and, furthermore, it is no objection to the service of the new citation that more than 12 months had elapsed since the judgment of the lower court had been rendered. The proceedings required of the appellant had all been filed in due time, and the court said that the "rest is cured by the statute." This was affirmed in *Jones v. Caperton*, 14 La. Ann. 698, in which it was held that an irregular service of citation may be cured after the 12 months have elapsed since the judgment of the lower court was rendered. Although the point was not raised in *Murphy v. Insurance Co.*, 33 La. Ann. 455, yet it must have been evident to all concerned, as well as to the court, that the 12 months from the date of the judgment appealed from had elapsed when a second service was ordered. The rule met with this court's approval in *Cockerham v. Bosley*, 52 La. Ann. 65, 28

South. 814. After citing another decision, we will bring our own to a close: In *Broussard v. Broussard*, 2 La. Ann. 769, the plaintiff alleged that she had not been cited at all. This, the court held, was not sufficient to authorize the dismissal of the appeal; that it is the duty of the clerk to issue, and of the sheriff to serve, the citation, and make his return. No failure of these officers to do their duty can deprive parties of their right to be heard on appeal, but such neglect authorizes the granting of further time for citing the appellee. It follows that the same rule should apply when the failure is not due to the officers, but to the fact that the appellee, after diligent search, could nowhere be found, and had no domicile at which to make a domiciliary service. *Hibernia Nat. Bank v. Sarah Planting & Refining Co.* (not yet officially reported) 31 South. 1031.

The motion to dismiss is denied. It is therefore ordered that the cause be continued until the first Monday of January next, in order that the appellee be cited to answer the appeal taken in this case.

On Second Motion to Dismiss.

(Nov. 18, 1901.)

This is the second motion by appellee to dismiss the appeal on the ground that he, as appellee, has not been properly cited to answer the appeal. It occurs to us that our first decree, sustaining the appeal, covers the objection raised in the second motion to dismiss. In the first motion, plaintiff and appellee averred that there was no legal service of citation of appeal, that he has lived in the city of New Orleans since his birth, and that his domicile was on Magazine street, at the number stated. The court, in denying this first motion to dismiss the appeal, found that the sheriff had endeavored to make a legal service, but, owing to his inability to find plaintiff and appellant, he was unable to make a service either on the appellee personally, or at his domicile, and that he had, after having advised with defendants' and appellants' counsel, made service of the citation of appeal by leaving it with counsel for plaintiff and appellee at his office. The question was considered by us, and we, for reasons stated in our first opinion, ordered another service to be made. The service has been made as required, and it is therefore no longer possible to return to a consideration of the first ground decided.

The second motion to dismiss the appeal is overruled.

On the Merits.

This is a suit by plaintiff to have himself decreed the owner of the lots of ground, and improvements thereon, situated in the First district of the city of New Orleans, and numbered 23 and 24 in the square No. 69. He sets out in his petition that he bought this property from Lawrence Fabacher, who had

bought it from the state tax collector at a public sale made by the tax collector on the 24th day of May, 1890, for the state taxes of 1889. He alleges that previous to the tax sale the property was owned by the late Henry Levy, who, dying, left Sarah Klein, his surviving widow in community, in possession up to the date of purchase by Lawrence Fabacher; that in the year 1891 Sarah Klein, for a valuable consideration, confirmed the title in favor of plaintiff, which he (plaintiff and appellant, Herman Levy) now claims. Plaintiff sets out in his petition that Henry Levy had, at the date of his death, issue of his marriage with Sarah Klein two children, viz., Alex and Leon Levy, and that these children departed this life prior to the death of Sarah Klein. Plaintiff claims that he owns the property in question both by acquisition of the title from Fabacher, and the acquisition from Sarah Klein, before named. It appears that Alex Levy and Leon Levy departed this life subsequent to their father. It follows that they inherited the undivided half of the property, subject to the usufruct of their mother, Sarah Klein, but they died prior to their mother. But plaintiff urges that the said Alex and Leon Levy having departed this life prior to Sarah Klein, their mother, the grandchildren (to wit, the children of Alex and Leon Levy) of Sarah Klein could inherit from her, viz., Sarah Klein, the undivided half of the property, and that they, in consequence, could not have inherited it from their late father, Henry Levy. The position of plaintiff on this point is that, as these children inherited from their grandmother directly, they are bound by her ratification of plaintiff's title, particularly as it is not shown that the ratification has aught to do with the legitime of these heirs. Plaintiff pleads the tax title as forming one of the links in the chain of title. The heirs of Leon Levy, who are the grandchildren of Sarah Klein, are Ella, wife of Isidore Rich, and Teenie, wife of Leopold Klein; and the heirs of Alex Levy, who are also grandchildren of Sarah Klein, Jacques and Moses Levy and Adeline Levy. Plaintiff avers that he has become subrogated to the rights of Lawrence Fabacher, and that he and his author in title have paid taxes due prior to his becoming owner of the property to an amount of about \$1,500. The action is for slander of title. The defendants claimed ownership, and thereby became plaintiffs in a petitory action. The onus of proof is with them. They must sustain whatever strength there is in their own title. He (plaintiff) charges that, at the time of the purchase by Lawrence Fabacher, these heirs, who are plaintiffs in reconvention, were *sui juris*, and aware of the fact of the purchase, and they were also aware of the fact that the purchasers were paying amounts of taxes, as heretofore stated, as due on the property; that they were willing at the time that plaintiff should have entire and perfect title to the property. Plaintiff

further charges that these defendants have slandered his title, and have thereby prevented him from selling the property, and on these and other grounds he claims damages in the sum of \$2,500. Plaintiff annexed interrogatories to his petition, to be answered by these defendants. Defendants pleaded a general denial, and also attacked the tax sale before mentioned, which Sarah Klein confirmed, on the ground that no assessment had been made of the property, no advertisement, and no demand of payment, and on other grounds. They (defendants), aver in this answer that this sale was made, through the instrumentality of Herman Levy, to Lawrence Fabacher, and from Fabacher to Herman Levy, and confirmed to Herman Levy by Sarah Klein, his grandmother, in her interest, for her benefit, and for the benefit of the children and heirs of Henry Levy, Alex Levy, and Leon Levy. They seek to recover the interest they allege they have in the property, and ask that plaintiff be ordered to account for the receipts and disbursements on said property. The interrogatories propounded by plaintiff to defendants were answered. Motion was made to strike out the answers to interrogatories on facts and articles, on the ground that they were improperly answered, not categorically, and attempted to inject into the answers things that do not belong to the case. - The motion was granted in part, and rejected as to the remainder of the answers. There was also a motion made to compel the defendants to elect between two antagonistic and inconsistent positions, in that defendants in their answers set forth the invalidity of the tax sale in question, and they also set forth that plaintiff, who invokes this tax title, bought the property for the use, benefit, and advantage of the grandmother of the defendants; that the latter plea affirms the validity of the title, while the former denies it, and the two are inconsistent. The district court declined to compel the defendants to elect as to their pleas.

Both pleas being before us for decision, we take up the first. The tax deed under which plaintiff holds contains the recital that the formalities required in order to convey title at tax sale have all been complied with. Defendants have not sought to prove any of the irregularities and illegalities charged in their answer. The onus of proof was with the defendants, by whom the tax deed had been attacked. The tax sale has a validity upon its face, which must retain full legal effect until it is shown that the declarations in the deed are not correct. The sale was made in 1890, and duly inscribed in the proper office. No question but that the taxes for which the property was sold were due. Upon this branch of the case it only remains for us to affirm the judgment.

But defendants raise another issue, which, in our view, goes far toward affirming the validity of the tax sale they attacked in this

suit. They allege and contend that the property was purchased at tax sale for account of their grandmother Sarah Klein. They have failed to sustain their averment that the property was not that of the plaintiff, but of their grandmother. In their answer to the interrogatories propounded to them by plaintiff, and to which we have before referred, they sought to prove and sustain their defense by injecting testimony not called for by the interrogatories. This was excluded by ruling of the lower court, to which ruling we do not infer that objection is now urged. Defendants afterward in the trial sought to sustain their plea against the title of plaintiff by offering to examine other witnesses to prove by parol that plaintiff is not the owner, and that the deed under which he holds is a simulation. The defendants are not claiming as creditors, nor are they third persons. They are heirs who set up that the plaintiff is not entitled to the property. There is no question of legitimate issue. They are therefore bound by the action of their grandmother, who ratified by deed the title which they attack. All the evidence offered was oral and inadmissible to set aside a deed which has been ratified by all concerned.

The attack of plaintiffs in reconvention upon plaintiff Herman Levy's title being based exclusively upon oral testimony, the rule of law which prevents persons inter partes from attacking and setting aside their own deeds upon oral testimony must be sustained. The defendants do not allege and show fraud and simulation. They are not forced heirs seeking to recover their legitimate, nor creditors seeking to set aside a sale in fraud of their rights,—all exceptions that do not apply to defendants' case. Defendants' oral testimony could not be heard in order that they might substitute another title (oral) to plaintiff's title. Plaintiff, as a witness, testified in support of his deed. The attempt to impeach him as a witness, and show that he held the title without consideration, was not successful. No part of the testimony admitted in evidence, or no part of that excluded, shows, or has a tendency to prove, that the sale in question was without consideration, as contended by plaintiffs in reconvention.

We do not think that the testimony sustains any demand for the damages claimed by the plaintiff. This demand was not pressed upon the court's attention. Our examination of the issues has resulted in convincing us that the issues as presented do not make out a case for damages.

By agreement of all the parties concerned, another suit was consolidated with this case. The judgment of the district court rendered a separate judgment in the last-mentioned case. We do not understand that defendants appeal from that judgment, which was rendered in their favor.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment decreed

ing plaintiff to be the owner of the property described therein, and rejecting plaintiff's demand for damages, be affirmed.

On Application for Rehearing.

(Feb. 3, 1902.)

PROVOSTY, J. A rehearing is granted in this case, restricted to the question of the validity or invalidity of the tax sale, in so far as concerns the interest of the two defendants in the undivided half once owned by their grandfather Henry Levy in the property in question, and title to which they claim by inheritance; the inquiry being restricted to the irregularities alleged in the tax proceedings leading to the sale; the liability for costs to abide the final decision.

On Rehearing.

(April 28, 1902.)

NICHOLLS, C. J. A rehearing was granted in this case, restricted to the question of the validity or invalidity of the tax sale in so far as concerns the interest of the two defendants to the undivided half once owned by their grandfather Henry Levy in the property in question, and title to which they claim by inheritance; the inquiry being restricted to the irregularities alleged in the tax proceedings leading to the sale.

The property involved in this litigation was purchased by Henry Levy during his marriage with Sarah Klein. Henry Levy died in March, 1876, leaving as his heirs his sons, Alexander Levy and Leon Levy, issue of his marriage with Sarah Klein. His succession was opened in the civil district court for the parish of Orleans, and the two sons were on the 21st of July, 1881, recognized by judgment of court as his sole heirs to the property in question; their mother being entitled to the undivided half as widow in community, and holding possession of the other half under her usufructuary rights. Leon Levy died on the 3d of August, 1889, and Alexander Levy died on the 18th of August of the same year. Their mother, Sarah Klein, died on the 23d of February, 1894. On the 24th of May, 1900, two lots claimed by the plaintiff were separately sold at tax sale in enforcement of state taxes of 1889 assessed upon them in the name of Henry Levy, and adjudicated to Lawrence Fabacher. Deeds to Fabacher were executed on June 12, 1900. On the 21st of July, 1891, Fabacher, by notarial act, sold and assigned (but without warranty) to the plaintiff, Herman Levy, a son of Alexander Levy, and the plaintiff herein, all his (Fabacher's) rights, title, and interest in and to the two lots adjudicated to him, for and in consideration of the recited price of \$500, which the vendor acknowledged he had received, and for which he gave acquittance. The titles were declared to have been based

on the tax adjudications referred to. Mrs. Sarah Klein, the mother of Herman Levy, intervened in this act, and took cognizance of the sale to him by Fabacher. She referred to the tax adjudications, and acknowledged that they were valid and binding, that she had no defenses to urge against the same, and that title to the property had vested absolutely in Fabacher by nonredemption of the same within the period fixed by law. In view of the premises and in consideration of the sum of \$500 then and there paid to her by Herman Levy, she relinquished, abandoned, remitted, transmitted, and forever quitclaimed to the latter (which quitclaim Herman Levy accepted) all such rights, title, interest, claim, pretension, action, or cause of action as she might have had in the properties; binding herself to warrant him and his heirs or assigns against all person or persons lawfully claiming the same in the quiet and peaceable possession of the same forever. On the 12th of March, 1894, the plaintiff instituted the present action of slander of title against Ella Levy, wife of Isidore Rich, and Teenie Levy, widow of Leopold Klein, the daughter and sole heir of Leon Levy. On the 24th of March, 1894, the defendants answered. They averred: "That plaintiff has no legal or equitable title to the property described in his petition, for this, namely: That the tax sale under which his vendor acquired, and under which Sarah Klein Levy confirmed to him for family purposes, was and is null and void, because: (1) A proper assessment of said property was not made. (2) That notice of demand of payment, of advertisement of the sale of said property, was not made or given as required by law; your respondents being then nonresidents, and in ignorance of what was done. (3) They aver the sale was made and had through the instrumentality of Herman Levy to Lawrence Fabacher, and from him to Herman Levy, by Sarah Klein Levy, his grandmother, in the interest and for the benefit of their said grandmother, and the children and heirs of Henry Levy, Alex Levy, and Leon Levy, and without any other consideration to said Sarah Klein Levy, and with the view and object of placing said property in the name of Herman Levy, as a living person, to collect the revenues thereof, pay the legal charges and taxes accrued thereon, and with the surplus of proceeds thereof to contribute to the support of their grandmother Sarah Klein Levy in the same manner he and Alex Levy before had done prior to said tax sales; said tax sales and confirmation being without the knowledge of these defendants, and concealed from them until January, 1894." On the 25th of April, 1894, by act before Dreyfous, notary public, Leopold Klein, husband of Teenie Levy, executed a power of attorney to Isidore Rich, in which he, among other matters, empowered him "to authorize my [his] wife in all acts and matters in

which such authorization is necessary,—particularly to authorize her to defend the suit against her instituted by Herman Levy, or to enter into that connection into all contracts, covenants, and agreements as may be requisite; to sign all bonds of appeal or other needful bonds, or to assist her in any compromise and composition as she may deem most advisable in her interest." On the 15th of May, 1894, Ella Levy, wife of Isidore Rich, and Teenie Levy, wife of Leopold Klein, and Isidore Rich, to aid and authorize his wife, and, under the said power of attorney, to aid and assist Mrs. Klein, executed an act before Cohn, notary, in which it was recited that: "Whereas, Herman Levy is the apparent owner of certain real estate hereinafter described, situated in this city; and whereas, they are desirous of giving a full quitclaim to said Levy thereto, and of his ratifying his title thereto: Therefore, in view of the premises, and for a full and valuable consideration received by them, as they hereby acknowledge, they do, respectively, by these presents, relinquish, abandon, remise, transfer, and forever quitclaim unto the said Herman Levy, his heirs and assigns (all of which the said Herman Levy hereby accepts), all such rights, title, interest, claim, pretensions, action, or cause of action which they might have or might have had in and to the following described real estate; hereby binding ourselves to warrant said Levy, his heirs and assigns, against all persons lawfully claiming the said property in the quiet and peaceable possession of the same forever." After this follows a description of the properties, declaring them to be the same properties acquired by Lawrence Fabacher at the tax sales. Herman Levy did not sign this act, though it was evidently contemplated that he should have done so. This quitclaim deed was recorded on June 27, 1894. On the 26th of June, 1894, Herman Levy sold these lots, under full warranty, and with subrogation, to Frank J. Nusloch, for \$5,000,—\$2,500 cash; the balance represented by three notes of the purchaser, payable to his own order, and by him indorsed, secured by special mortgage and vendor's privilege on the property. The plaintiff repudiated and repudiates the claim that the tax sales here made for the reasons and purposes stated in the answer, and maintains and contends that they were made, not by consent, but adversely to the owners; that Fabacher obtained a full, absolute, and complete title to the lots which he himself subsequently acquired, solely on his own account, and which he caused his mother to have confirmed and ratified for a valuable consideration passing to her from himself. The quitclaim from the defendants to the plaintiff is not referred to in the pleadings. Nor are any claims urged based upon it. It was evidently executed under some compromise arrangement or reservation. Mrs. Sarah Klein

only owned the undivided half of the property. Her ratification and quitclaim covered nothing more than her own interest in the property. She could bind herself, but not bind the defendants holding an interest in the other undivided half as heirs of their father, Leon Levy; and the plaintiff denies that she intended or attempted to do so.

Unless the defendants have concluded themselves in some way, we think their interest in the properties as heirs of their father was not divested by the tax sales referred to. They were made in enforcement of the delinquent taxes of 1889, under an assessment made in the name of Henry Levy. He was not the owner at that time, but had been dead a number of years. The father of the defendants had been recognized as one of his heirs as far back as 1881 by judgment of court, and his mother, Sarah Klein, was in possession as usufructuary at the date of the tax sales. The deed refers to Henry Levy as being the delinquent taxpayer, and declares that the notices given were sent to him. An assessment of the property made at that time in the name of Henry Levy, and notices sent to him, were not, under the circumstances of the case, a compliance with the requirements of the law. We set aside a tax sale in *Genella v. Vincent*, 50 La. Ann. 966, 967, 24 South. 690, under circumstances very similar to the present. The property in that case had been sold under an assessment in the name of Catherine Neidergang. She had removed from New Orleans to Switzerland years before, and had died there, bequeathing her property to her husband, Jaquier. Her succession was opened in New Orleans, and her husband recognized and placed in possession. At the time of the tax sale, Jaquier was absent from the state, but the property was in possession of his tenant. In the tax deed the notices required by law to be given were declared to have been given to the delinquent tax debtor, and the delinquent tax debtor was in the deed declared to Catherine Neidergang. At the time of the tax sale which is involved in the present litigation, Teenie Levy, wife of Leopold Klein, was owner of one undivided eighth interest in each of the two lots described in plaintiff's petition as heir of her father, Leon Levy, and Ella Levy, wife of Isidore Rich, was owner of one undivided eighth interest in each of said lots described in plaintiff's petition, as heir of her father, Leon Levy. We are of the opinion that the said Ella Levy and the said Teenie Levy were not divested of their said interest in the property by the tax sales referred to in the pleadings, and that they are still the owners of the same. We are strongly impressed with the belief that Fabacher was merely a party interposed to hold title, and that the real adjudicatee at the tax sale was either Mrs. Sarah Klein or Herman Levy. It will be remembered at the time of the tax sales the latter was himself a joint owner in the

properties, by reason of his heirship of his father, Alexander Levy. If the plaintiff in this suit has made payment of taxes on the property towards the payment of which defendants should have contributed, he has the right to enforce such contribution now. The continued possession of the property has given rise to reciprocal rights and obligations between the parties, which should be liquidated, and the property partitioned, if the parties elect to put an end to their joint ownership. The record is not in a situation to enable us to pass upon these questions, and the cause must be remanded for that purpose.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the defendant Ella Levy wife of Isidore Rich, and the defendant Teenie Levy wife of Leopold Klein, are owners each of one undivided eighth interest in each of the lots of ground described in the petition of the plaintiff herein, the tax sales of the said properties by C. Harrison Parler, state tax collector, on the 24th of May, 1890, at which said properties were adjudicated to Lawrence Fabacher to the contrary notwithstanding; and it is hereby ordered, adjudged, and decreed that the said tax sales and the said adjudications be, and they are hereby, decreed, to the extent of the said interest of the said parties in said properties, null, void, and of no effect, and that the same be set aside. It is further ordered, adjudged, and decreed that the former decree of this court rendered in this matter, to the extent herein just adjudged and decreed, be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed that this cause be remanded to the district court, and there reinstated on the docket, and that that court cause, by proper proceedings, to be ascertained, adjusted, and liquidated the respective rights and obligations of the parties hereto arising out of, and relating to, said properties. It is further ordered, adjudged, and decreed that the plaintiff pay the costs of this appeal; defendants to pay the costs of the district court. It is further ordered, adjudged, and decreed that our former decree and judgment herein, except as herein altered and amended, remain undisturbed and affirmed.

BREAUX, J., dissents.

LINDSEY v. KENAN.

(Supreme Court of Alabama. May 20, 1902.)
APPEAL—BILL OF EXCEPTIONS—SIGNING AFTER TERM—EXTENSION OF TIME.

Where the bill of exceptions purports to have been signed after the adjournment of the trial term, and it contains a recital that it was signed within the time allowed by the court, but there is no agreement extending the time or transcript of the alleged order of extension, the bill cannot be considered.

Appeal from circuit court, Geneva county; A. H. Alston, Judge.

Action between L. Lindsey and W. K. Kenan. From the judgment, defendant appeals. Affirmed.

This was an action of assumpsit, brought by the appellee against the appellant. The appeal is prosecuted from a judgment in favor of the plaintiff. Under the opinion on the present appeal it is unnecessary to set out the facts in detail.

W. O. Mulkey and Sollie & Kirkland, for appellant. P. N. Hickman, for appellee.

SHARPE, J. That which is incorporated in the transcript as a bill of exceptions purports to have been signed after the adjournment of the term of court at which trial was had, and there is neither order of court nor agreement extending time for signing. In it there is a recital to the effect that it was signed within the time allowed by an order of court, but that recital, being merely a statement of the judge, cannot be looked to as establishing an order of court, the proper evidence of its existence being a transcript of the order. *Dantzier v. Mill Co.*, 128 Ala. 410, 30 South. 674. The assignments of error are each based on matters which could only be shown by a bill of exceptions, and, since the supposed bill is not legally authenticated, the assignments are without support. Judgment affirmed.

WILKINSON v. WILKINSON.

(Supreme Court of Alabama. May 14, 1902.)

DIVORCE—TRIAL—EVIDENCE—EX PARTE DEPOSITION.

In an action for divorce on the ground of desertion, after decree pro confesso complainant submitted his cause for decree on the testimony taken by him, as authorized by Acts 1898-99, p. 118. After such submission, the chancellor, without notice to or the knowledge of complainant, prepared interrogatories to be propounded to the defendant, and on their being answered, considered such answers as evidence in the cause on the hearing, and denied the divorce. *Held*, that testimony so taken ex parte without complainant having an opportunity to cross-examine or submit cross interrogatories should not be considered.

Appeal from chancery court, Tallapoosa county; Richard B. Kelly, Chancellor.

Action for divorce by W. H. Wilkinson against Mary W. Wilkinson. From a judgment dismissing the bill, plaintiff appeals. Reversed.

Jas. W. Strother, for appellant.

TYSON, J. The bill in this cause was filed by the husband against the wife for a divorce upon the ground of voluntary abandonment. It contains all the necessary statutory allegations. Code, §§ 1485, 1492. After decree pro confesso, the complainant, in accordance with the provisions of the act of the general assembly approved December 14,

1898 (Acts 1898-99, p. 118), submitted his cause for decree in vacation, upon the testimony taken by him. After the submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. This the register did, and those answers were considered by him upon the hearing as evidence in the cause. It does not appear that the complainant knew that this order had been made in the cause, or ever saw the interrogatories. Nor does it appear that he had any notice of the time and place of the taking the answers upon the interrogatories by the register, or was given an opportunity to file cross interrogatories, or to cross-examine the witness. For aught appearing, the whole proceeding was ex parte. Indeed, from all that appears in the record, it may be affirmed that it was an ex parte deposition. While it is true that such suits are regarded as of a tripartite character,—a triangular proceeding sui generis,—wherein the public, or government, occupies, in effect, the position of a third party, and the court is bound to act for the public in such cases (*Powell v. Powell*, 80 Ala. 595, 1 South. 549; *Ribet v. Ribet*, 39 Ala. 348), and may, to that end, ex mero motu, at any time before final decree, direct an inquiry to ascertain the fact of the existence of a defense (*Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75; 7 Enc. Pl. & Prac. 88), we apprehend, in making the inquiry, the rights of the complainant are not to be abridged or disregarded, but must be respected. When an inquiry of this sort is instituted by the chancellor, involving, as it necessarily does, the right of the complainant to maintain his suit, there is no reason why the complainant should be precluded or debarred of the right which he has of having notice of the inquiry as well as the right to cross-examine the witnesses who may be examined by the court and to introduce evidence in his own behalf. The fact that the issue is made with him by the court instead of by the respondent, does not and cannot deprive him of his right of trial according to the forms of law, the right to know the issue he is expected to meet, to cross-examine the witnesses that may be called to testify against him upon the issue, and to introduce evidence to disprove the truth of the defense attempted to be set up by the court to defeat his bill. No good reason can be assigned—and, for that matter, none can exist—why the government should be accorded an advantage in this class of cases which it does not and cannot have in causes where the state, its representative, is a party on the record. In whatever form the inquiry may be instituted, it is safe to say that the complainant is entitled to be heard. To deprive him of this right would be to deny to him due process of law. The right to be heard seems to have been denied him

in this case. It follows that the answers of the respondent to the interrogatories cannot be considered as evidence.

Reversed and remanded.

WINTER v. STATE.

(Supreme Court of Alabama. May 14, 1902.)

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—INSTRUCTIONS—EFFECT OF THE EVIDENCE.

1. On a trial for selling intoxicating liquors without a license, it is error for the court to state in the charge to the jury, "That there was a sale of the liquor in this case appears from the evidence almost without dispute."

2. On a trial for selling intoxicating liquor without a license, a witness testified that he said he would like to get some whisky, and asked what a half pint would cost, and that defendant said he did not know of any, but might find some, and supposed it would cost 35 cents. Witness then threw 35 cents on the ground, and they both left. In about half an hour witness saw defendant, and asked about the whisky, and he told where he had put it. Witness then went to the place and found the whisky. The court charged that, if the jury "believed from the evidence, beyond all reasonable doubt, defendant's conduct was a subterfuge to sell his own whisky, or that he was acting as agent for some one else who owned the whisky in making the sale, if such a sale was made, he is guilty." *Held* not error.

3. Defendant's request to charge that, "if the jury have a reasonable doubt growing out of the whole evidence or any part of it" whether he sold the liquor to the witness, or merely acted as his agent in procuring it, they cannot convict, was properly refused as predicated an acquittal on a part of the evidence.

4. Defendant's request to charge that "there is no presumption in this case that defendant was a man who had liquor to sell" was properly refused, as he might have been found guilty though he had no liquor to sell.

5. It is not error to refuse to give a charge which is a substantial duplicate of a charge given.

Appeal from circuit court, Cherokee county; J. A. Bilbro, Judge.

J. H. Winter was convicted for selling intoxicating liquors without a license, and appeals. Reversed.

The appellant in this case, J. H. Winter, was indicted, tried and convicted for selling spirituous, vinous and malt liquors without a license and contrary to law. Upon the trial of the case, only one witness, Dal Keener, was examined. He testified that he met the defendant in Centre, Cherokee county, and stated to him that he would like to get some whisky; that the defendant replied that he did not know of any, but said that he might find some; upon being asked what a half pint would cost, he said he supposed it would cost 35 cents; thereupon the witness threw 35 cents on the ground in the defendant's presence and left; that the defendant also left and in about half an hour he, the witness, saw the defendant and asked him about the whisky and the defendant told him where he had left it on the side of the road about a quarter of a mile from where he had first seen the defendant. This witness

further testified that when the defendant left him he went in the direction of his home, and that the whisky was placed not very far from the defendant's home.

Among the portions of the court's oral charge to which exceptions were separately reserved and which are set forth in the opinion, were the following: (a) "If you believe from the evidence beyond all reasonable doubt defendant's conduct was a subterfuge to sell his own whisky to the witness then he would be guilty." (b) "If defendant had no interest in the whisky, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whisky in making a sale to the state witness, Keener, if such a sale was made, he is guilty."

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if the jury have a reasonable doubt growing out of the whole evidence or any part of it, whether the defendant sold the liquor to the witness or was interested in the liquor or the money thrown down by the witness or whether the defendant acted merely as the agent of the witness in procuring the liquor for him then the jury cannot convict him." (2) "There is no presumption in this case that defendant was a man who had liquor to sell." (3) "The jury are not authorized to guess at defendant's guilt, but must find him not guilty unless they are convinced by the evidence beyond all reasonable doubt and to a moral certainty that defendant sold the liquor as charged in the indictment."

H. W. Cardon, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. Only one witness was examined, and that one on the part of the state. His evidence tended strongly to show that defendant sold him at the time and place mentioned, a half pint of whisky, for the price of 35 cents.

In its general charge to the jury, the court stated in a manner not objected to, what constituted a sale, and told them that the state must show beyond all reasonable doubt, that the defendant sold the whisky in question to the party alleged, or, that not being the owner of nor interested in it, nor interested in the money paid for it, if any was paid, he was acting in the sale for the owner of the whisky. After this statement, the court stated to the jury,—"That there was a sale of the liquor in this case appears from the evidence almost without dispute." To this statement, the defendant excepted. This was a charge on the effect of the evidence, an error which was not relieved by other portions of the oral charge in which it appeared,—the question as to whether there was a sale or not, being one for the determination of the jury under all the evidence.

Parts of the oral charge marked "A" and "B," were separately excepted to. These were given in connection with that part of the charge set out above, to which exceptions were reserved, and in the same connection, as a part of the same oral charge,—“That before they [the jury] could convict the defendant, they must believe from the evidence beyond all reasonable doubt, that the defendant sold the whisky to the witness, Keener, or that if he did not own the whisky, he aided and assisted in the sale as the agent of the owner,” etc. When construed with reference to and in connection with the entire charge, and the evidence in the case, these excepted portions of the charge, did not contain reversible error. The one marked “A,” thus construed, did not assume that defendant sold his own liquor.

The first charge refused to defendant, was substantially given in charges 1, 2, and 3 requested by defendant; but, without reference to this, it was bad, in that it predicated an acquittal on a part of the evidence. *Nicholson v. State*, 117 Ala. 32, 23 South. 792; *Winter v. State* (Ala.) 31 South. 717.

Charge 2 was properly refused as tending to mislead the jury. Defendant might have been properly found guilty under the evidence, notwithstanding he was not a man who had liquor to sell.

Without reference to other infirmity in charge 3, refused to defendant, it was a substantial duplicate of charge 6 given, and its refusal may be justified on that ground.

For the error indicated the judgment below is reversed and the cause remanded.

Reversed and remanded.

TREADWELL v. TORBERT.

(Supreme Court of Alabama. May 14, 1902.)
ACTION TO CANCEL DEED—POSSESSION—
QUIETING TITLE.

1. Where the grantor in a deed which was procured by duress or other fraud is not in possession of the land, and can bring ejectment, he cannot maintain an action in equity to cancel the deed or remove cloud from his title.

2. Where the grantor in a deed which was procured by fraud delivered possession to the grantee, he cannot regain possession, so as to maintain an action in equity to cancel the deed, by contracting with the tenants of such grantee to lease the premises to them.

Appeal from chancery court, Geneva county; W. L. Parks, Chancellor.

Action by Fannie O. Treadwell against O. C. Torbert. From a judgment for defendant, plaintiff appeals. Affirmed.

It was averred in the bill that on June 27, 1895, the complainant executed to the defendant a deed in which she conveyed certain lands, specifically described; that said deed was procured from the complainant by the defendant by fraud and duress, and by unlawful acts on the part of the defendant; that prior to the execution of said deed the

defendant instituted a prosecution against H. P. Treadwell, the husband of the complainant, by making an affidavit before a justice of the peace charging him with obtaining a large sum of money by false pretenses; that there was no ground for said prosecution; that said Treadwell had not obtained money by false pretenses, as charged, and that the prosecution was commenced by the defendant for the express purpose of extorting from the said H. P. Treadwell or the complainant the deed to the property described; that immediately after the arrest, and while Treadwell was under bond for his appearance, the defendant commenced to make propositions of compromise, and finally proposed to the complainant that, if she would execute a deed to the lands described in the bill, he would dismiss said prosecution, at the same time representing to her that, if this was not done, her husband would be convicted of the offense charged, and would be sent to the penitentiary; that by reason of said fraudulent representations, and by duress incident thereto, the complainant was induced to execute said deed to the defendant. It was then further averred that said charge was absolutely false, and that, although the deed expressed a consideration of \$1,500, no consideration was paid, whatever, and that said deed was obtained from the complainant by reason of the representations and duress, as stated. It was then alleged in the bill that the complainant was at the time of the filing of the bill in the possession of the property described in the bill, and conveyed in said deed. The prayer of the bill was that said deed be canceled as a cloud upon the complainant's title. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

Mulkey & Mulkey, for appellant. G. P. Harrison, J. J. Morris, and C. D. Carmichael, for appellee.

SHARPE, J. In controversies involving merely disputed questions of fact affecting title to land freed from matters calling specially for relief in equity, the right of trial by jury prevails, and for the settlement of such disputes courts of law afford the appropriate remedies. Duress, when employed to procure a conveyance of property, is a species of fraud, and is not of itself a ground of equitable jurisdiction. Hence one who would sue only to avoid his deed to lands by fraudulent practices, and whose asserted title and estate are such as would support ejectment, cannot bring his case under the jurisdiction which exists in equity to cancel deeds

and undivided titles, unless he is in possession of the land, and is so disabled to sue in ejectment. *Peeples v. Burns*, 77 Ala. 290.

Nor will possession gained by a wrong to his adversary serve in such case to give a complainant standing in equity, for equity will not so encourage unfairness; and consequently this court has held unavailing to a complainant a possession obtained by having tenants of his adversary attorn to him, because in so doing the complainant co-operated with the tenants in violating the duty they owed their landlord of surrendering to him possession at expiration of the lease. *Fleming v. Moore*, 122 Ala. 390, 26 South. 174; *Campbell v. Davis*, 85 Ala. 56, 4 South. 140.

In the present case the main facts relating to possession, as we find them from the evidence, are as follows: Soon after the deed in question was executed, defendant was let into the possession of the property it conveyed, and which consisted mainly of farm lands, though two town lots were included. The lots were vacant, and no acts of ownership over them are shown to have been done by either party, except that defendant has paid taxes on them and offered them for sale. Defendant rented the farm lands in 1896 and 1897 to a tenant who cultivated part, and sublet the remainder of what he had rented. In 1898 this tenant refused to surrender the lands to defendant, and suffered the subtenants to remain thereon. The possession of these lands on which complainant relies is such only as she holds by virtue of a contract whereby she agreed to rent the land to those persons who had previously rented from defendant's tenant, and through the occupation of those persons as her tenants. The duty of surrendering possession at the end of the rental term rests on the subtenant no less than on the first tenant. *Russell v. Irwin's Adm'r*, 38 Ala. 44; 18 Am. & Eng. Enc. Law, 403. Complainant, by contracting with them for their continued occupation, encouraged them to violate that duty, and in doing so was culpable in no less degree than if they had been the original tenants.

The principle applied in *Fleming v. Moore*, *supra*, governs this case, and under it the decree will be affirmed.

ACREE et al. v. DABNEY.

(Supreme Court of Alabama. May 13, 1902.)

WILLS—LIFE ESTATE—REMAINDER IN FEE—GRANT BY REMAINDER-MEN—DEATH BEFORE LIFE TENANT—TITLE OF VENDEE.

1. Testator devised land to his wife, on her death to be equally divided between his children then surviving in equal shares. The next item of the will gave certain personality to his three children, named, to be equally divided, "together with the foregoing bequest to their mother after her death." *Held*, that it was clearly the intent to devise to the three children *eo nomine* the fee in the land.

2. Testator devised land to his wife for life, with remainder in fee to be equally divided between such of his three sons as might sur-

vive the wife. The sons, prior to the life tenant's death, gave warranty deeds of the land to defendant, and all the sons died before the life tenant. *Held*, that the sons took a vested estate, not divested by the happening of the contingency of the survivorship of one or more of them of the life tenant, and hence their deeds passed the fee.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Action by Jane Acree and others against Jesse Dabney. From a judgment for defendant, plaintiffs appeal. Affirmed.

This was a statutory action of ejectment, brought by the appellants, as children of James and Samuel Oliver, against the defendant Jesse Dabney, to recover certain lands specifically described in the complaint. The cause was tried by the court without the intervention of a jury upon an agreed statement of facts, and the claims of the plaintiffs and the defendant, respectively, are shown in the opinion. Upon such facts the court rendered judgment in favor of the defendant, to the rendition of which judgment the plaintiffs duly excepted. The plaintiffs appeal, and assign as error the rendition of judgment for the defendant.

R. T. Goodwyn and Jennings J. Pierce, for appellants. Joseph Callaway and Hill & Hill, for appellee.

TYSON, J. This is an action of ejectment, brought by the children of James and Samuel Oliver to recover the tract of land described in the complaint. The father of James and Samuel, being the owner of this land, made a will, in which he devised it to his wife for life, and "after her death to be equally divided between my [his] children which may then be surviving." The testator left surviving him, in addition to James and Samuel, another son, John, and his wife, the life tenant, Susan. Each of the sons and the life tenant executed warranty deeds of bargain and sale to the land to one Dillard, who went into possession, and afterwards sold it to the defendant. After the execution of these deeds, the sons died, leaving surviving them the life tenant, who also died a short time before the institution of this suit.

Before entering upon a discussion of the nature or character of the remainder to the children, it may be well to dispel any doubt that may exist as to the intention of the testator to expressly devise to his three sons *eo nomine* the fee in the land sued for. To do this it is only necessary to call attention to the second item of the will, which reads as follows: "The other three-fourths of my negroes I do hereby devise and bequeath unto my three children, to wit, Samuel C. Oliver, James McCarter Oliver, and Knoux Ponder [John R.] Oliver, to be equally divided between them, share and share alike, to them and their heirs, forever, together with the foregoing bequest to their mother after her death." Under the principles declared in *Thorington v. Hall*, 111 Ala. 323, 21 South. 335, 56 Am.

St. Rep. 54, *Smaw v. Young*, 109 Ala. 528, 20 South. 370, and *Kumpe v. Coons*, 63 Ala. 448, the wife took a life estate in the land, and each of the children of the testator, the three sons, took a vested remainder, subject to be divested. In the cases of *Thorington v. Hall* and *Smaw v. Young* there was a divestiture of the share or shares of those of the remainder-men who died before the life tenant, since there was a surviving remainder man or men to take. In the case in hand there is no surviving child or remainder-man to take upon the termination of the life estate, since all of them died before the life tenant. The event or contingency upon which the estate already vested was to be divested did not happen. Where this is the case, the rule is that "an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen. Applying this rule of construction, in *Harrison v. Foreman*, 5 Ves. 207, where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties, and, in case of the death of either of them in the lifetime of A., then the whole to the survivor living at her decease. Both died in her lifetime; and Sir R. P. Arden, M. R., held that the original gift was not defeated. So, in *Sturges v. Pearson*, 4 Madd. 411, it was held that a gift to a person for life, and after his death to his three children, or such of them as should be living at the time of his death, conferred a vested interest on the children, subject to be divested only in favor of those who should be living at the prescribed period; so that, if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives. * * * So, in *Belk v. Slack*, 1 Keen, 238, where a testator gave the residue of his real and personal estate to trustees, upon trust for A. for life, and after the decease of A. and B. he gave the same to C. and D., to be equally divided between them, share and share alike, or to the survivor or survivors of them, C. and D. both died in the lifetime of A. and B., and it was held that their respective representatives were entitled to the several moieties of the residue." 1 Jarm. Wills, pp. *785, *786, top pp. 799, 800. See report of these cases in 5 Ves. 207; 4 Madd. 441; 1 Keen, 238. In *Page v. May*, 24 Beav. 323, the testator bequeathed his reversionary interest in the £1,000 consols to his mother for her life, and at her decease he gave and bequeathed them to his servant, Sarah Triggs, for life, "and after her decease he gave the said £1,000 to John, Edward, and Samuel Page, to be equally divided, share and share alike, or, in case of the demise of each or either of them, to be divided between the survivors or survivor or their representatives." The three legatees John, Edward, and Samuel died in the lifetime of Sarah, who survived the first life tenant, the mother. The court said: "The three legatees having died in the life of the tenant for life, the question is whether this

legacy took effect or went over. I am of opinion that it falls within the case of *Harrison v. Foreman*, supra, and that class of cases. It is, in effect, an alternative bequest to them, and, if one or two of them happened to die, and two or one of them survived the tenant for life, then the whole would go to the survivors or survivor, as the case might be. But the first bequest to the three was a vested gift, liable to be divested on the happening of a particular event, which did not occur, namely, of there being survivors or a survivor at the death of the tenant for life." In *Littlejohns v. Household*, 21 Beav. 29, the testator, by his will, devised a house to his three daughters, Catherine, Ann, and Elizabeth, for life, and after their decease to his three grandchildren, Catherine, Christiana, and William, their heirs and assigns, share and share alike; and he authorized his trustee to convey the house to his said grandchildren, their heirs and assigns, in such shares as aforesaid. And in the event of the death of either of his said grandchildren in the lifetime of his said daughters, then the testator desired that the share of them so dying should be transferred to the survivors, and, if only one should be living, then to him or her so surviving. The court said: "I think there is not much difficulty on the face of this will. There is a plain gift for life, in the first instance, to the testator's daughters, and there is a clear vested remainder to the three grandchildren as tenants in common in fee, which cannot be taken away or divested except by express words. The words are: [His honor read the devesting clause]. Those being the words, the question is, in the first place, when is the transfer of the estate to take place? It can only take place after the death of the surviving tenant for life; that is, after the death of the surviving daughter of the testator. The same period must be the time for divesting the estate, in case it was divested. 'Surviving,' therefore, at the end of the clause, means surviving the last tenant for life. The case of *Cripps v. Wolcott*, 4 Madd. 11, therefore, clearly applies to this case, and this is made clear by the word 'transferred,' because there could be no transfer till after the death of the last tenant for life: and *Sturges v. Pearson*, supra, also applies, for in that case the gift was a vested interest, subject to be divested in favor of survivors; but none survived, and therefore there was no divesting." See, also, 29 Am. & Eng. Enc. Law (1st Ed.) 467, and note 2. This rule of construction has been fully recognized and enforced by this court in *Sherrod v. Sherrod's Adm'rs*, 38 Ala. 537; *Drew's Adm'r v. Drew*, 66 Ala. 455; and *Grimball v. Patton*, 70 Ala. 626. The plaintiffs' fathers having a vested estate, which was never divested by the happening of the contingency of survivorship of one or more of them of the life tenant, their deeds operated to pass the fee to the defendant's grantor, and therefore to preclude their recovery.

Affirmed.

ELSTON et al. v. ROOP et al.

(Supreme Court of Alabama. May 22, 1902.)

DETINUE—PLEAS—CONTRACTS—ATTESTING—MORTGAGES DESCRIBED AS AGENTS—RIGHT TO POSSESSION—DAMAGES—EVIDENCE.

1. Plea in detinue for certain articles, alleging that the title is partly based on a mortgage, presents no material issue.

2. Plea in detinue for certain articles, alleging fraud in the procuring of a mortgage, without showing that plaintiff's title to or right to recover the property depends on or is affected by the fraud, is bad.

3. A writing, though signed by mark, may be attested by one who did not see the parties sign it; they appearing before him and acknowledging the signature as theirs, and requesting him to attest.

4. Description in a mortgage of the mortgagees as agents of another does not prevent title to the property vesting in them, so that they may maintain action therefor.

5. A mortgage on its face importing a present conveyance of property as security for a debt to accrue on the mortgagor's failure to do something, and not postponing the mortgagees' right to possession, or making it depend on such failure, entitles the mortgagees to immediate possession.¹

6. A stipulation in contract for \$300 liquidated damages in case of failure to perform, even if regarded as one for a penalty, is sufficient evidence to authorize a finding of that amount of damages.

Appeal from city court of Anniston; James W. Lapsley, Judge.

Action by Roop & Sewell against Jarrett Elston and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

This was an action of detinue to recover the possession of a horse, a mule, a buggy, and wagon, and the value of the hire or use of such property during the detention thereof. The case was instituted in a justice of the peace court, and was carried to the city court of Anniston by appeal. In the city court the defendants filed the following pleas: "(1) And now come the defendants and say they are not guilty, and do not detain the property sued for and described in the complaint. (2) Defendants further suggest that the title in suit is partly based upon a mortgage. (3) Defendants say that they undertook to make a joint contract with F. L. Gardner to carry the mail on route 24,316, from Zula to Anniston, for a term of one year, and that the defendants were told by one Sewell, one of the plaintiffs in this case, that the contract referred to the mortgage contained the agreement, and that, relying on the representations of Sewell, they undertook to execute said contract and the mortgage sued on, and that said Sewell misled them as to the time, and that, immediately upon the discovery of the fraud practiced in the procuring of the signatures of defendants, they at once notified F. L. Gardner that they would not undertake to carry said mail for four years, as named in the contract." The plaintiffs demurred to the third plea upon the following grounds: "(1) Said

plea fails to show what connection the contract and mortgage therein referred to have with the plaintiffs' suit. (2) For that no sufficient facts are alleged to show that said contract and mortgage, if they are the basis of the suit, are not valid and binding. (3) For that said plea does not show any such false and fraudulent representations by plaintiffs, or any one for plaintiffs, as would avoid either the contract or mortgage referred to in the plea." The plaintiffs also moved to strike the third plea upon the ground that said plea is frivolous, and falls to show wherein it would afford a defense, and states no issue involved in the cause. The plaintiffs moved to strike the defendants' suggestion numbered 2 from the file upon the following grounds: (1) No facts are stated in said plea to show that plaintiffs claimed title to the property sued for by the terms of the mortgage; (2) that the fact that plaintiffs base their right to recovery partly on a mortgage is no defense to the suit; (3) that said suggestion falls to state sufficient facts to authorize the court to ascertain any fact or issue in the case. The court sustained the plaintiffs' demurrers to the defendants' third plea, and also the motions to strike the second and third pleas.

On the trial of the cause the plaintiffs introduced one George J. Stone, who testified, against the defendants' objection, that the defendants came before him and admitted that they signed a certain mortgage which was given to Roop & Sewell; that he did not see the defendants sign said mortgage, but that the defendants swore before him that they had signed the same, and that Jarrett Elston said to him that he made his mark opposite his name to said mortgage; that thereupon the witness signed his name as a witness to the signature of the defendants to said instrument, and attached his notary public seal thereto. The paper referred to in the testimony of the witness Stone, which purported to have been signed by the defendants in the presence of the witness Stone, was as follows: "State of Alabama, Calhoun County. Five days after failure to transport the U. S. mail on route No. 24,316, from Anniston to Zula, from Aug. 13, 1900, to June 30, 1904, I agree to pay Roop & Sewell, agents for F. L. Gardner, contractor with United States for above-named route, three hundred dollars, liquidated damages, for value received, with interest from the fifth day after failure until paid, at seven per cent. per annum, with all costs of collection, including ten per cent. attorney's fees. And to secure the payment of this note I hereby mortgage and convey unto said payees, their heirs and assigns, the following described property, to wit." There then follows a description of the property sued for in the present action, and also a waiver of the right of exemption. Upon the plaintiffs' offering this instrument in evidence, the defendants objected upon the grounds: (1) That the execution of said instrument had not been proved; (2) said mort-

¹ See Chattel Mortgages, vol. 9, Cent. Dig. § 273.

gage does not show any title in the plaintiffs; (3) that the mortgage was irrelevant and immaterial. The court overruled the objection, and the defendants duly excepted. The defendants then made a suggestion, as provided under the statute, that the mortgage debt be ascertained. Sewell, one of the plaintiffs, testified as a witness that the defendants had never carried the mail under the written contract which they signed with F. L. Gardner. It was further shown that the defendants were in possession of the property at the time of the institution of the suit. Each of the defendants, as a witness, testified that they did not know at the time of executing the mortgage introduced in evidence that they were signing such paper; that they had agreed with F. L. Gardner, upon representations made to them, that they would carry the mail, but that they had never agreed to execute the mortgage introduced in evidence; and that said mortgage was not read over to them before it was signed by them, nor did they know its contents. In rebuttal, Sewell, one of the plaintiffs, and George Stone, each testified that the mortgage was read over to the defendants before they signed and executed the same. The cause was tried by the court without the intervention of a jury. Upon the introduction of all the evidence, the court rendered judgment in favor of the plaintiffs; and, in accordance with the suggestions on the record that the suit was by the mortgagee against the mortgagor, the court ascertained the amount of the mortgage debt to be the sum of \$300. To the rendition of this judgment the defendants duly excepted. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

E. H. Hanna, for appellants. Coleman & Blackmon, for appellees.

SHARPE, J. Plea 2 to the complaint filed in the city court did not present a material issue; nor, from anything appearing in the pleadings, could it be seen that plea 3 presented a defense, since it attempts only to set up fraud in the execution of a mortgage, without showing that plaintiffs' title to or right to recover the property depended on, or was affected by, the alleged fraud. These pleas were each subject to the demurrers and to the motions to strike.

A writing may be validly attested by one who did not see the parties to it sign, where they appear before him and acknowledge the signatures are their own, and request him to sign in attestation of the fact. 1 Devl. Deeds, § 257; 9 Am. & Eng. Enc. Law, 149, and note 4. In this way Stone's attestation of the mortgage under which the plaintiffs claim was procured, and thereby the mark of Jarrett Elston became a signature, within the meaning of that clause of section 1 of the Code which provides that "'signature' or 'subscription' includes mark when the per-

son cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness."

The fact that plaintiffs were described in the mortgage as agents for Gardner did not prevent title to the property from vesting in plaintiffs. It may be that as between them and Gardner they were only trustees, but they were not for that reason incapacitated to maintain the action. *Baker v. Washington*, 5 Stew. & P. 142; *Pierce v. Jackson*, 56 Ala. 599.

The mortgage, though given to secure performance of a contract with Gardner, was not rendered inadmissible as by the nonproduction of that contract, for under the issues the performance or breach of that contract was not involved. The mortgage, on its face, imported a present conveyance of the property sued for, to the plaintiff, as security for a debt to accrue upon specified contingency, viz., defendants' failure to carry mail on a given route for four years. It contains nothing either expressly or impliedly postponing plaintiffs' right to have possession of the property, or making that right to depend on a failure to perform the contract with Gardner. It therefore entitled the plaintiffs to have possession immediately upon its execution. *Ellington v. Charleston*, 51 Ala. 166; *Heflin v. Slay*, 78 Ala. 180.

The gist of the action was the alleged wrongful detention, and, if the validity of the mortgage be assumed, the detention was wrongful, since the plaintiffs had both the legal title and the right of possession. On the question of whether the mortgage was rendered invalid by fraudulent representations, the burden of proof was on defendants, and the evidence on that issue does not seem to preponderate in their favor.

Upon defendants' suggestion, made under section 1477 of the Code, the court, sitting without a jury, ascertained the amount of the mortgage debt to be \$300, which was the amount expressly stipulated for in the mortgage as liquidated damages to accrue upon the failure of defendants to carry the mail on a given route for four years. This finding was proper, whether the stipulation be regarded as one for liquidated damages or for a penalty. If for the former, the mortgage was security for the whole amount; and, if for the latter, the mortgage was still security for the damages actually sustained by the breach of the agreement; and of this amount the agreement of parties was evidence, upon which the court was authorized to predicate its finding in the absence of other evidence on the subject, of which there was none.

The amount of the debt as ascertained exceeded the value of the property, and therefore the court was not, under the statute, required to so frame the judgment as to allow defendants to pay the debt and costs in discharge of their liability to execution on the principal judgment; but the fact that

the judgment was so rendered did not injure the defendants, and was therefore not error entitling them to a reversal.

The judgment will be affirmed.

MOSELEY v. COLLINS et al.

(Supreme Court of Alabama. May 20, 1902.)

MANDAMUS — PETITION — ALLEGATIONS — DEMAND FOR RELIEF — DEPRIVATION OF RIGHT — RELIEF FROM VOID ACT.

1. Where, on mandamus to compel the elders of a church to strike from its memorials a writing purporting to have been made by the corporation canceling relator's name on the membership roll, which writing is alleged to be the unauthorized act of respondents, the petition fails to allege a demand on respondents for the action desired, the writ is properly denied.

2. The act of respondents, if unauthorized, as alleged, having deprived relator of no rights, his petition did not show him entitled to the writ.

Appeal from circuit court, Madison county; O. Kyle, Judge.

Mandamus by the state, on the relation of Anthony W. Moseley, to compel Ira F. Collins and others to cancel a writing purporting to cancel relator's name on the membership roll of the Christian Church of Huntsville. From a judgment dismissing the petition, relator appeals. Affirmed.

This is a petition addressed to the judge of the circuit court of Madison county, and filed by the appellee, Anthony W. Moseley, seeking, by mandamus, to have the petitioner restored to his rights and franchises as a member of the Christian Church of Huntsville, Ala., a corporation created and organized under the general laws of this state. Under the opinion on the present appeal it is unnecessary to set out the facts of the case in detail. On the hearing of the cause the court rendered judgment denying the writ of mandamus, and ordered the petition dismissed. From this judgment the petitioner appeals, and assigns the rendition thereof as error.

Robt. C. Brickell and Oscar R. Hundley, for appellant. Cooper & Foster, for appellee.

TYSON, J. The petition for mandamus in this case proceeds upon the theory that no corporate action had ever been taken by the corporation in excluding the petitioner from the exercise of his rights as a member and as an officer. Indeed, it is averred that no vote of the members comprising the corporation was had directing the striking of his name from the roll of membership, but that it was the unauthorized act of the respondents Collins and McBride, assuming to act in their official capacity as elders. The prayer of the petition is for a writ of mandamus directed to the corporation, to Ira F. Collins, Jesse B. Boyd, and S. E. Collins, commanding that a certain paper writing purporting to have been adopted by the members of the

corporation directing the church registrar to cancel the name of petitioner on the roll of membership be stricken from the file of the record or memorials of said church, and that any minute entry or record of the proceedings on said paper writing may be expunged; and further commanding that his name be restored to the roll of membership of said church. On the hearing the petition was dismissed, and this appeal is prosecuted from that judgment.

Premitting a discussion or decision of the question as to whether the wrongs complained of are not solely for the cognizance of an ecclesiastical tribunal, purely ecclesiastical or spiritual, involving the right of the church to exclusively determine, we think it clear, treating the case as made by the petition as one involving property rights, that its dismissal was proper. To entitle the petitioner to this extraordinary writ, he must show that he has a clear right to the performance of the act or duty demanded, and that on demand the respondents have neglected or refused performance. "The invariable test by which the right of a party applying for a mandamus is determined is to inquire—First, whether he has a clear legal right; and, if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right." *Speed v. Cocke*, 57 Ala. 215; *Ex parte Edwards*, 123 Ala. 102, 26 South. 643; *Hill v. Tarver* (Ala.) 30 South. 499. In *Merrill on Mandamus* the rule is stated to be: "When the duty sought to be enforced is of a private nature, affecting only the right of the relator, a personal demand is necessary; and it is also necessary if the duty sought to be enforced is of such a character that it could not be expected to be performed till demanded. Decisions that there must be an express and distinct demand or request to perform must be confined to such cases. Where, however, the duty is of a purely public nature, wherein no individual right or duty is concerned, and where there is no one person upon whom either a right or duty devolves to make a demand of performance, an express demand or refusal is not necessary." Section 224. The same author says: "Since this writ never issues against a party unless he is in default, it must clearly appear by the allegations of the petition that a demand has been made on him to fulfill his duty and perform the act desired. * * * When an averment of a demand is necessary, the lack of such averment is fatal, even though the trial court may find such a request and refusal. * * * When a demand is necessary, the fact that it was made must be alleged with precision." Section 257. Again, he says: "It must appear by the allegations of the petition that the party complained of refused or failed to comply with the demand to fulfill his duty." *Moses on Mandamus*, on page 18, states the rule to be: "In order to lay the foundation for issuing a writ of mandamus, there must

have been a refusal to do that which it is the object of the mandamus to enforce, either in direct terms or by circumstances distinctly showing an intention in the party not to do the act required." In *Tapping's Mandamus*, p. *282, it is said: "It is an imperative rule of the law of mandamus that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand either in direct terms or by conduct from which a refusal can be conclusively implied; it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the court for the purpose of compelling him." This latter quotation was adopted and enforced by the supreme court of the United States as announcing the correct rule in *U. S. v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721. See, also, *Heard Shortt*, Extr. Rem. pp. *247, *248; *High*, Extr. Rem. §§ 12, 13; *State v. Lehre*, 7 Rich. Law, 230; *Oroville & V. R. Co. v. Plumas County Sup'rs*, 37 Cal. 362; *People v. Town of Mt. Morris*, 137 Ill. 579, 27 N. E. 757; *State v. Schaack*, 28 Minn. 359, 10 N. W. 22; *State v. Davis*, 17 Minn. 431 (Gil. 406); *State v. Smith*, 31 Neb. 590, 48 N. W. 468; *Douglas v. Town of Chatham*, 41 Conn. 211; *Lee Co. v. State*, 36 Ark. 276; *Grand Co. v. People*, 8 Colo. App. 43; *State v. Mayor, etc., of City of Jacksonville*, 22 Fla. 25, 26; *Leonard v. House*, 15 Ga. 473; *Lake Erie & W. Ry. Co. v. State*, 139 Ind. 158, 38 N. E. 596; *Compton v. Airlal*, 9 La. Ann. 496; *Chesebro v. Kent Circuit Judge*, 70 Mich. 650, 38 N. W. 658. An analogous principle has often been recognized by this court in suits brought by stockholders against corporations of which they are members to correct alleged corporate wrongs. In those cases it has been uniformly held that generally, before the stockholder can maintain an action against the corporation, he must first make demand upon the managing board of officers to correct the wrongs complained of, and, meeting with failure or refusal, he must next seek redress through the stockholders as a body. *Land Co. v. Palm*, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140; *Development Co. v. Tritsch*, 110 Ala. 274, 20 South. 16; *Steiner v. Parsons*, 103 Ala. 215, 13 South. 771; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 212. We have but to apply these principles to the petition in this case. No demand and refusal upon the church is averred. Non constat, the wrongs complained of would have been righted by that corporation had it been requested to do so. *Parker v. Hubbard*, 64 Ala. 203. While it is doubtless immaterial, we call attention to the fact that the evidence shows that no request or demand was ever made upon the corporation to right the wrongs alleged. It is hardly necessary to add, in conclusion, that the acts

of the respondents Collins, Boyd, and Collins, if unauthorized and void, as averred in the petition, did not and could not operate to deprive the petitioner of any of his rights as a member or officer in the corporation. It is unnecessary to notice any of the exceptions reserved upon the trial, since they cannot change the result.

The judgment refusing the writ and dismissing the petition must be affirmed.

MITCHELL v. STATE.

(Supreme Court of Alabama. May 21, 1902.)

HOMICIDE—EVIDENCE—CHARACTER OF DECEASED—REBUTTAL—INSTRUCTIONS—SELF-DEFENSE—DEFENSE OF ANOTHER—RETREAT.

1. Where, on a prosecution for murder, defendant introduced evidence tending to show deceased a violent and bloodthirsty character, testimony that he was a "good, fair, average man" was not objectionable as not in rebuttal, especially as defendant might have examined the witness as to whether he meant deceased was peaceable and quiet.

2. On appeal from a conviction of manslaughter under an indictment for murder, the refusal of instructions having reference to murder requires no consideration.

3. On a prosecution for murder the defendant requested an instruction that flight of a defendant, although a circumstance to be considered by the jury in connection with all the evidence, is evidence of a weak and inconclusive character; that it may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt; that flight may proceed from an unwillingness to stand a public prosecution, or from fear of the result from an inability to explain false appearances, or from the advice of friends to avoid public excitement; and, if it proceeded from any one or more of such reasons, then flight is not evidence of guilt at all. *Held* properly refused, because argumentative, and calculated to mislead.

4. On a prosecution for murder it was not error to refuse to charge that the jury, in considering the testimony of the children of deceased, should weigh it in view of the fact that they were his children, and of the interest they felt in the case.

5. Where, on a prosecution of three persons jointly indicted for murder, there was some evidence tending to show a conspiracy between them to commit the crime, it was proper to refuse instructions to the effect that there was no evidence of conspiracy.

6. On a prosecution for murder the evidence tended to show that deceased had threatened defendant's life, and that a short time before the killing the two sons of the defendant started towards their home by deceased's house; that when they got to his house they saw his son carrying a gun to him, and that thereupon one of the sons turned back, and went to where the defendant was, and he went with the son to deceased's house, carrying his gun; that as deceased saw the defendant coming he ran across the road to his house, calling to his daughter to bring him his gun quickly; that the defendant saw the daughter carrying the gun to her father, and when deceased was within 10 or 15 steps from his daughter the defendant fired upon him. The court refused to instruct that a defendant is warranted in acting more promptly when assailed by one who has threatened his life than when assailed by one who has not. *Held* properly refused; if for no other reason, because it ignored any reference to defendant's part in commencing the difficulty.

7. For the same reasons it was proper to refuse to charge that a defendant is warranted in acting more promptly in his own defense when assailed by a man of violent character than when assailed by one of law-abiding character.

8. For the same reasons it was proper to refuse to charge that the jury had a right to look to the character of the deceased, and that evidence tending to show that the deceased was a man of violent character was proper for consideration in connection with all the evidence in determining who was the aggressor in the difficulty, and in determining what impression the conduct of the deceased at the time of the killing made upon the mind of the defendant.

9. No error can be predicated on refusal to give an instruction substantially embraced in the charge.

10. The defendant requested the court to instruct that, if the jury believed, from all the evidence, that there were appearances of danger surrounding defendant at the time of the difficulty, then, in determining whether such appearances were sufficient to produce in the mind of the defendant a reasonable belief that his life was in danger, they should determine the sufficiency of such appearances of danger from the standpoint then occupied by the defendant as he was then surrounded, and if, after thus considering the evidence, the jury had a reasonable doubt as to whether such appearances were sufficient to produce such a reasonable belief in the mind of the defendant, and if defendant did not provoke the difficulty, and there was no other reasonable means of escape, and if, under these circumstances, defendant killed the deceased, then it was self-defense, and the jury should acquit the defendant. *Held* properly refused, because it did not hypothesize the belief of defendant that he was in imminent peril.

11. The instruction was properly refused because not clearly stating the doctrine of imminency of peril and of escape therefrom.

12. The court refused to charge that, while the slayer who is free from fault in bringing on the difficulty must use all possible means of retreat to avoid the fatal act, yet where it is reasonably apparent that he is about to be assailed with a deadly weapon by the deceased in such a manner as apparently to subject him to danger of losing his life, if he is not in a position to avoid it reasonably, the law does not require him to wait until his adversary gains a position equal to his own, and is upon equal terms with him in all respects, but under such circumstances he may lawfully slay his adversary so soon as it appears reasonably from his adversary's acts that a mortal combat is unavoidable. *Held* properly refused, since, as applicable to the case, it assumed the slayer free from fault in bringing on the difficulty.

13. The charge was erroneous as inculcating the repudiated doctrine that, if a defendant is in a position of advantage over his adversary, who is about to assault him, he may hold his position, even to the point of slaying his adversary, and make no effort to retreat, although his danger is not increased thereby.

14. It was proper to refuse a charge which was open to the construction of placing no duty of retreat on defendant at a time when deceased was fleeing to his house.

15. It was proper to refuse to charge that if, when defendant started to deceased's, he entertained the purpose of engaging in a difficulty with deceased if such should be necessary to protect his son against an unprovoked and felonious assault by deceased, if such should be made, such fact would not make the defendant the aggressor in the difficulty, since, notwithstanding the facts hypothesized, the jury might have found defendant the aggressor.

16. For the same reason it was proper to refuse to instruct that an intention, when the

defendant started back towards deceased, to kill the latter if it should become necessary to protect his son against a felonious and unprovoked assault, would not make the defendant at fault in bringing on the difficulty.

Appeal from circuit court, Marshall county; J. A. Bilbro, Judge.

D. P. Mitchell was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The appellant in this case, D. P. Mitchell, was indicted jointly with his two sons, for the murder of one Dave Thompson by shooting him with a gun, was tried separately and convicted of manslaughter in the first degree and sentenced to the penitentiary for five years.

On the trial the evidence for the state tended to show that as the defendant, in company with his two sons, was passing by the house of the deceased, Dave Thompson, said Thompson ran across the road towards his house and as he got near his porch the defendant fired upon and killed him. That the defendant was near the gate opening into Thompson's yard, at the time the fatal shot was fired. There was some evidence on the part of the state tending to show that there was a conspiracy between the defendant and his two sons for the killing of such Thompson. That Thompson had a few days prior to his killing snapped a gun at one of the sons of the defendant.

The evidence for the defendant tended to show that a short time before the killing, the two sons of the defendant who were jointly indicted with him, started towards their home by Thompson's house; that when they got to Thompson's house they saw his son carrying a gun to him, and that thereupon one of the sons turned back and went to where the defendant was; that thereupon the defendant went with him to Thompson's house carrying his gun; that as Thompson saw the defendant coming, he ran across the road to his house calling to his daughter to bring him his gun quickly; that the defendant saw Thompson's daughter carrying the gun to him, and that when Thompson was within 10 or 15 steps from his daughter, the defendant fired upon him. There was evidence introduced on the part of the defendant showing that Thompson had made threats against the defendant and his sons, and had stated that he was going to kill him. The daughter and his two sons testified as witnesses for the state. There was evidence introduced as to the character of the deceased. This is sufficiently shown in the opinion. There was evidence tending to show that after the homicide the defendant fled to Marlow county.

Upon the introduction of all the evidence, the defendant requested the court to give several written charges, and separately excepted to the court's refusal to give each of said charges. Charges 1 to 7 inclusive relate to murder and it is, therefore, unnecessary to

set them out in detail. The other charges, to the refusal to give each of which the defendant separately excepted, were the following: "(8) The court charges the jury that flight of a defendant although a circumstance to be considered by the jury in connection with all the other evidence, is evidence of a weak and inconclusive character. It may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution or from fear of the result; from an inability to explain false appearances, or from the advice of friends to avoid public excitement, and if it proceeded from any one or more of these reasons, then flight is not evidence of guilt at all." "(10) The court charges the jury that in considering the testimony of Maggie, Francis and David Thompson, they must weigh it in the light of the fact that they are the children of the deceased, and of the material interest they feel in the case." "(12) The court charges the jury that there is no evidence that the killing in this case was in pursuance of any conspiracy. (13) The court charges the jury that there is no evidence in this case of any conspiracy between D. P. Mitchell, Lon Mitchell and Lint Mitchell to take the life of the deceased. (14) The court charges the jury that a defendant is warranted in acting more promptly in his own defense when assailed by a person who he knows has made threats of taking his life than when assailed by one who has made no such threats. (14½) The court charges the jury that the law is that a defendant is warranted in acting more promptly in his own defense when assailed by a man of known violent character than when assailed by a person of peaceable and law abiding character. (15) The court charges the jury that they have a right to look to the character of the deceased man and evidence tending to show that the deceased was a man of violent character is proper for their consideration in connection with all the evidence in determining who was the aggressor in the difficulty, and in determining what impression the conduct of the deceased at the time of the killing made upon the mind of the defendant. (16) The court charges the jury that if they believe from all the evidence that there were appearances of danger surrounding defendant at the time of the difficulty, then in determining whether such appearances were sufficient to produce in the minds of the defendant a reasonable belief that his life was in danger, the jury should determine the sufficiency of such appearances of danger from the standpoint then occupied by the defendant as he was then surrounded, and if after thus considering the evidence the jury have a reasonable doubt as to whether such appearances were sufficient to produce such a reasonable belief in the mind of the defendant, and if defendant did not provoke the difficulty and there was no other reasonable means of es-

cape and if under these circumstances defendant killed the deceased then this was self-defense and the jury should acquit the defendant. (17) While the slayer who is free from fault in bringing on the difficulty must use all possible means of retreat to avoid the fatal act, yet where it is reasonably apparent that he is about to be assailed with a deadly weapon by the deceased in such a manner as apparently to subject him to danger of losing his life, if he is not in a position to avoid it reasonably, the law does not require him to wait until his adversary gains a position equal to his own, and is upon equal terms with him in all respects, but under such circumstances he may lawfully slay his adversary so soon as it appears reasonably from his adversary's acts that a mortal combat is unavoidable." "(20) The court charges the jury that if when defendant started back from Joppa to Thompson's he entertained the purpose of engaging in a difficulty with Thompson, if such should be necessary to protect his son Lon Mitchell against an unprovoked and felonious assault by Thompson, if such should be made, this would not make the defendant the aggressor in the difficulty. (21) The court charges the jury that an intention when the defendant started back from Joppa towards Thompson's to kill Thompson, if it should become necessary to do so in order to protect his son Lon Mitchell against a felonious and unprovoked assault at the hands of Thompson, would not make the defendant at fault in bringing on the difficulty."

J. E. Brown and Street & Isbell, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. On the trial, the defendant introduced evidence tending to show that deceased was a man of violent, bloodthirsty character. The state in rebuttal, introduced a witness, who was asked if he knew the general character of the deceased, who answered, that "he was a good, fair, average man." To the question and answer, the defendant objected, because illegal and irrelevant, which objection was overruled. The objection raised in argument is, that the evidence offered is not in rebuttal. It is true the original evidence was as to the violent, bloodthirsty character of deceased. These traits have some bearing on general character, and it is clear the state had the right to rebut such evidence by showing the deceased's reputation for peace and quiet. It would seem that proof that "he was a good, fair, average man," would have some tendency in that direction, and to that end, was not wholly illegal and irrelevant. Moreover, it was open to the defendant, to require the witness to explain what he meant by the expression used, if it was supposed it did not tend to show character for peace and quiet. *Hussey v. State*, 87 Ala. 122, 6 South. 420; *Elland v. State*, 52 Ala. 323.

The defendant was convicted of manslaughter in the first degree, on indictment charging him with murder. Charges from 1 to 7 inclusive, requested by defendant and refused, had reference to murder, and do not, therefore, require consideration. *Evans v. State*, 109 Ala. 11, 19 South. 535; *Winter v. State*, 123 Ala. 1, 26 South. 949; *Fallon v. State*, 83 Ala. 5, 3 South. 525.

Charge 8 requested by the defendant was argumentative and calculated to mislead. There was no error in its refusal. The same charge in substance was condemned on the former appeal. *Mitchell v. State* (Ala.) 30 South. 348.

Charge 9 is not insisted on, for the reason as counsel state, it "finds substantial duplication in given charge No. 36."

Charge 10, that the children of deceased were competent witnesses for the state, and that they testified under whatever influence their relationship to him inspired, was in nowise disputed. That the jury had the legal right to believe or to disbelieve them, as they would any other witnesses in the case, nobody denied. The only effect of the instruction was to draw the attention of the jury to the relationship of the witnesses to deceased, as a matter calculated to throw discredit on their evidence. The charge was a mere argument, which possibly might have been given, but its refusal was equally without error. *Horn v. State*, 102 Ala. 155, 15 South. 278.

Charges 12 and 13, as there was some evidence tending to show a conspiracy between the defendant and his sons, were properly refused.

Charges 14, 14½ and 15, in view of the evidence tending to show that defendant was the aggressor, were each bad, if for no other reason, because they ignore any reference to fault on defendant's part in commencing the difficulty. Similar charges were, for the same reason, condemned on the former appeal. *Mitchell v. State*, 30 South. 348. It may be added, that charge 15 was given substantially in charges 38, 40 and 45.

Charge 16 is faulty. It does not hypothesize the belief of defendant, that he was in imminent peril, nor does it fully and clearly state the doctrine of imminency of peril, and of escape therefrom. *Evans v. State*, 109 Ala. 12, 19 South. 535; *Wilkins v. State*, 98 Ala. 1, 13 South. 312; *Howard v. State*, 110 Ala. 91, 20 South. 365; *Jackson v. State*, 78 Ala. 471.

Charge 17, as applicable to this case, assumes that the slayer is [was] free from fault in bringing on the difficulty, and this is sufficient to condemn it. Moreover, it inculcates the repudiated doctrine, that if a defendant is in a position of advantage over his adversary, who is about to assault him, he may hold his position, even to the point of slaying his adversary, and make no effort to retreat, although his danger is not increased thereby. 1 Mayfield, Dig. p. 804, §§ 55, 57.

Charge 18 was rightly refused. It hypothesizes two different moments of time, on which the instructions are based: First, when Thompson was crossing the road and running towards his house fleeing from Mitchell to a place of safety; and the second, the moment when defendant shot Thompson. As to the first period of time, the instruction is asked, that if Mitchell believed the facts hypothesized, "he had a right to act in the light of this reasonable belief,"—[to do what is not stated, and up to this time, no duty of retreat is put upon him by the charge, but it continues after a comma],—"and if Mitchell was without fault in bringing on the difficulty, and if at the moment he shot [having stood his ground meantime, while Thompson was running for his gun], the appearances were such as to create in his mind, a reasonable belief that he was in danger, etc. * * * and if there was not reasonably apparent to defendant, circumstanced as he then was [at the moment he shot], a means whereby he could escape without increasing his danger, then the defendant would not be guilty," etc. The charge is thus open to the construction, that it seeks to impose no duty of retreat on defendant, from the danger appearing at the first period of time mentioned, when Thompson was fleeing towards his house, and not to impose such duty on him, till afterwards, at the moment when he shot, whereas, he was under this duty, at all times from the inception of the difficulty. If not positively erroneous, it is confusing and calculated to mislead.

Charge 19 is not insisted on in argument, and without reference to that fact, was properly refused. It is confused and argumentative.

Those numbered 20 and 21 were also properly refused. If given, their only tendency would have been to mislead. Non constat the facts hypothesized, the jury, under all the facts of the case, may have believed that defendant was the aggressor and precipitated the difficulty.

Affirmed.

GADSDEN & A. U. RY. CO. v. JULIAN.
(Supreme Court of Alabama. May 22, 1902.)
RAILROADS—INJURY TO INFANT ON TRACK—
NEGLIGENCE—PLEADING.

A complaint against a railway company for running over a person should, though he was an infant, show that when injured he was not a trespasser, or that the persons in charge of the train became aware of his perilous position, and were thereafter guilty of actionable misconduct.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by R. W. Julian, administrator, against the Gadsden & Attalla Union Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The first and fourth counts of the complaint were as follows: "First. The plaintiff, who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant corporation the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor less than eleven years of age, by running against and over plaintiff's intestate with an electric car, which said killing occurred on or about the 22d day of June, 1900." "Fourth. The plaintiff, who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor less than eleven years of age, by running against him with an electric car, which said killing occurred on or about the 22d day of June, 1900, in Etowah county, Alabama." To the first and fourth counts of the complaint the defendant separately demurred upon the following grounds: (1) They show no duty the defendant owed the plaintiff which they negligently failed to perform. (2) They show that plaintiff's intestate was a trespasser on defendant's track, and they aver nothing more than simple negligence in his killing. (3) They do not show the particular act of negligence complained of. (4) They do not state the particular acts or matters which constitute the willful, wanton, or intentional negligence complained of. (6) They are too vague and uncertain. (7) They fail to allege any facts which show willful, wanton, or intentional negligence. There is a recital in the record that "defendant demurs to the third count on the same grounds set out in his demurrer to the second count, assigning each ground separately"; but the grounds of the demurrer to the second count do not appear in the record. The court overruled the defendant's demurrers to the complaint. On the present appeal the defendant assigns as error the court's overruling its demurrers to the complaint.

Dortch & Martin and W. J. Boykin, for appellant. Goodhue & Blackwood, for appellee.

SHARPE, J. Counts 1 and 4 of the complaint are each wanting in particularity of averment in that they fail to show either that plaintiff's intestate, when injured, was not a trespasser on defendant's track, or that defendant's servants in charge of the train became aware of his perilous position on the track, and were thereafter guilty of actionable misconduct. *Railway Co. v. Chewning*, 93 Ala. 24, 9 South. 458; *Railroad Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Railroad Co. v. Robbins*, 124 Ala. 113, 27 South. 422; *Railroad Co. v. Brown*, 121 Ala. 221, 25 South. 609. A child as well as an adult may be a trespasser, and ordinarily a railroad company is under no more obligation to keep a lookout for children who, without enticement for which it is responsible, may go on the track at a place they have no right to

be, than to look out for adults. *Railroad Co. v. Robbins*, supra; *Railroad Co. v. Moorer*, 116 Ala. 642, 22 South. 900; 3 Elliott, R. R. § 1259. Therefore the averment of infancy contained in counts 1 and 4 does not supply the facts essential to show a duty breached. The demurrers to these counts respectively should have been sustained. The demurrer to count 3 fails for want of specific grounds, since it merely adopts the grounds in what is referred to as the demurrer to count 2, and no demurrer to count 2 is found in the record.

Reversed and remanded.

BOSTICK v. JACOBS et al.

(Supreme Court of Alabama. May 21, 1902.)

MORTGAGES—SURETIES—FORECLOSURE SALE—APPLICATION OF PROCEEDS—PRIORITIES—RESALE OF PROPERTY.

1. Where the first to mature of a series of notes is signed by plaintiff as surety, but all the notes are secured by a mortgage, which provides that default in the payment of the note first due shall mature all the notes, but which does not authorize the mortgagee to apply the proceeds of a sale to the payment of certain of the notes to the exclusion of others, the proceeds of a foreclosure sale are to be credited pro rata on all the notes.

2. Where mortgaged property is purchased at a foreclosure by the mortgagee, and sold for an increased price, sureties on notes secured by the mortgage are not entitled to have the proceeds of the latter sale applied to the deficiency on the notes on which they are sureties.

Appeal from chancery court, Jackson county; Wm. H. Simpson, Chancellor.

Suit by F. A. Bostick against J. C. Jacobs, as executor, and others. From a decree in favor of defendants, the complainant appeals. Reversed.

The bill averred substantially the following facts: On July 5, 1898, J. W. Shoemaker purchased a certain tract of land from the defendants for the sum of \$4,000. This was a credit transaction, and Shoemaker executed his four promissory notes to his vendors,—one for \$500, due November 1, 1898; one for \$1,000, due January 1, 1899; one for \$1,000, due November 1, 1899; and one for \$1,500, due January 1, 1900. The complainant, F. A. Bostick, signed the first of these two notes executed by Shoemaker as a surety for said Shoemaker. The defendants conveyed the property to Shoemaker by deed, and Shoemaker executed a mortgage to them upon the same property to secure the payment of the four notes above mentioned. Upon default in the payment of the first two notes, the defendants brought a suit in the circuit court against the appellant as surety on the first two notes, and on March 7, 1899, recovered a judgment against the complainant in the sum of \$7,738.72. On June 12, 1899, the defendants, by virtue of the power contained in the mortgage, foreclosed said mortgage, and at said foreclosure sale became the purchasers of the property for \$1,600. Shortly after the foreclosure of the

mortgage and the purchase of the mortgaged property by the defendants, they sold the property so purchased to one Smith for the sum of \$4,000. It was then averred in the bill that it was understood and agreed between the complainant and Shoemaker on the one side and the defendants on the other that the complainant should be protected as such surety by the mortgage which was to be executed on the property so purchased by Shoemaker and the defendants; that this mortgage was to be primarily for the protection of the complainant, as surety on said two notes; that the mortgage executed was not such a mortgage as was agreed to be given, and did not give to complainant the primary protection agreed upon; that said mortgage not only secured the first two notes, but also the entire indebtedness as evidenced by the other two notes, and that it was stipulated therein that upon the failure to pay either one of said notes the whole mortgage indebtedness should become due and payable, and the mortgage should be foreclosed, and that in this respect the said mortgage departed from the agreement and understanding between the complainant and the defendants; that the complainant was entitled to the benefit of the proceeds arising from the foreclosure of said mortgage, or from any fund realized from the property described in said mortgage, and has the right to have it applied for his benefit on such two notes on which he is surety in preference to the note on which he is not surety; that the defendants have received out of the proceeds of such mortgaged property a sum sufficient to liquidate the two notes which he signed as surety, and that he is entitled to have such notes canceled, and to be discharged from further liability on account of his said suretyship; and that the stipulation contained in said mortgage, as hereinabove stated, providing for the maturity of all the notes upon default being made in the payment of any one of them, was without the knowledge or consent of the complainant. The prayer of the bill was that a reference be taken before the register to ascertain what had been received by the defendants on account of the foreclosure and sale of the mortgage, or any sum specifically received on the resale of the property, "and that the amount so ascertained may be, by the order and decree of this court, applied for the benefit of complainant as said surety on said notes aforesaid, and that, if the amount be sufficient, the same may be canceled, and that the judgment obtained thereon against this complainant may also be adjudged and decreed to be satisfied, and, if said sum should be less than amount necessary to satisfy said notes and said judgment, the same may be applied to the exclusive credit of this complainant pro tanto on said notes on which he is surety, and the same may be satisfied to that extent." It was also prayed that said judgment against the complainant be marked

"Satisfied" and canceled. The defendants demurred to the bill, and prayed to dismiss the same for the want of equity. Upon the submission of the cause upon the demurrer and motion the court rendered a decree sustaining the demurrer and motion, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

F. A. Bostick, for appellant. J. B. Tally and Martin & Bouldin, for appellees.

TYSON, J. The bill in this cause presents two theories upon which the complainant relies to have the two notes which he executed as surety for the mortgagor, and upon which judgment was recovered against him before the sale under the power contained in the mortgage was had, satisfied and discharged. The first of these proceeds upon the averment that the terms of the mortgage, to which he is not a party, are not in accordance with the understanding had with him by which he agreed to become bound as surety. This phase of the case, however, is not insisted upon in argument. The other phase of the bill presents a case for equitable relief, not to the extent of having the entire proceeds derived from the sale under the mortgage applied to a release or satisfaction of the judgment, but only pro rata. By the terms of the mortgage, upon default in the payment of the first maturing note, upon which complainant was surety, the whole mortgage debt, including the other one upon which he was surety as well as the two notes executed by the mortgagor alone, became due and payable. In short, the default at maturity of the first maturing note matured the other three, thereby destroying all priority in the distribution of the proceeds of the sale of one note over another. 2 Jones, Mortg. § 1703; also sections 1179-1183. Again, the mortgage conferring no authority upon the mortgagees to apply the proceeds of the sale of the mortgaged property to the payment of any note or notes to the exclusion of the others, the law applied the proceeds to the entire debt secured by the mortgage. This being true, the complainant, as surety, has the right to have the proceeds of the sale (\$1,600) applied in just proportions to the discharge of that portion of the debt for which he is bound. *Fletcher v. Varner*, 45 Ala. 429; *Bank v. Moore* (N. Y.) 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. Rep. 775; 2 Jones, Mortg. (5th Ed.) § 1706.

It is scarcely necessary, in conclusion, to say that, under no possible aspect of the case is the complainant, and, for that matter, can never become, entitled to have the proceeds of the sale to Smith by the respondents, as purchasers, applied to a discharge of his liability to them. The decree of the court dismissing the bill for want of equity is reversed, and a decree will be here entered overruling the motion.

Reversed and rendered.

EVANS v. SOUTHERN RY. CO.

(Supreme Court of Alabama. May 21, 1902.)

RAILROAD—FENCING RIGHT OF WAY—KILLING STOCK—ACTION—COMPLAINT—MISJOINDER—STATUTE OF FRAUDS—APPEAL—BILL OF EXCEPTIONS.

1. A count in a complaint charging that defendant railroad company negligently ran over plaintiff's hogs, being in case, cannot be joined with a count in assumpsit, charging that the hogs were killed by defendant's train through the failure of defendant to comply with a contract with plaintiff requiring defendant to fence its track and maintain cattle guards.

2. An agreement by a railroad company with a landowner to fence its right of way and construct cattle guards, in consideration of a grant of such right of way, renders the company prima facie liable for the killing of stock of the landowner entering the track by reason of the failure of the company to maintain such fence and cattle guards.

3. A complaint which charges the killing of hogs by a railroad company as a result of a breach of a contract to maintain fences and cattle guards is not subject to demurrer, in failing to allege when the contract was first broken, as such contract is continuing, and breaches may be several and continuous.

4. The failure of such complaint to allege that the contract was in writing does not render it subject to demurrer, though the contract is obnoxious to the statute of frauds if oral, but such objection can only be raised by plea.

5. Minute entries reciting exceptions to rulings on motions are not sufficient proof of such exceptions to authorize a consideration of such rulings on appeal, but such exceptions must be shown by bills of exceptions.

Tyson, J., dissenting in part.

Appeal from circuit court, Hale county; John Moore, Judge.

Action by A. P. Evans against the Southern Railway Company for stock killed by defendant company. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action brought by the appellant, A. P. Evans, against the appellee, the Southern Railway Company. The suit was originally commenced in a justice of the peace court, and was carried by appeal to the circuit court. In the circuit court the plaintiff filed a complaint containing two counts. In the first count the plaintiff sought to recover the sum of \$30 for the killing of two hogs by a train operated on the defendant's railroad track, and averred in said count that the defendant "so negligently operated said locomotive and train of cars attached thereto that in consequence of the negligence of the defendant, its agents, servants, or employés, two hogs of the plaintiff were run over" by said locomotive or train of cars and were killed. In the second count, after averring that the plaintiff's two hogs were run over and killed by a train of cars operated on the defendant's track, the plaintiff then averred as follows: "That the defendant had contracted with him in construction of a right of way through and over this plaintiff's land, that they would keep said railroad fences on both sides through plaintiff's land, and keep and maintain cattle guards at the boundary

of plaintiff's land; and plaintiff avers that defendant did construct such fences and cattle guards, but that the defendant negligently and carelessly allowed the said fences and cattle guards to get out of repair or become destroyed. And plaintiff avers that, by reason of such negligence and failure of duty on the part of defendant, plaintiff's hogs entered upon the right of way and railroad track of defendant." The defendant demurred to this complaint upon the ground that there was a misjoinder of counts, in that count No. 1 was *ex delicto*, and count No. 2 was *ex contractu*. This demurrer was sustained. After the demurrer to the complaint containing the two counts was sustained, the plaintiff filed another count, numbered 3, in which he averred the operation by the defendant of a train of cars along its road, and that said train of cars so operated by the defendant ran over and killed the two hogs belonging to the plaintiff. The third count of the complaint then continued as follows: "And plaintiff avers that the defendant had contracted with him, to wit, January 1, 1876, in consideration of a right of way through and over the plaintiff's land, that it would keep its said railroad track fenced on both sides through plaintiff's land, and to keep and maintain cattle guards at both ends or boundaries. And plaintiff avers that defendant did construct such fences and cattle guards in consideration of the grant of the right of way by plaintiff to defendant over plaintiff's lands, but that the defendant prior to October 23, 1899, failed and refused to keep the same in repair, and that, by reason of such failure and refusal to do and perform what they had contracted to do, two hogs of defendant entered upon the right of way of defendant, and were killed by defendant's engine and cars, to the damage of plaintiff \$30." The defendant demurred to this complaint upon the following grounds: "(1) Because said count fails to allege where said contract was made. (2) Because said count fails to allege whether said contract was in writing. (3) Because said count fails to allege when said contract was broken by defendant. (4) Because said count fails to state any cause of action against defendant. (5) Because said plaintiff in said count does not claim damages for a breach of said alleged contract, but claims damages for the killing of two hogs, and fails to state or allege any facts that would entitle the plaintiff to recover in this action." This demurrer was sustained. Thereupon the defendant filed another count of the complaint, numbered 4. Upon the objection to the filing of the count No. 4, and a motion by defendant to strike the same from the file, the court sustained said objection, and granted said motion. Thereupon the plaintiff declining to plead further, judgment was rendered for the defendant. The judgment entry contains several rulings upon motions made by the defendant, and to which rulings the plaintiff separately excepted. There is no bill of excep-

tions set out in the transcript. The plaintiff appeals, and assigns as error the several rulings of the trial court upon the pleadings.

Thos. E. Knight, for appellant. F. L. Petrus and A. M. Tunstall, for appellee.

SHARPE, J. Count 1 of the complaint first filed in the circuit court was in case, and count 2 was in assumption. Those counts were improperly joined. *Morris v. Bank*, 122 Ala. 580, 25 South. 499, 82 Am. St. Rep. 95.

Count 3 was not subject to the demurrer. An agreement by a railroad company with a landowner to build and maintain fences and cattle guards in consideration of his grant of a right of way is prima facie binding on the company to pay the landowner for injuries to his animals entering on the track in consequence of the company's fault in failing to maintain fences in accordance with the terms of the contract. *Railway Co. v. Barnes*, 116 Ind. 126, 18 N. E. 459; *Railway Co. v. Sumner* (Ind. Sup.) 5 N. E. 404, 55 Am. Rep. 719; *Railroad Co. v. Kenney*, 82 Ky. 154.

While such a contract is continuing, breaches of it may be several and continuous. *Phelps v. New Haven & Northampton Co.*, 43 Conn. 453. It is therefore unnecessary for a complaint, in declaring on the contract, to aver when the contract was first broken.

If the contract was not in writing, and is for that reason obnoxious to the statute of frauds, the objection is matter for plea, and not for demurrer. *Strouse v. Elting*, 110 Ala. 132, 20 South. 123.

Recitals in the minute entries are not proper evidence on appeal that exceptions were taken to rulings on the several motions assigned for error, and, there being no bill of exceptions, those assignments are without support.

Reversed and remanded.

TYSON, J., concurs in the result, but dissents as to the first point; being of the opinion that count 2 is in case, and that there was no misjoinder. *White v. Levy*, 91 Ala. 179, 8 South. 563; *Bank v. Jeffries*, 73 Ala. 191.

WHITE v. STATE.

(Supreme Court of Alabama. May 22, 1902.)

HOMICIDE—EVIDENCE—CONFESSIONS—EXPERT TESTIMONY—QUALIFICATION OF EXPERT—QUESTION FOR TRIAL COURT—REASONABLE DOUBT—CERTAINTY OF GUILT.

1. On a prosecution for murder, the question whether a witness is an expert, and competent to give his opinion as to whether certain stains are those of blood, is one addressed to the discretion of the trial court.

2. Code, § 4333, enacts that a judgment of conviction shall not be reversed because of error in the record, where the court is satisfied that no injury resulted to defendant. *Held*, that where, on appeal from a conviction of murder, it does not appear what the production of a bundle of clothing found at the

house of a codefendant had to do with the case, and it is shown that the court, at the request of the solicitor, had the bundle laid where the jury could see it, but it does not appear that the bundle was opened, or its contents exhibited to the jury, there was no cause for reversal, since no injury could have resulted to the defendant from what was done.

3. On a prosecution for murder, the value of the opinion of an expert that certain stains are those of blood is a question for the jury in connection with all the evidence.

4. On a prosecution for murder a witness testified that, seeing accused in jail while he was being held for trial, he asked him what made him do that, in reply to which he made certain incriminating statements. *Held*, that the statements were properly admitted, though he was under arrest, and the question assumed his guilt.

5. On a criminal prosecution it was proper to refuse to charge that the jury must find from the circumstances relied on in order to convict that there was no other possible or reasonable conclusion to be reached but that of defendant's guilt, absence of reasonable doubt of guilt being all that can be required.

6. Where, on a prosecution for murder, the evidence tended to show that defendant and another acted in concert in effecting the death, and that, while accused may not have struck the blow, he aided and abetted, it was proper to refuse to charge that, no matter how strong the circumstances might be, if they could be reconciled with the theory that some other person did the killing charged against the defendant, defendant's guilt was not established by the measure of proof required.

7. On a criminal prosecution it is not error to refuse a charge having no other office than to refute arguments of the prosecuting officer.

Appeal from circuit court, Jackson county; A. H. Alston, Judge.

Sam White was convicted of murder, and he appeals. Affirmed.

The appellant Sam White was jointly indicted with one Florence Kimbrough for the murder of Mary Williams, was tried separately, and was convicted of murder in the first degree and sentenced to the penitentiary for life.

When the case was called for trial, the defendant moved the court to quash the venire served upon him, upon the ground that one C. Knight, whose name was on the list of jurors served on the defendant for his trial in this case, was excused by the court from serving on the jury; that he was so excused without the knowledge or consent of the defendant; that the ground for excusing him was that he had served as a juror in a justice of the peace court within 12 months, but that said Knight came to court and offered to serve as a juror during the week defendant was tried, but was excused by the court without legal cause or excuse therefor; and that the defendant was deprived of the right to pass upon said Knight as a juror on his trial. The facts as stated in the motion were admitted to be true. The court overruled the objection and the defendant duly excepted. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and

separately excepted to the court's refusal to give each of them as asked: (6) "The jury must find from the circumstances relied on in this case, in order to convict, that there is no other possible or reasonable conclusion to be reached, but that of defendant's guilt, and if you do not so find, then the state has failed to make out a case, and it is your duty to acquit the defendant." (11) "The court charges you, gentlemen, that no matter how strong the circumstances may be in this case, if they can be reconciled with the theory, that some other person did the killing charged against the defendant, then defendant's guilt is not established by that full measure of proof required by law, and the jury should acquit him." (18) "The uncontroverted testimony in this case is that Mary Williams asked the defendant to go with her from the place where White overtook the deceased, to the house where the body of deceased was found."

Tate & Walker, for appellant. Chas. G. Brown, Atty. Gen., and John F. Proctor, for the State.

HARALSON, J. There was no error in overruling the defendant's motion to quash the venire, based on the ground that the court had, without defendant's consent, excused a juror whose name was on the list served on him for his trial. It is shown that no such ground existed.

What the production of the bundle of clothing found at the house of Kimbrough, a codefendant not here on trial, had to do with the case is not made to appear. The court, at the request of the solicitor, had the bundle produced, and it was laid where the jury could see it, but it does not appear that the bundle was opened or its contents exhibited to the jury. No possible injury could have resulted to the defendant from what was done. Code, § 4333. It may be presumed, the bundle was produced for its contents to be used, if in the progress of the trial, it was shown to be proper to do so, which was not done.

Dr. Boyd was examined as a witness for the state, and testified, that he had been practicing medicine for about two years, and was a county physician; that he had considerable experience in examining blood spots and had examined the defendant's leggings with a low-power lens; that he went with the coroner's jury on the morning the dead woman was found, and was asked by the solicitor what he found on the defendant's leggings. He answered, that he found some stains on them that looked like blood; that he made no microscopical examination of the stains, and could not swear positively that it was blood—could only swear that these stains looked like blood. The leggings were introduced in evidence by the defendant. The defendant when said question was propounded to the witness, objected to it be-

cause it was not shown that the witness had the knowledge to qualify him to testify as an expert; that it was not shown that he had made the proper examination to enable him to testify as to what was on defendant's leggings, and because such testimony was immaterial and inadmissible, and he moved to exclude the answers on the same grounds, but his objections were overruled. Whether he was an expert or not, and competent to express the opinion he did as to these stains, was a matter addressed to the discretion of the court, and the province of the court to determine. He gave it as his opinion, based on his experience in examining blood spots, that they looked like the stains of blood. The force and value of this opinion, was open to be combated by other proof, that the opinion was worthless, and its value was for the jury to determine, in connection with all the evidence. *Insurance Co. v. Stephens*, 51 Ala. 123; *Walker v. State*, 58 Ala. 393; *Railroad Co. v. Sandlin*, 125 Ala. 591, 28 South. 40.

This witness was asked by the solicitor, if defendant had made a statement to him concerning the homicide; how and by whom it was done, and witness answered that he had made such a statement. Upon objection by defendant to the witness making the statement to the jury, the court ordered the jury to retire, which they did. The court then asked the witness, if he had made any promise or threats to defendant to induce him to make a statement, to which witness replied that he had not; that being county physician, he was at the jail to visit a sick prisoner, and while there he saw defendant and inquired of him, how he was getting along, and how his troubles were serving him, and he replied, he was getting along very well; that he then asked him, what made him do that, when defendant replied, that he was not guilty, did not kill the woman and did not have anything to do with it. Without more, he said, "I will tell you how it was," and proceeded to make the statement which the witness detailed to the court, such as is set out in the transcript, and which, upon return of the jury to the court room, the court allowed to be repeated to them by the witness as evidence in the cause.

This evidence, which tended to implicate defendant as a guilty party in the homicide, was properly admitted. The fact that he was under arrest, and that he made the statement to the witness in answer to a question that assumed his guilt, did not render it inadmissible as an admission or confession. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Redd v. State*, 68 Ala. 492; *Miller v. State*, 40 Ala. 54; *McQueen v. State*, 94 Ala. 50, 10 South. 433.

The sixth charge was properly refused. In order to convict, the law does not require that there can be no other possible conclusion to be reached but that of defendant's guilt. Reasonable doubt of guilt is all that can be

required for an acquittal. *Scott v. State*, 96 Ala. 20, 11 South. 193; *Karr v. State*, 100 Ala. 1, 17 South. 328.

Charge 11 was properly refused, when construed with reference to the evidence. The tendencies of the evidence were, that the defendant and Florence Kimbrough acted in concert in effecting the death of deceased, and while Kimbrough may have struck the blow that killed her, that defendant was implicated in the matter and aided and abetted therein. *Pickens v. State*, 115 Ala. 43, 51, 22 South. 551.

Charge 18 was improper. The confessed purpose of the charge was to refute some remarks of the solicitor in his closing argument; and it is not error in the court to refuse a charge having no other purpose than to respond to or offset arguments made before the jury by the prosecuting officer. *Mitchell v. State* (Ala.) 30 South. 349.

Let the judgment and sentence below be affirmed.

Affirmed.

JIMMERSON v. STATE.

(Supreme Court of Alabama. May 22, 1902.)

HOMICIDE — SELF-DEFENSE — REASONABLE DOUBT — EVIDENCE — CHARACTER OF DECEASED — FORMER DIFFICULTIES — INSTRUCTIONS — DRAWING JURY.

1. The slips containing the names of persons composing two special venires on trial of defendant for homicide were returned to the jury box after such venires were quashed. *Held* not to authorize the quashing of a subsequent venire drawn from such box, where none of the persons thereon were drawn on such other venires.

2. Evidence, on a trial for homicide, as to difficulties between deceased and defendant, occurring more than two months before the homicide which has no immediate connection with the homicide, and sheds no legitimate light thereon, is not admissible on behalf of defendant, as such difficulties neither justify nor palliate the homicide.

3. The defendant, against whom deceased is claimed to have made threats, may be asked on cross-examination if he had not heard, prior to the killing, that deceased was going to leave the neighborhood, as tending to show that deceased did not intend to execute his threats, and the desire of defendant to kill deceased before the latter left.

4. When defendant introduces no evidence of the bad character of deceased, evidence of his threats to kill defendant, and that deceased had illicit intercourse with defendant's wife, does not entitle the state to show the good character of deceased.

5. When defendant testifies that he had sworn out a warrant against deceased prior to the homicide, and that deceased was placed under bonds to appear before the grand jury, evidence that defendant so acted under advice of counsel is inadmissible.

6. An instruction that "a doubt to acquit the defendant must be actual and substantial, not mere possibility or speculation, not a mere possibility or possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt," is not erroneous.

7. A requested instruction that, if there existed in the mind of defendant, when he fired the fatal shot, a reasonable apprehension of

imminent danger to his life or limb, he was authorized in killing deceased, if defendant was not in fault in bringing on the difficulty, is erroneous.

8. A requested instruction that defendant must be acquitted if a single juror has a reasonable doubt of his guilt arising from the evidence is erroneous.

9. A requested instruction in homicide that "a reasonable doubt is a doubt growing up out of all the evidence in the case for which you can give a reason" is erroneous.

10. Mere apprehension of imminent danger, caused by demonstrations of the deceased, or by threats, coupled with his acts or declarations, is not sufficient to justify a homicide.

11. An instruction as to self-defense which ignores the doctrine of escape is erroneous.

12. A requested instruction that defendant cannot be convicted if the circumstances were such as to create in the mind of a reasonable man a belief that he was in imminent danger of life or of great bodily harm, and could not flee without adding to his danger, is erroneous in failing to hypothesize the reasonable belief of defendant that he was in imminent danger.

13. The defendant requested an instruction that, to justify the defendant on the ground of self-defense, it was not necessary that the danger from the deceased should have been an actual or real danger, but such as would induce a reasonable person in the defendant's position to believe that he was in imminent danger of great bodily harm under such appearance that defendant would not be held accountable, though it should afterwards appear that he was in no actual peril. The rule of law in such case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, knowing what he knew and seeing what he saw, suppose from the situation and the surroundings? *Held*, that such instruction was argumentative and misleading, ignoring the doctrine of retreat, and failing to hypothesize the reasonable belief of defendant that he was in peril.

Appeal from circuit court, Barbour county; A. A. Evans, Judge.

Joe Jimmerson was convicted of murder, and he appeals. Reversed.

The appellant in this case, Joe Jimmerson, was indicted and tried for the murder of Ed Searcy, was convicted of murder in the second degree, and sentenced to the penitentiary for 20 years.

The trial of the case was had at the fall term of the circuit court. The defendant made a motion to quash the venire drawn and served upon him for the trial of the cause upon the ground that at the preceding spring term of the circuit court several venires had been drawn from the jury box of the county to try the defendant, and also to try other murder cases. That after drawing the names of the jurors from the jury box who were to constitute the special venires, the court placed in the jury box the names of the persons so drawn on said special venires and that the special venire drawn for the present trial of the defendant was drawn from the jury box after the names on the former special venires had been restored and returned to such jury box. In connection with this motion the following facts: At the spring term, 1901, the court drew from said box two juries to try defendant at that term

of the court. He also drew from said box at said spring term two other juries to try murder cases. Both the venire to try defendant at that term were quashed. All four of the juries, or the names of the persons thus drawn as juries, being written on slips of paper, were by the court immediately after each drawing folded up and returned to the jury box. These slips of paper with the names of the jurors were mixed and mingled with the other names in the box and became a part of the contents of the box; in fact, they occupied the same position in the box as they did before they were drawn out. The admission made by the defendant in reference to the motions is copied in the opinion. The motion to quash the venire was overruled.

It was shown by the evidence that the killing of the deceased occurred in a public road; that the deceased was going in one direction and the defendant in another, when they met in said road. There was a conflict in the evidence as to what took place at this meeting, the evidence for the state tending to show that the deceased and his wife were walking along the public road, and that the defendant was approaching them; carrying a shotgun; that as soon as the defendant was near the deceased, he lifted his gun to his shoulder and fired upon him; that the deceased turned from the road into a field and the defendant followed him and fired two more shots at him, and that the last two shots inflicted wounds from which the deceased died.

The evidence for the defendant tended to show that as defendant was going along the public road he met the deceased and to avoid a difficulty changed from the side of the road to prevent meeting deceased and deceased also changed so as to put himself immediately in front of defendant, and when they approached to within a short distance, deceased drew from his right-hand pants pocket a pistol and presented and tried to shoot defendant, but his pistol failing to act he did not shoot; that defendant thereupon shot twice with his shotgun loaded with small shot, No. 7; that neither shot struck deceased; that thereupon deceased left the road, made a circuit around the adjacent hill, and was concealed from defendant while beyond the hill; that defendant did not follow deceased, but went up on the bank where he could observe deceased and guard against his approach, and when he got to the top of the bank he observed deceased coming from behind the stumps toward him still having the pistol and trying to shoot defendant; that thereupon defendant fired twice and deceased cringed and thus received the load in a quartering or diagonal direction in the back and leg on the inside of the leg; that deceased then ran east and fell, and defendant returned to the road. There was also evidence for the defendant tending to show that the deceased had improper and illicit re-

lations with the defendant's wife. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently shown in the opinion.

The court at the request of the state gave to the jury the following written charge: (1) "The court charges the jury that a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt." The defendant duly excepted to the court's giving this charge, and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1) "The court charges the jury that if they believe from all the evidence in this case that there existed in the mind of the defendant at the time he fired the fatal shot, a reasonable apprehension of imminent danger to his life or limb, then the defendant could lawfully act upon appearances and kill the deceased if the defendant was without fault in bringing on the difficulty." (2) "The court charges the jury that if there be a single juror who has a reasonable doubt of the guilt of the defendant, growing up out of the evidence in this case, the jury should acquit the defendant." (3) "The court charges the jury that a reasonable doubt is a doubt growing up out of all the evidence in the case for which you can give a reason, and, if there is a reasonable doubt of defendant's guilt, the jury should acquit the defendant." (4) "The court charges the jury that in order to justify the defendant on the ground of self-defense, it is not essential that there should have been any actual or real danger, if there was an apprehension of imminent danger caused by acts or demonstrations of the deceased, or by his threats or words coupled with his acts or demonstrations; and if the jury find from the evidence that the acts or demonstrations or the threats made by deceased against defendant, if such threats and acts were made, coupled with the acts or demonstrations, produced in the mind of the defendant a reasonable apprehension or expectation of some serious bodily harm to himself from the deceased, the defendant would be justified if he acted on such appearances of danger and under reasonable apprehension even though it subsequently turned out that there was in reality no danger, and deceased was free of fault in bringing on the difficulty." (5) "The court charges the jury that if they believe from the evidence that Searcy brought on the difficulty at the time it occurred, and that defendant was not at that time at fault, and if they further believe from the evidence that the circumstances were such as to create in the mind of a reasonable man a belief that he was in imminent danger of his life or of great bodily harm and that he could not flee without adding to his danger, they must ac-

quit the defendant." (6) "The court charges the jury that in order to justify the defendant on the ground of self-defense it is not necessary that the danger from the deceased to the defendant should have been an actual or real danger, but such as would induce a reasonable person in the defendant's position to believe that he was in imminent danger of great bodily harm or injury from deceased. Under such appearance the defendant would have the right to act and would not be held accountable, though it should afterwards appear that the indications upon which he acted were wholly fallacious and that he was in no actual peril. The rule of law in such case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, knowing what he knew and seeing what he saw, suppose from the situation and the surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger of great bodily harm, then the defendant would be justified in acting upon such appearances, and would be entitled to an acquittal at the hands of the jury, if he was without fault in bringing on the difficulty." (7) "The court charges the jury that the jury cannot consider any evidence showing or tending to show that the deceased was a man of good character for peace and quiet in determining the guilt or innocence of the defendant." (8) "Although the jury may find from the evidence that the state has proved the good character of the deceased for peace and quiet in the neighborhood in which he resided they cannot consider this evidence in considering the guilt or innocence of defendant."

Lee & Lee, G. W. Peach, and A. H. Merrill, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. 1. There was no error in overruling the motion to quash the venire for the trial of defendant, on the grounds therein stated. It may be admitted, that the slips containing the names of the persons composing the three venires which were quashed on motion of defendant at the former term of the court,—two of them for the trial of this defendant, and one of them for the trial of another defendant in a capital case,—should not have been restored to the jury box, after said venires were quashed, but should have been destroyed. It is unnecessary for us now to determine that question. However that may be, the fact that the slips containing these names were returned to the box, did not of itself, as contended by defendant, so taint and corrupt the box, "that it ceased to be a jury box, and no legal jury could [thereafter] be drawn therefrom." The only ground upon which such a contention can be rested is, that these slips when once drawn from the box could not be legally restored thereto and mingled with the other

slips remaining, so as that they could not be thereafter identified, in drawing other venires from the box, thereby rendering it possible for the same persons to be drawn and placed on an indefinite number of venires. If the judge instead of restoring the slips in the manner alleged, had placed them in a sealed envelope, and thus sealed up had placed them in the box, the liability to have repeated venires composed of some of the same persons, might have been thus obviated. In this case, the slips were not placed in sealed envelopes, nor tied together; but a list of the names on each venire was carefully preserved, and these lists are copied in the transcript as Exhibits A., B. and C. to this motion. Furthermore, it was admitted by defendant, on the trial of the motion, "that none of the persons drawn on the previous venires, marked A., B. and C. were drawn to try this case," at the term at which it was tried. Under this state of facts, it affirmatively appears, that defendant by the alleged wrongful action of the court in restoring said names to the jury box was not thereby deprived of any legal right, or suffered any special injury. *Wilkins v. State*, 112 Ala. 55, 21 South. 56; Code, §§ 4333, 4997.

2. The evidence sought to be introduced by defendant and rejected by the court, made the basis of alleged errors as assigned, from 3 to 11 inclusive, was illegal and entirely irrelevant to the issues in the case. These occurrences, as appear, going into the particulars of a former difficulty and objectionable on that account, were all of a date more than two months prior to this homicide; they purport to have occurred at the house of deceased and at defendant's own house in his absence, and of which, for more than the length of time specified, defendant was fully informed. They had no immediate connection with the fatal attack by defendant on deceased, and of themselves could neither justify nor palliate defendant's act in killing him, nor shed any legitimate light on the transaction. *Rogers v. State*, 117 Ala. 9, 22 South. 666; *Ragland v. State*, 125 Ala. 12, 27 South. 983.

3. On the cross-examination of defendant as a witness, he was asked by the solicitor, if he had not heard that deceased was about to move from the neighborhood, which question was objected to, because the evidence sought was immaterial and irrelevant,—and not because it was hearsay. Its only possible relevancy or materiality rested on the idea, that defendant hearing that deceased was about to move away, desired to kill him before he left for having defiled defendant's wife; or, as tending to show that deceased did not intend to execute his threats against defendant, and that they were idle talk, and for such purposes the evidence was competent.

4. The state was allowed to prove against the objection of defendant, that the general

character of the deceased was good, and also, that his character for peace and quiet was good. The objection interposed was, that the character of deceased had not been assailed by defendant. The objection was well taken, and the evidence should not have been admitted. Not a word of evidence had been introduced by defendant, in respect of the general character of deceased, whether good or bad, nor, as to his character for turbulence, violence or revengefulness. The admission of the evidence is sought to be justified, on the ground that there was evidence by defendant tending to show that deceased had, prior to his killing, threatened to kill defendant, and that he had had illicit intercourse with defendant's wife. These did not authorize proof, in rebuttal, of his general character, nor as distinguishable therefrom, of his character for peace and quiet. They were not introduced and were not admissible to prove general reputation, and, of themselves, did not show deceased's character for peace and quiet to be bad. He might have been guilty of both, and yet not have been a turbulent, violent or revengeful man. *Ben v. State*, 87 Ala. 103; *Eiland v. State*, 52 Ala. 323; *Hussey v. State*, 87 Ala. 122, 6 South. 420.

5. The defendant was allowed to prove that he had sworn out a warrant against deceased, and he was under bond to appear and answer any charge that might be preferred against him by the grand jury. In connection with this, he offered to prove that he had sworn out the warrant "under the advice of counsel," but on objection that this statement as to the advice of counsel was "immaterial, irrelevant, illegal and incompetent," the court excluded it, and in this it did not err.

6. There was no error in the charge given for the state. The vices of charges from 1 to 3, inclusive, refused for defendant are manifest, and require no discussion.

Refused charge 4 was faulty. Mere "apprehension of imminent danger caused by acts or demonstrations of the deceased, or by threats or words coupled with his acts or declarations," as stated in the charge, were not sufficient to justify a deadly assault upon deceased, as the charge implies. Moreover, the charge ignores the doctrine of escape.

The fifth charge, to say no more of it, fails to hypothesize the reasonable belief of defendant that he was in imminent peril.

The sixth is subject to the same vice as the fifth. It is besides argumentative and tends to mislead, and ignores the doctrine of retreat.

From what has been said as to the proof of the good character of deceased, it will appear that charges 7 and 8 requested by defendant and refused, should have been given.

For the errors indicated the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

FIRST NAT. BANK OF MONTGOMERY v. TYSON.

(Supreme Court of Alabama. May 20, 1902.)

MUNICIPAL CORPORATIONS — NUISANCE — ERECTING BUILDING IN STREET—POWER OF CITY—CONSENT TO NUISANCE—INJUNCTION—ADJOINING OWNERS—EASEMENTS OF LIGHT, AIR, AND VIEW—INJUNCTION—IRREPARABLE INJURY—PLEADING — BILL — SUFFICIENCY — PLEA—DUPLICITY.

1. A municipal corporation, in the absence of a statutory grant of such power, cannot authorize the erection in city streets of a building which constitutes a nuisance.

2. An encroachment of 22 inches on the sidewalk by pillars of a building is a public nuisance, without regard to whether they are erected for ornament or utility.

3. A public nuisance by the erection of pillars of a building on the sidewalk 22 inches in front of the lot on which the building is being built is such an infringement on the right of an adjoining property owner to light, air, and view as to authorize an injunction, at the suit of such owner, to restrain the erection of such pillars, even though the defendant owns the fee to the center of the street, subject only to the public use.

4. The fact that the erection of pillars of a building in a street will damage the building and property of an adjoining owner, by obstructing the air, light, and view, and that the tenants of the latter will leave as a result thereof, and that it will depreciate the value of such property, by destroying its symmetry along the highway, constitutes an irreparable injury, sufficient to sustain an injunction.

5. On appeal from a decree refusing to vacate a temporary injunction restraining a lot owner from erecting pillars of a building so as to encroach on the street, it is immaterial whether the injunction worked greater prejudice to defendant than its refusal would have caused complainant.

6. The easement of view from every part of a public street, as well as that of light and air, belongs, as a valuable right, to one owning property abutting on the street, and will be protected by the courts against illegal encroachments.

7. A person sustaining a peculiar injury as a result of the existence of a nuisance in a city street may enjoin such nuisance without first applying to the city authorities for relief.

8. Allegations in a bill enjoining the erection of pillars of a building in a street that it is proposed to erect four pillars 16 feet high on the sidewalk, 2 feet, more or less, beyond the building line of the street; that the street has been laid out the full width between the building lines; that plaintiff's building is on such line; and that plaintiff alleges, on advice of counsel, that such encroachment constitutes a public nuisance,—are sufficient allegations of an intention to obstruct the street to create a public nuisance, and of the location of the building lines, to prevent the bill from being demurrable for the want of sufficient allegations of such facts.

9. A plea in an injunction suit by an adjoining property owner to restrain the erection of pillars of a building in a street, alleging that plaintiff is estopped by reason of having consented to the erection of such pillars, and that plaintiff has no easement in light, air, and view which is obstructed by the pillars, is bad for duplicity.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Injunction by A. P. Tyson against the First National Bank of Montgomery to restrain the erection of a building with pillars in the

street. From a decree overruling a demurrer to the bill and a motion to dissolve, the defendant appeals. Affirmed.

The bill in this case was filed on July 20, 1901, by the appellee, A. P. Tyson, against the First National Bank of Montgomery. The bill averred in substance as follows: Complainant was a resident citizen, property owner, and taxpayer in the city of Montgomery. The defendant bank was organized under the laws of the United States and located in said city. Commerce street in said city was dedicated to and accepted by the public more than 50 years ago, and was used by the public for street purposes; that it was laid out of uniform width for its entire length between the building lines, and built up on both sides with business houses, all of which, with two exceptions, extending to the building line only or receding therefrom. Complainant owns a three-story brick building on the east side of the street, known as No. 12 Commerce street, used as a bank and office building, and extending up to the building line of the street, but not encroaching thereon. The defendant bank owned a lot on the same side of the street, known as No. 14 Commerce street, immediately adjoining complainant's lot and building, upon which the bank was constructing a six-story brick and stone building. The bank intended to place in front of its building four stone columns, as ornaments, to extend from the sidewalk, 16 feet in height, and 2 feet, more or less, beyond the established building line into the street; that the bases for these columns had already been laid and the columns cut; that complainant had protested against said encroachment on the highway, but, notwithstanding, the said bank intended to place said columns in front of its building. Upon advice of counsel, complainant averred that the said encroachment upon the highway is a public nuisance, and if completed and placed in position as contemplated "said encroachment will greatly damage your orator beyond that which is common to the public generally by injuring and depreciating the value of your orator's property and by destroying the symmetry of your orator's building along the highway, which is valuable, and by obstructing the light, air and view necessarily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along said highway north of your orator's building will be cut off from your orator's building." It was further averred that complainant's valuable tenants would leave the building, and had threatened to leave, if the columns encroached on the highway.

In the prayer of the bill the complainant asked "that a preliminary injunction may issue from your honor's court, directed to the said the First National Bank of Montgomery, Alabama, its officers, agents or servants, architects and contractors in charge of said building of the said First National Bank, enjoin-

ing and restraining it, its officers, agents and servants, architects and contractors in charge of said building as aforesaid, from placing said stone columns on said highway, as aforesaid; and from placing any encroachment whatsoever on said highway which is intended to be permanent, and upon a hearing thereof, your orator prays that said injunction may be made perpetual, and that said the First National Bank be perpetually enjoined from placing any stone columns, blocks, steps, or any encroachment intended to be permanent upon said highway, in front of its said building as aforesaid, and that it may be ordered to remove any encroachment which it has already caused to be placed on said highway of a permanent nature in front of its said building as aforesaid."

On August 2, 1901, the judge of the city court awarded a temporary injunction. On August 8th, in the further argument of the cause, the judge vacated the order granting the temporary injunction. Thereupon, on the same day, upon petition addressed to the chief justice of the supreme court, a temporary restraining order was granted, upon the consideration of the application of the complainant for a temporary injunction, and on August 10th the chief justice of the supreme court granted a temporary injunction.

The respondent filed a sworn answer, in which he set up three pleas. The answer and the pleas were amended after the issuance by the chief justice of the temporary injunction. It is unnecessary to set out at length the averments of the answer. The pleas as amended were as follows: Answering the bill, and by way of first plea, defendant averred on information and belief that if the line between the street and abutting property owners is as contended by complainant in his bill, then complainant's building itself extends into and encroaches upon Commerce street, and if defendant's columns would encroach into the street and constitute a public nuisance, then complainant's building also encroaches on the street and constitutes a public nuisance, and complainant is in part delicto with defendant, and the special injury alleged in the bill to complainant's light, air and view will be done to the part of his building which itself constitutes a public nuisance; but defendant denies that its building will obstruct the light, air or view from the building of complainant, and denies that complainant is entitled to have light, air and view to his building across lands in which the defendant owns the fee, and over which the complainant and the public generally have only an easement of passage.

Further answering, and by way of second plea, defendant says that before beginning the construction of its building, it called upon the proper authorities of the city of Montgomery to point out and establish the true line between its property and the street, and it was its bona fide intention to conduct

itself in a lawful manner in reference to the position and construction of its building, and with that view called upon the city authorities to point out the line; that the city failed and refused to point out the line, and thereupon, out of abundance of caution, it applied to the city for, and the city granted, permission to it to project the base of its building 26 inches beyond the property line and to set up on such base four stone columns to project 22 inches beyond said property line; that the sidewalk in front of the buildings of complainant and defendant is wide and spacious and the placing of the columns in front of defendant's building would not in any manner interfere with or injure the rights of the public to ready and convenient passage along the sidewalk; that to this time, defendant had only erected in front of its building now in course of construction, a foundation flush and level with the sidewalk upon which the bases for the columns are to stand, which bases will extend 1 foot 10 inches above the level of the sidewalk, and 26 inches from the front of the main building in the course of construction; that the columns are to be 16 feet high sitting on such bases, and each of them at the bottom will extend only 22 inches beyond the present front wall of the building and taper to the top, which will only be 13½ inches from the line of the front wall; that the column nearest complainant's building will be 1 foot 10 inches from the north wall thereof, and not nearer; that the city of Montgomery now has and for years has had authority generally to control and regulate the streets of the city for any and all purposes, and to alter, widen, cut down, extend or otherwise alter or improve all streets or sidewalks; and upon advice of counsel defendant says that, even if the columns extend into the street, the city had authority to grant defendant permission to extend them as above described to be intended by this defendant; upon information and belief, defendant says that in every city in Alabama, including Montgomery, for years past, and long prior to the enactment of the present charter of Montgomery, and many of its previous charters, the power of municipal corporations to grant permission to abutters on streets to place permanent ornaments in front of their buildings, encroaching into the public highway, has been exercised under such authority by municipalities, as the city of Montgomery has to control its streets as above recited; that this was well known and a matter of public notoriety and history at the time of the enactment of the present charter of Montgomery, as well as when its previous charters were enacted, and said city had frequently exercised the power granting like and more extensive permissions than the permission above described, and under such permissions many buildings have been constructed and are now standing in the city of Montgomery, including the two on Commerce street next south of complainant's building, whose orna-

ments attached to their fronts encroach into the highway, if defendant's columns would encroach into Commerce street; wherefore, upon the advice of counsel, defendant says it was the intention of the legislature, and it had the power to confer upon the city of Montgomery, and did confer upon it, the power to grant such permission as has been granted to defendant, and whether defendant was acting under said permission or under its rights as the owner of the land upon which the columns are to be constructed depends upon where the line of the property of this defendant and Commerce street is; that defendant owns the fee to the center of Commerce street in front of its building, subject alone to the right of complainant and the public generally to pass to and fro along the street, and complainant had no other right or rights in reference to the part of said street in front of defendant's building to which it owns the fee.

Further answering, and by way of third plea, defendant says, that its building is planned to be six stories, to be erected, and being erected at large cost, for banking and office purposes; that defendant had made contracts for the completion of the building by September 1st, which defendant alleges, on information, was known to complainant when he made objection to said columns; that after the building of the basement of the building and the construction of the foundation for the bases of the columns, and not before, complainant objected to the columns, and defendant thereupon exhibited to him the plans of the building, which showed fully and precisely the proposed location of the columns, which plans had been prepared months previously and were the basis of a contract between the defendant and John W. Hood & Co. for the construction of the building and the purchase of the columns at a large price, which defendant says on information and belief was well known to complainant; that defendant explained to complainant the position the columns would occupy and discussed a contemplated change of the plans so as to omit said columns therefrom; that complainant then withdrew all objections to defendant proceeding with its plans in placing said columns in position, and complainant when he withdrew said objection informed defendant that since he had seen the plans he was satisfied that placing the columns in such position as planned would not injure him or his building, but would add to the value of his building; that, as was well known to complainant, no part of the six stories of the building was at that time constructed above the basement, which was at that time flush and on a line with the sidewalk; that if complainant had then insisted on his objection, defendant could have yielded thereto at that time without any very great expense, but that a continuance of the plans of defendant for the main part of its building called for the expenditure of \$50,000 or more, as was well known to

complainant when he withdrew his objection; that some time elapsed between the withdrawal of the objections and the continuance of the construction of the building, and defendant, relying upon complainant having withdrawn his objections to the columns, proceeded with the building above the first story and completed all the walls thereof, and not until after defendant had done this did complainant in any manner renew his objections to the columns; that the columns are to stand in front of and as a part of the first story of the building, and the first story will be incomplete and unfinished without them, would present a rough and unkempt appearance, and the columns are, as was well known to complainant when he withdrew his objection and when he renewed it, a material and necessary part of the building and a part of the support of the same; that after the renewal of complainant's objection, it would have cost defendant \$10,000 and caused it to make a breach of its contract with John W. Hood & Co. for the construction of the building, and with tenants to whom it had let space therein, to have removed the first story so as to comply with the wishes of complainant in refraining from proceeding with said plans so that said columns would be a necessary part thereof. Wherefore, defendant says, on advice of counsel, that complainant has estopped himself from renewing his objection and maintaining his bill, and that, even if complainant would suffer any injury special to himself, and not common to the public, from said columns, he, by his acts, conversations and conduct above described, well knowing all the facts, has induced and permitted defendant to go to great trouble and expense, and, before a renewal of his objection, has induced and permitted defendant to proceed with its building on a plan including the columns to a point at which it would have been a great expense to change the same so as to omit the columns or so as to place them further back from the street, if indeed it would not have been impracticable and impossible to do so without a violation of its contracts with Hood & Co. and its prospective tenants; that if complainant would suffer any injury from the columns being placed in position as planned, it would be infinitesimal in comparison with the immediate, proximate and necessary injury which defendant would suffer from the granting of an injunction; whereby, on advice of counsel, defendant says complainant has estopped himself from insisting upon any special injury by reason of the columns, without the averment and proof of which special injury complainant cannot maintain the suit. And defendant further says, on advice of counsel, that complainant is not entitled to have light, air and view come to his building from that part of the street in front of defendant's building to which defendant has the fee, and that the only easement to which the public or complainant is entitled over the part of the

street to which defendant has the fee, is the right of passage to and fro.

The defendant also demurred to the bill upon 19 grounds, which were in substance as follows: (1) There is no sufficient averment of intention to obstruct Commerce street or to create a public nuisance. (2) Complainant does not show that he will suffer irreparable damage. (3) It does not appear but that the city of Montgomery consented to the erection of the columns. (4) It is not shown that the columns will be beyond or off of the property of the bank. (5) It is not shown where the building line is, or that defendant intended to go beyond its own property into the street. (6) No obstruction of the street is shown, and no more is shown than a mere encroachment for the prevention of which the court is without jurisdiction at the suit of a private party. (7) Complainant has a complete and adequate remedy at law for depreciation in the value of his building, loss in rents, and destruction of its symmetry, has no right to light, air or view from the part of Commerce street upon which the bank's building fronts, and any obstruction to it is *damnum absque injuria*, for which he has no right of action. (8) No injury special and peculiar to complainant, and not common to the public generally, is shown. (9) It is not shown that the complainant has applied to the proper authorities of the city to prevent the alleged nuisance.

The complainant filed exceptions to these pleas, upon the ground that the same were insufficient at law and presented no facts upon which the complainant could join issue. The defendant moved to discharge the temporary injunction upon the following grounds: "(1) Said injunction was granted without authority of law. (2) Said chief justice had no jurisdiction to grant said injunction. (3) In this cause an injunction was granted by Hon. A. D. Sayre, and was in force from August 2, to August 8, 1901, at which last date the order granting said injunction was set aside upon the release by defendant of all damages, and said injunction was then, by Hon. A. D. Sayre, refused. Wherefore, defendant says that no such case was presented as authorized said chief justice to act in the premises, and grant said injunction." There was also a motion made to dissolve the injunction.

The cause was submitted upon the exception of the complainant to the three pleas filed by the defendant, upon the motion to discharge and dissolve the injunction, and upon the demurrers to the bill. The chancellor rendered a decree overruling the motions to discharge and dissolve the injunction and the demurrer to the bill and sustained the exceptions to the several pleas. From this decree the defendant appeals, and assigns the rendition thereof as error.

Watts, Troy & Caffey, for appellant. O. O. Maner, for appellee.

HARALSON, J. The cause was submitted for decree on the pleadings, the exceptions of

complainant to the three pleas filed by the defendant, the motions to discharge and to dissolve the injunction, and on the demurrer to the bill, accompanied by the several affidavits filed by the complainant and the defendant.

It may be stated broadly, since it seems to be everywhere settled in this country, that a building or other structure of like nature, erected on a street,—which includes its sidewalks,—without the sanction of the legislature, is a nuisance; that public "highways belong from side to side and from end to end to the public," and they are entitled to a free passage along any portion of it, not in use by some other traveler, and that there can be no rightful permanent use of the way for private purposes. *Elliott, Roads & S.* § 645. This court has said: "The public have a right to passage over a street, to its utmost extent, unobstructed by any impediments, and any unauthorized obstruction which necessarily impedes the lawful use of a highway is a public nuisance at common law." *Costello v. State*, 108 Ala. 45, 18 South. 820, 35 L. R. A. 303. Again, it is said: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such, is not permitted to be done by the law, with impunity." *State v. Edens*, 85 N. C. 528.

It is again well settled, that a municipal corporation cannot license the erection or commission of a nuisance in or on a public street. "A building," says Dillon, "or other structure of like nature, erected upon a street, without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets, without express power to this end conferred on them by the charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings, standing on the line of the streets. The person erecting or maintaining a nuisance upon a public street, alley or place, is liable to the adjoining owner or other person who suffers special damage therefrom." 2 Dill. Mun. Corp. § 660, and authorities there cited; *State v. Mayor*, etc., of City of Mobile, 5 Port. 279, 30 Am. Dec. 564; *City of Demopolis v. Webb*, 87 Ala. 606, 6 South. 408; *Webb v. City of Demopolis*, 96 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Hoole v. Attorney General*, 22 Ala. 194; *Costello v. State*, supra; *Douglass v. City Council*, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376.

There can be no question, but that the erec-

tion of the proposed pillars by defendant in front of its building on the street, and which are to extend, as admitted, 22 inches beyond the west line of said building onto the sidewalk, is a public nuisance, to abate which, the public might maintain a bill. *Reed v. City of Birmingham*, 92 Ala. 344, 9 South. 161; 1 Dill. Mun. Corp. § 374; *Elliott, Roads & S.* §§ 664, 665; authorities supra.

It is also well understood, that, in addition to the right of the public to maintain a suit in equity for an injunction against the erection and maintenance of a public nuisance, a private citizen who sustains an injury therefrom, different in degree and kind from that suffered by the general public, may maintain a suit in equity to enjoin it. *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405; *Mayor, etc., v. Rodgers*, 10 Ala. 37, 47; *Elliott, Roads & S.* § 665. As to the injury being irreparable, or not capable of full and complete compensation in damages, as is sometimes said to be the requirement in case a private citizen complains to abate it, Mr. Elliott observes in the section referred to, that "the phrase, 'irreparable injury,' is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." *Ogletree v. McQuagga*, 67 Ala. 580, 42 Am. Rep. 112.

On the same subject Mr. Wood states, that "by irreparable injury, is not meant such injury as is beyond possibility of repair, or beyond possibility of compensation in damages, nor necessarily great injury or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law." 2 Wood, Nuis. § 778, and note; 3 Pom. Eq. Jur. § 1349; *Whaley v. Wilson*, 112 Ala. 630, 20 South. 922.

The bill alleges, "that said encroachment [of the erection of said pillars on the sidewalk] upon said highway is a public nuisance, not only infringing upon the rights of the commonwealth of Alabama, but if same are completed and placed in position, as now contemplated by the First National Bank, said encroachment will greatly damage your orator beyond that which is common to the public generally, by injuring and depreciating the value of your orator's property, and by destroying the symmetry of your orator's building along the highway, which is valuable, and by obstructing the light, air and view necessa-

rily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along said highway north of your orator's building, will be cut off from your orator's building." He also avers that the tenants in his building are valuable to him, and some of them have informed complainant, that if said columns encroach on said highway, or if any part of said building of defendant encroaches on said highway, they will no longer remain his tenants. Here is averment of special damage to complainant, apart from that which may be suffered by the public at large.

It appears that the bases of the columns proposed to be erected in front of defendant's building are outside the west wall of the main structure to which they are expected to be attached, and as is averred and not denied, "are to extend from the sidewalk, sixteen feet in height, more or less, and are to extend two feet more or less [22 inches seems to be the real extent] beyond the established building line on said highway, into and upon the street." It is wholly immaterial, it may be added, whether these columns are designed to be for ornament or utility, or whether defendant will be prejudiced more by the temporary injunction against their erection, than complainant might be, if it had not been granted.

We try the case on this appeal, on the pleadings as they are presented, in advance of any evidence taken in the cause. Whether the evidence when taken will, on submission of the case for final disposition, sustain the averments for relief or not, we are not given to know. It is a case as presented, as the court below held, and we think properly, where, everything considered, the complainant was entitled to his injunction, and its continuance, to await the final disposition of the cause. *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3.

The defendant, it may be conceded, owns as it claims, to the center of the street in front of its building, and its right to the use of its property in any way it pleases, subject only to the easement of the public along the street, as a thoroughfare of travel and commerce; but it denies to complainant the right to light, air and view, except from that part of the street immediately in front of his property. So far as light and air are concerned, the subject has been much discussed, and may be taken as well settled, but the question of view, if distinguishable from these, has not often arisen. The easement of light and air is placed, on what would seem to be good reason, and certainly on authority, along with the easement of access, the one no more important than the other, except in degree. This easement of access, says Mr. Elliott. "is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation. In New York and in most of the states in which the question has arisen,

the abutter has an easement in the light and air over the street, and 'above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner.'" In support of the text, note 1, many authorities from different courts are cited, including the case of *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 10 Sup. Ct. 743, 34 L. Ed. 231. In the case last cited, the court say: "The owners of lands abutting on a street in the city of New York have an easement of way and of light and air over it; and through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement; but, in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action."

From the well-considered case of *Barnett v. Johnson*, 15 N. J. Eq. 481, we quote approvingly what we consider to be especially applicable to the case in hand, that there are "two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage, the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air. * * * When people build upon the public highway, do they inquire or care who owns the fee of the roadbed [or street]? Do they act or rely on any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. * * * It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision." *Dill v. Board* (N. J. Eq.) 20 Atl. 739, 10 L. R. A. 276; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311.

In the case of *Dill v. Board*, supra, touching the rights of parties to streets dedicated to public use, the court said: "If we inquire what those rights are, we find that they are twofold: First, a right of access from the abutting property, and a passage to and fro over it in all its extent; and, second, a right

of light, air, prospect and ventilation. These rights are quite distinct from each other, and capable of being separately exercised and enjoyed. The right of light, air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect and ventilation exists is clearly established by the authority of this and other states." *Hallock v. Scheyer*, 33 Hun, 111.

It is difficult to understand, why an easement of view from every part of a public street, is not, like light and air, a valuable right, of which the owner of a building on the street, ought not to be deprived by an encroachment on the highway by a coterminous or adjacent proprietor. The right of view or prospect, is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right, "It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light and air, and to be inferior to them only in point of convenience or necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate." As to these and all other matters brought forward, the injunction should await the decision of the cause when tried for final decree, on pleadings and proofs taken.

The demurrer on the ground that it is not alleged in the bill, that complainant had applied without success to the authorities of the city of Montgomery for relief, is wanting in merit. He had a right to file the bill without reference to any action taken by the city. *Douglass v. City Council*, 118 Ala. 611, 24 South. 745, 43 L. R. A. 376. The demurrer as to any of its grounds was also properly overruled.

From what has been said, it will appear that the first and second pleas were properly held to be without merit. See *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162, 26 South. 895; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 239, 21 L. R. A. 62, respectively, as to each of these pleas. The court held, that the third plea, as originally filed was good; but as amended was bad for duplicity,—citing *Story*, Eq. Pl. 653. Without considering the third plea as originally filed, we concur with the court below, that as amended, it was bad for duplicity. There was no error in overruling the motion to discharge and dissolve the injunction, and finding no reversible error in any of the rulings of the court below, let its decree be affirmed.

Affirmed.

TYSON, J., not sitting.

ILLINOIS CENT. R. CO. v. HOSKINS.

(Supreme Court of Mississippi. June 10, 1902.)

RAILROADS—RIGHT OF WAY—DEFECTIVE CONDEMNATION—TRESPASSES—IMPROVEMENTS—REMOVAL—OCCUPATION—DAMAGES.

1. Where a railroad, in the condemnation of land for a right of way, fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.

2. Where a railroad company is in possession of land under a defective condemnation, it may be dispossessed by ejectment.

3. Where a railroad has reason to believe that its possession of land is rightful under condemnation proceedings, but the proceedings were defective, it is not liable in punitive damages for its trespasses on the land.

4. Though a railroad, in taking possession of land and placing structures thereon, is a trespasser, because the condemnation proceedings were not in conformity with law, it is entitled to remove such structures.

5. Where land is wrongfully occupied by a railroad, the owner in ejectment is entitled to damages to the land from the construction of the roadbed.

6. Where a railroad built a spur over plaintiff's land, in ejectment plaintiff was entitled, as compensation for the use, to a reasonable compensation for any use to which plaintiff might have put the land, and not to a portion of the freights that should have been earned in carriage of goods from the end of the spur over the same and to places on the main line.

7. That the spur was not an essential part of the main line did not entitle plaintiff to such freights as compensation.

Appeal from circuit court, Lincoln county; Robt. Powell, Judge.

"To be officially reported."

Action by S. W. Hoskins against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Mayes & Harris, for appellant. Harper & Potter, for appellee.

TERRAL, J. S. W. Hoskins brought an action of ejectment in the circuit court of Lincoln county against the Illinois Central Railroad Company for the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 6, township 7 N., range 9 E. Two thousand five hundred dollars was demanded for the use and occupation of it by the defendant. The defendant pleaded the general issue, and gave notice of valuable improvements put upon the land by it to the amount of \$100,000. These improvements constitute the roadbed and track of about 1,000 feet across said quarter section of land, being a part of its spur line from Brookhaven to a gravel pit beyond the same. The plaintiff had a recovery for his land, and also for \$1,800 for the use and occupation of it for six years, with an allowance of \$300 to defendant for its improvements. From a judgment entered in conformity with this verdict the Illinois Central Railroad Company appeals. The \$1,800 allowed for rent to plaintiff arose, as it is claimed, by reason of the freights which the company should have received from hauling gravel

and lumber taken at the east end of the spur road over the spur line and over its main line, withersoever carried; one-third of which freights, it is asserted, should be paid to the plaintiff, and which third was estimated, or rather guessed, to be \$1,800. The \$300 allowed to defendant for valuable improvements is the outcome of this 1,000 feet of railroad on plaintiff's land, which the evidence of a witness for the plaintiff showed it must have cost the defendant \$2,000 to construct, while that of a witness for the defendant showed its building to have cost more than \$3,400. This statement, considered in connection with the verdict, demonstrates, we think, the impropriety of the result here reached. The plaintiff should not have recovered \$1,800 for use and occupation, because no part of that sum arose from any use of the land to which the defendant could have devoted it, nor should the defendant have been allowed \$300 for the value of the structures put by it upon the land, which structures it is entitled to remove at its pleasure. It is a general rule of law that whatsoever chattels are attached to the realty with the manifest intent that they remain there become part and parcel of it, and cannot be removed without the consent of the owner of the freehold to whom they are considered a gift; but to this rule there are exceptions, and among others is the superstructure of a railway company. Such a company exercises the right of eminent domain,—a governmental function,—and takes no freehold but a mere easement, and therefore cannot be said to have intended to attach its rails and ties and other appliances to the freehold. They are constructed also for public use and enjoyment, and it is their quality in this respect that distinguishes the acts of the company in their construction from those of a trespasser or others; and, if the terms for acquiring this easement are too onerous, it may remove its rails and ties, and pass in another direction. True, if it does not proceed in conformity with its power in the condemnation of the land for its right of way, and until it does so proceed, all its acts upon the land are trespasses, for which it is liable; and it may be put out of possession by ejectment. The defendant here had good reason to think it had acquired a right of way over this tract of land, and it therefore is not liable for punitive damages; but for all its acts upon the land, unless and until it acquires a right of way, it is responsible as a trespasser. This court, in *Railroad Co. v. Dickson*, 63 Miss. 380, 385, 63 Am. Rep. 809, approved the doctrine announced on this subject by the courts of Pennsylvania, Michigan, and Alabama. In *Justice v. Railroad Co.*, 87 Pa. 28, it is said: "The common-law rule is undoubted that a trespasser who builds on another's land, dedicates his structures to the owner. This case is not the case of a mere trespass by one having no authority to enter,

but of one representing the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true, the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to the taking of the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for, though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. Another evident difference between a mere tortfeasor and a railroad company is this: the former necessarily attaches his structures to the freehold, for he has no less estate in himself; but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit: The right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purposes; and lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law, notwithstanding the original illegality of the entry. There are some analogies bearing remotely on the question before us, showing that property is not gained by the owner of the land because found upon it," etc. In *Railroad Co. v. Dunlap*, 47 Mich. 458, 11 N. W. 271, the supreme court (page 465, 47 Mich., and page 273, 11 N. W.) said: "We are of opinion that no error was committed in excluding from the compensation allowed to Dunlap the value of the railroad track laid upon the land. The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be

absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold." In *Jones v. Railway Co.*, 70 Ala. 227, Brickell, C. J., ably demonstrates that the necessary structures for a railroad, placed upon land by one having the power of eminent domain, continue, under all circumstances, the personal chattels of such one. This rule is announced in *Railroad Co. v. Le Blanc*, 74 Miss. 650, 673, 21 South. 760, where many of the authorities supporting it are cited with approval. The plaintiff shows a right to recover the premises from the defendant, and he is entitled to recover also of defendant, for its use and occupation, a reasonable compensation for any use to which it could reasonably have been put by the plaintiff, and a further sum to cover all damages done upon the land by the defendant in constructing a roadbed for its railway track. The plaintiff is to be compensated for all losses, but he should have no increased compensation by reason of its use as a part of the system of railroad operated by defendant. *Sullivan v. Lafayette Co.*, 61 Miss. 271; *Kille v. Ege*, 82 Pa. 102; *Bullock v. Wilson*, 3 Port. 382; *Sedg. Dam.* § 908. The appellee insists that these principles do not apply to this case because the 1,000 feet of roadbed here sued for is only a part of a short spur line, and not an essential or necessary part of defendant's main line; but the principle of law relating to the subject applies alike, we think, to both cases.

Reversed and remanded.

OWENS v. STATE.

(Supreme Court of Mississippi. June 9, 1902.)
HOMICIDE—EVIDENCE—THREATS—INSTRUCTIONS—DISCREDITING WITNESS—CONTRADICTORY STATEMENTS.

1. Defendant was indicted for murdering a revenue officer. The killing was done by others when he was not present, but the state claimed that he furnished ammunition for the purpose, and advised the killing. *Held* error to admit testimony that over a year before, and after an officer had been shot, defendant said: "If the revenue officers didn't quit bothering out there, there would be some more of them shot." "I don't mean that I will do it, but it will be done."

2. On the trial of defendant for the murder of a revenue officer, the only testimony connecting him with the crime was that of an accomplice, who, on cross-examination, testified that all that he had stated on his direct examination was false, that defendant did not do the acts or speak the words witness had testified to, and that his reason for testifying as he did was that the other persons accused of the crime had told him to do so. *Held* error to refuse to charge that "if they [the jury] believed from the evidence that any witness has heretofore, or on this trial, sworn falsely to any material fact in this case, they may disregard the testimony of such witness altogether."

3. It was error to refuse to charge that "witnesses may be impeached by showing that they have made statements at other times and places,

and have testified under oath at other times and places, materially different from their testimony on the witness stand; and the jury may disregard the testimony of witnesses who are shown to their satisfaction to have willfully made statements or given sworn testimony at other times and places materially in conflict with their testimony on the witness stand in this case. But this testimony to impeach the witness is for the purpose of showing such witness to be unworthy of credit, and not directly to establish the guilt or innocence of the defendant."

Appeal from circuit court, Lafayette county; P. H. Lowry, Judge.

"To be officially reported."

Whit Owens was convicted of murder, and appeals. Reversed.

Whit Owens, appellant, was, together with Wil Mathis and Orlandus Lester, indicted for the murder of Hugh Montgomery on the 16th of November, 1901, convicted, and sentenced to death. The evidence for the state showed that John and Hugh Montgomery were deputy United States marshals, and went to the house of Wil Mathis on the evening of November 16, 1901, for the purpose of arresting Mathis for illicit distilling; that they were persuaded by Mathis and one Jackson to stay overnight at Mathis' house, and during the night were murdered in Mathis' house. There was no proof that Owens was present at the time of the murder, it being the theory of the state that he was an accessory before the fact. The only evidence connecting him with the crime was that of Orlandus Lester, an accomplice, and who testified that, after the arrival of the Montgomerys at the home of Mathis, Mathis sent him (Lester) to the house of defendant Owens, who lived about two miles from Mathis, with a message for him to come there with his gun, and bring some buckshot, and help him kill the two officers; that Owens gave him no answer when the message was delivered, but said he would answer later; that he then went some distance further, to the house of one Geo. Mask, who, like Mathis, was a son-in-law of Owens, and got Mask's gun, and came back by Owens' place, when Owens gave him some buckshot shells, and told him to tell Mathis that he could not come, for fear his wife would create an alarm, and not to let the officers get away, and that Mathis and Jackson could manage them; that, after he returned to Mathis' house, Mathis sent him into the room where the Montgomerys were in bed, with a lamp, to get some cobs, and, as he was about to come out, Mathis and Jackson came to the door, and opened fire on them and killed them. On cross-examination, Lester stated that all that he had stated on his direct examination was false, and that Owens gave him no shells, and sent no word whatever to Mathis, and that he testified falsely because Mathis told him to do so, as it would be of advantage to them (Lester and Mathis). The opinion of the court contains a further statement of the facts. Defendant's motion for a new trial was overruled, and he appeals.

Stephens & Stephens and McWille & Thompson, for appellant. W. L. Easterling, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. This case is not like that of Mathis or Lester. In those cases the guilt of the parties was shown by overwhelming evidence of the most positive character. This appellant was not present at the killing, and the effort here is to show that he was an accessory before the fact. But this rests wholly upon the testimony of Lester, a self-confessed perjurer. It was earnestly argued that Owens did not take the stand, and that no member of his family took the stand, to contradict Lester as to what Lester said occurred at Owens' house, between him, and Owens. But the state must convict on affirmative testimony showing the guilt, not on the failure of the defendant to show his innocence. That innocence is presumed till the state has shown the contrary. The conversations overheard between Owens and others in the jail are not addressed to the point of showing affirmatively his guilt. They are not affirmative evidence of participation in the crime as accessory before the fact, and it is not, of course, argued that they involve any confession. They have their due weight as evidence, but it is perfectly plain that this conviction must rest exclusively on the testimony of Lester.

On the trial of this case the witness P. E. Mathews was permitted to testify to an alleged threat. What he says on that subject is as follows: "Q. State to the jury if you have ever heard him make a statement with reference to the killing of revenue officers? If so, state to the jury when and where it was, and what was said? A. Yes, sir; I heard him make a statement. (Counsel for defendant objected. Objection overruled. Exception taken.) Q. Tell the jury when and where it was, and what was said? A. I don't remember exactly the date. It was some little time after Dave Rogers was shot at out here south of town. I had a conversation with him. By the court: About how long ago? A. It was something over a year ago. My recollection is it was in the summer or fall of 1900. Q. At that time what was Dave Rogers? A. Deputy United States marshal. By court: State the words that was said by Whit Owens? A. I had a conversation with Mr. Owens here in town, near the federal court building. His statement to me was, if the revenue officers didn't quit bothering out there, there would be some more of them shot. (Counsel for defendant objected as incompetent, too remote, etc. Objection overruled. Exception taken.) Q. Did you say anything to him, or him to you, further? A. Yes, sir; I told him that I thought it was improper to make that kind of a statement. (Counsel for defendant objected. Objection sustained.) By the court: I don't think Mathews' statement to Owens is admissible, and it is excluded. A. His answer was, 'I don't

mean that I will do it, but it will be done.' That's about his language, as well as I remember it. (Counsel for defendant objected, and moved to exclude all this testimony. Objection overruled. Exception taken.)" The court should have permitted what Mathews said to Owens to go in evidence. It was part of one continuous conversation, and what Mathews said to Owens is necessary to make intelligible Owens' response, "I don't mean that I will do it, but it will be done." It is not possible to sustain the admission of this testimony on the theory that it shows a threat. It is perfectly plain that Owens did not threaten these two officers individually; and counsel for the state concede that, but they say that it was a class—revenue officers as a class—who were threatened. Threatened by whom? Owens did not threaten to do anything himself. It is impossible to take his language and work out of it, by any just reasoning, any threat that he was going to injure, or aid in injuring, anybody. On the contrary, he expressly disclaimed the purpose of shooting any one himself. "I don't mean that I will do it, but that it will be done." We think it perfectly clear that the language used contained no threat, within the meaning of the law. It was error to admit this testimony. The language was used more than a year prior to this trial. There is nothing in the evidence to indicate that, at the time this alleged threat was made, Owens had any cause himself for personal animosity towards the revenue officers. The most that can be said was that he was describing a state of feeling that existed in his community towards revenue officers as a class, but when he couples with this statement the distinct declaration, "I don't mean that I will do it," it must be perfectly obvious that this falls far short of stating any threat on his part that he individually would shoot, or aid in shooting, any revenue officer. Within none of the principles laid down in the law books as to what constitutes a threat can this language be held to be a threat. See *Hinson v. State*, 66 Miss. 532, 6 South. 463. It was therefore error to admit this testimony. It is too obvious for discussion that this testimony was prejudicial in the highest degree to the defendant's rights. It must have weighed mightily with the jury. The same testimony was admitted in the other case against Owens. In one of these cases, singularly enough, the jury found the defendant guilty of murder, without fixing his punishment at imprisonment in the penitentiary for life; and in the other the jury, whilst finding him guilty of murder, merely fixed his punishment at imprisonment for life.

In this case, in which the prisoner was sentenced to death, the court refused to charge the jury for defendant as follows: "The court instructs the jury that if they believe from the evidence that any witness has heretofore, or on this trial, sworn falsely to any material fact in this case, they may disregard the testimony of such witness al-

together." In the other case the court refused an identical instruction to the defendant in the following words: "The court instructs the jury that if they believe from the evidence that any witness has heretofore, or on this trial, sworn falsely to any material fact in this case, they may disregard the testimony of such witness altogether." Both these instructions should have been given in the respective trials. The fact that the court had charged the jury, in an instruction telling them that they were authorized to convict on the testimony of the accomplice alone, and that they were the sole judges of the credibility of the witnesses, does not cure this error, on the peculiar facts of this case; for here the whole case for the state depended absolutely upon the testimony of this one witness, Lester. Without his testimony it was, of course, impossible to convict defendant. He, and he only, testifies to the substantive facts affirmatively showing the defendant to have been an accessory before the fact in this horrible assassination. The whole purpose of the testimony was to connect Owens with the killing, and this connection is shown alone by the testimony of this witness Lester, and this witness is a self-confessed perjurer. There is scarcely a material fact in his testimony about which he does not confess that he deliberately perjured himself at different times. Nay, more than this, he actually confesses to deliberate perjury during the same examination in this case, contradicting under oath on the cross-examination the most solemn statements of fact fresh from his lips on the examination in chief. Could there be conceived a case in which it was more vital to a fair and impartial trial that these two instructions should have been given? They go to the very soul of the defense, to wit, that the state witness was wholly unworthy of credit. It was not sufficient, therefore, to have stated incidentally that the jury were the sole judges of the credibility of the witnesses, in the charge, not pointing specifically on that proposition, but on the totally distinct proposition that the jury might convict on the unsupported testimony of an accomplice. The principle of *Green v. State*, 55 Miss. 454, controls here, wherein it was held error to refuse an instruction for defendant that the testimony of an accomplice should be received with great caution, and that the jury might disbelieve such testimony altogether, although the jury had already been charged that they were the sole judges of the evidence, and might disregard the testimony of such witnesses as they did not believe. The charge in *Finley v. Hunt*, 56 Miss. 223, told the jury the witness "was not entitled to credit" as to any other matter as to which he had testified, if he had testified falsely as to any material matter, and was properly refused, because it commanded the jury to wholly disbelieve the

witness in such case. It is not objectionable on the ground that it was aimed at the witness Lester. This case is not like that of *Railway Co. v. Tate*, 70 Miss. 348, 12 South. 333, in that respect. The testimony of the only witness for the defendant there was not only not contradicted, but was neither improbable nor unreasonable. Here the testimony of this witness is self-contradictory. He himself admits that he has deliberately perjured himself in his statement as given in the examination in chief and cross-examination on this very same trial. In such a case it is no objection that the instruction is aimed at testimony confessedly perjured. See *Norwood & Butterfield Co. v. Andrews*, 71 Miss. 641, 18 South. 262. It may be said that the instruction omits the word "intentionally," and that under *Railroad Co. v. Hedrick*, 62 Miss. 29, it was properly refused for that reason; but that case and similar cases refer alone to those instances in which it is possible that the false testimony may have been simply mistaken testimony, in which the witness may have stated a fact falsely (stated it as it was not), and yet done so unintentionally (testified falsely, in other words, by pure mistake). But it would be preposterous to claim that this witness testified falsely, in the many instances in which he admits that he testified falsely, simply by mistake. He leaves no room for the application of the principles announced in the cases cited. He confessed, callously and shamelessly, that he had not only perjured himself, but had done so in such a way that it is impossible not to see, clearly and plainly, that he had intentionally and deliberately perjured himself as to most material facts. Where, therefore, the facts show that the witness had intentionally perjured himself about material matters, it is wholly immaterial that the word "intentional" was omitted from the charge. The only object of putting the word "intentionally" in such a charge is to warn the jury that they should not wholly reject the testimony of a witness because he had testified falsely merely, if he had so falsely testified unintentionally (that is to say, by mistake); but where the jury see (they themselves), with overwhelming clearness, that the witness had intentionally perjured himself, the insertion of the word "intentionally" in the charge is wholly immaterial.

The court also refused in this case, in which the prisoner was sentenced to death, to give the following charge: "The court instructs the jury, for the defendant, that witnesses may be impeached by showing that they have made statements at other times and places, and have testified under oath at other times and places, materially different from their testimony on the witness stand. And the jury may disregard the testimony of any witness or witnesses who are shown, to their satisfaction, to have

willfully made statements or given sworn testimony at other times and places materially in conflict with their testimony on the witness stand in this case. But this testimony to impeach the witness is for the purpose of showing such witness to be unworthy of credit, and not directly to establish the guilt or innocence of the defendant." It is impossible to conceive for what reason this instruction was refused. It is accurately drawn, peculiarly appropriate under the facts in this case, and eminently proper to have been given, and its refusal was a grievous error against the appellant.

Looking at these three errors, each one of them most vital and material to a fair and impartial trial, remembering that the conviction of the defendant rested exclusively upon the testimony of the witness Lester, so far as the facts showing his connection with the crime are concerned, is it not manifestly the plain duty of this court to reverse? We are bound to administer the law justly and impartially. If the jury, believing the witness, as they had a right to do; had found him guilty, the court having committed no reversible error in its rulings on the evidence and instructions, we would have disregarded all minor errors and affirmed the conviction; but it is impossible for any court of last resort to affirm a conviction resting, like this, on the solitary testimony of a callous and shameless perjurer,—a self-confessed perjurer, where the court has committed three errors, each vital, in the highest degree, to a fair and impartial trial. We repeat what we stated in the case of *Ellerbe v. State*, 75 Miss. 531, 22 South. 952, 41 L. R. A. 569: "If this error were a merely technical one, not vital in its nature, we would not for that alone reverse the judgment. * * * So far as the lawful power of this court can be exerted in affirming convictions for violations of the law of the land, it shall be exerted; and mere technical errors, without intrinsic merit, when we can, after careful and thorough examination of the whole case, confidently say that the right result has been reached, that substantial justice has been done, and that on a new trial no other result could reasonably be arrived at, will not avail here for reversal in civil or criminal cases; but where the defendant has been, as here, denied a right secured to him by the constitution and the laws of the land, we are compelled to reverse the case. In such cases the interests of society, the stability of the laws, the due administration of justice, demand a reversal. Disregard of fundamental right in the case of the guiltiest defendant, his conviction in violation of settled constitutional and legal safeguards intended for the protection of all, are not things which affect the particular defendant in a given case alone, but, in their disastrous and far-reaching consequences, involve, in future trials, the innocent and guilty alike,

subvert justice, and disorganize society. Guilt should be punished certainly and condignly, most assuredly; but guilt must be manifested in accordance with the law of the land, else some day the innocent, who are sometimes called to answer at the bar of their country, may come to find themselves involved in a common ruin, and deprived of the legal trial necessary to the vindication of their innocence." Where the crime committed is one as atrocious and infamous as this, there is all the more reason, on the one hand, why the court, sitting serene amid the tumult of feeling, should hold the scales of justice with even balance,—see to it that no just right of the accused is swept away in the tempest of passion aroused by the enormity of the crime; and, on the other, why the court should be liberal in its rulings to the defendant, since the result is, in such case, almost certainly conviction, if there be any testimony warranting it, and hence the common sense and sound judgment of the jury may well be trusted to reach the right result without the aid of vicious rulings on the evidence and the instructions. We say this much in deference to the earnest appeal made to us to affirm this conviction without regard to errors. This we might do, and would do, if we could conscientiously declare that these errors were not vital. But who shall say that the admission of evidence as to the threat, and the refusal of charges going to the very essence of the defense, were not most potential in producing the result? We administer the law of the land with equal hand between the state and the prisoner at the bar. We know nothing of his guilt or innocence except as manifested to us by the record. Neither the tumult of popular feeling against a defendant, nor sympathy of those dear to him in his behalf, can communicate itself to this tribunal. We would be unworthy of the high places we hold, if, convinced that vital error had been committed,—error showing that a fair and impartial trial has not been had,—we did not unhesitatingly reverse the judgment, in order that the defendant, however guilty, when finally sentenced to death, after having had a trial fair and impartial, may not be able, dying, to charge the administration of justice with an execution unsanctioned by the law of the land.

HARTFORD FIRE INS. CO. v. SHLENKER.

(Supreme Court of Mississippi. June 9, 1902.)

INSURANCE—POLICY—STIPULATIONS TO WAIVE STATUTE—LOSS.

Under Laws 1894, c. 63, § 1, as amended by Laws 1896, c. 56, providing that in case of loss by fire of insured personal property, where the same, after issuance of the policy, is constantly changed in specifics and quantity, in the course of trade, only the actual value of the property at the time of loss may be recovered, not to exceed the amount expressed in

the policy, where there was a policy of \$2,000 on a stock of cotton worth \$15,000, of which \$4,000 worth was destroyed by fire, the insured could recover the \$2,000, notwithstanding conditions in the policy expressly waiving all benefit under such law, and providing that the property should be insured to its full value, and in case of loss the insurer should be liable only for such portion of the loss as the amount of the policy bore to the full value of the property insured at the time of the fire.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Action by D. J. Shlenker against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

D. J. Shlenker sued appellant upon a fire insurance policy covering cotton in bales contained in certain cotton yards in Vicksburg, Miss. The policy sued on contained the following stipulations: "In consideration of the mutually agreed reduction of one per cent. per annum at which this policy is issued, the assured agree to waive any and all benefit that may be claimed under an act of the legislature of Mississippi known as 'House Bill No. 702,' approved March 20, 1896; and it is understood, agreed, and warranted by the assured that the basis for adjustment of any claim for loss or damage to the property covered by this insurance shall not exceed the actual cash market value of such property at the time of the loss and at the place of the fire, which cash market value shall in no event be greater than it would then and there cost to replace the property damaged or destroyed with property of the same kind and quality. And it is further understood, agreed, and warranted by the assured to maintain insurance to an amount not less than the cash value of the whole property hereby insured, and that in case of loss under this policy this company shall be liable only for such proportion of the whole loss which shall not exceed the actual market value as above provided as the amount of this insurance bears to the cash market value of the whole property hereby insured at the time of the fire. Now, therefore, in consideration of said reduction in rates, the assured do hereby covenant and agree with the Hartford Fire Insurance Company that, in case this warranty and agreement shall at any time be violated, they do hereby declare themselves liable to the Hartford Fire Insurance Company for any loss or damage which may result to said Hartford Fire Insurance Company by reason of breach of this warranty; it being clearly understood that this policy of insurance is based on this agreement, and its validity depends upon the performance of this obligation." The suit was for \$2,000, the amount of the policy, and the declaration alleged that there was \$15,000 worth of cotton in the yards at the time of the fire, which destroyed over \$4,000 worth of the cotton. Defendant filed several separate pleas, raising the following questions: (1) By the terms of the policy, the insurance company was not responsible for the whole amount named in the policy, but only to the

extent of the proportion which the amount named in the policy might bear to the whole amount of the value of the property insured; (2) that the stipulation that the insured would maintain insurance upon the property to its full value was a vital condition upon which the policy was issued, and that by failure to maintain such full insurance the policy became void; (3) that the insured became bound to make good any loss or damage which might result to the company by reason of his failure to maintain full insurance; (4) the property insured was constantly changing in specifics, quantity, and value in the usual course of trade, and that for this reason the policy was not subject to the valued-policy provisions of the law of 1896. Plaintiff demurred to these several pleas. The demurrer was sustained, to which defendant excepted, and declined to plead further, whereupon a judgment was rendered for plaintiff for the amount sued for and interest. From that judgment, defendant appeals.

E. J. Bowers and Catchings & Catchings, for appellant. Smith, Hirshe & Landau, for appellee.

WHITFIELD, C. J. The act under construction is as follows:

"An act to amend section 1 of chapter 63 of the Laws of 1894, known as the 'Valued Policy Law,' and to reduce the cost of fire insurance, and to prevent insurance trusts and combines, and to fix the amount of taxes to be paid by fire insurance companies.

"Section 1. Be it enacted by the legislature of the state of Mississippi, that section 1 of chapter 63 of the Laws of 1894, be so amended as to read as follows: In suits brought upon policies of insurance against loss by fire, hereafter issued or renewed, the insurer shall not be permitted to deny that the property insured was worth, at the time of issuing the policy, the full value upon which the insurance was calculated. And in case the policy contains a three-quarter valuation clause, the insurer shall not deny that the amount of the policy was but three-fourths the valuation at the date of its issuance, and a similar rule shall apply, it matters not what proportion the amount of insurance bears to valuation, according to the terms of the policy. In case of total loss of the property insured, the measure of damages shall be the amount for which the property was insured. In case of partial loss, or damage by fire, the measure of damages shall be an amount equal to the damage done the property, not to exceed the amount written in the policy, and in case of losses on stocks of goods and merchandise, and other species of personal property, where the same, after the issuance of the policy, is constantly changed in specifics and quantity, in the usual course of trade, only the actual value of the property at the time of the loss may be recovered, not to exceed the amount expressed in the policy." Laws 1896, c. 56.

The scheme of this statute, it seems to us, after the most careful consideration, is this: To provide that in case of total loss of property, real or personal, except personal property constantly changing in specifics and quantity, the company shall pay the amount named in the policy,—the amount on which, as a basis, the premium has been calculated and received.—and that in case of partial loss of real or personal property, except personal property constantly changing in specifics and quantity, the company shall pay the amount of actual damage, not to exceed the amount of the policy; again making the company possibly liable, according to the extent of the damage, on the basis of the amount on which it has received premiums. It could not be known in advance how great or small the damage would be in case of a partial loss, and hence no sum could be named as the measure of a partial loss; and consequently, since there was no sum the parties could agree on as the measure of the partial loss, there could be no contract to pay any specific sum, but the amount to be paid must be measured by the actual damage,—not to exceed, in the case of any company, the amount named in the policy. The insured might recover up to the amount on the basis of which the premiums had been calculated, but could never recover from different companies two or three times the value of the property destroyed, as in case of total loss, since there could be, in the nature of things, no fixation of the amount of partial loss, as there easily could be of the amount of a total loss. And lastly the statute provided that, in case of personal property constantly changing in specifics and quantity, the company should pay the actual value of the property destroyed, not to exceed the amount of the policy. The same thought, precisely, is manifest here as in the two previous cases. The insured must be made whole. The actual value of the property destroyed may be recovered, provided that amount does not exceed the amount named in the policy,—the amount, again, on the basis of which the premium has been calculated. The two things clearly deductible from the statute are these: First. The insured must, at all events, in each of the three cases named, recover the amount of his actual loss; that loss being fixed in the first class, but not susceptible of fixation in the two second classes, of property. Second. That the company must always pay on the basis of the amount on which it has received premiums,—only the actual damage or loss, of course, in the two last cases, but, nevertheless, that whole loss up to the limit named; the amount of the policy; the amount on which the premium has been calculated. In the first class,—real or personal property,—as to which the value could be agreed, it is provided that that value shall be the measure against each company, no matter how many, and the insured might

recover many times the actual value. Why? Because each company can agree for itself what the value is, and if it does so, and receives premiums on that basis, during the life of the contract, it does nothing but comply with the contract it makes, when it pays the whole value, for it had received premiums on the whole value. It could always know whether there was other insurance, and it might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another. They can, in the first class of property, know the value, and insure just such part of the value as they please; but, having insured a certain part, they must pay on the basis of the value of the whole or that part as named in the contract, since they have received premiums on such agreed value. In each of the last two classes of property the amount of the damage cannot be known in advance, so as to be contracted about; and, since no contract has been made to pay a fixed sum, the company can only be bound to pay such loss as proof may show. But while it cannot know in advance what the loss will be, it can agree to be bound up to a certain limit; and, naming such limit, and receiving premiums on such sum as the basis, it is required to pay the actual loss, not to exceed that limit. If the loss be less than such named limit,—the amount of the policy, the basis on which the premiums are received,—the company escapes with paying less than its possible liability. It has possibly been a very profitable contract in such case. If it has to pay the full amount of the policy, it is simply paying the amount on the basis of which it has all along received premiums. Twice does the statute carefully repeat that in the last two cases the measure of recovery should be the actual loss, not to exceed the amount named in the policy. Why this careful repetition, if it was not meant that the amount of the policy might be always recovered where the proof showed actual loss to that amount? Is it not clear that the legislature meant to impose a liability measured by the basis on which premiums were received? Twice it is said (once in case of personal property constantly changing in specifics and quantity) that the actual damage (the actual value of the property destroyed) should be recovered. Why this repetition, if it did not mean that the insured should be made whole, up to the amount named in the policy? It is said the legislature meant to leave "personal property constantly changing in specifics and quantity" as it had been. How can this be meant, when plainly it does deal with that sort of property, does name the measure of recovery,—"the actual value of the property destroyed, not to exceed the amount named in the policy"? This express and

specific dealing with the subject-matter excludes utterly the contention that it was to be left as before. The one thought in the legislative mind was to make the insured whole, up to the limit of the amount named in the policy, in the two last classes; and it was thought only just that, receiving premiums on the basis of the amount named in the policy, they should pay, also, on that basis,—pay the loss up to that limit. It may be said that, if the view of the appellant is correct, the policy is avoided wholly by failure to comply with the stipulation for full insurance. With the wisdom of the law we have nothing to do. All considerations of that character should be addressed to the legislative department. It is plain there were great evils to be remedied,—evils brought on by the unjust efforts on the part of the insurance companies to contract for less than fair liability. If, in attempting to cure confessed evils brought on by the insurance companies themselves, the legislature has gone too far, it is a matter for the legislature, and not for the courts. It must be clear that to permit coinsurance clauses, or three-quarter valuation clauses, or any other clauses which cross the plain purpose of this enactment, to stand, is to blot it out. In this very case the insured would get less than his actual loss, in that this insurance company would only pay two-fifteenths of the value of the property,—about one-half the amount on which it has received premiums. Our duty is discharged when we enforce the law as it is written. Amendments or repeals are for the legislative department.

Affirmed.

JACOBI v. STATE.

(Supreme Court of Alabama. April 17, 1902.)
ATTEMPTED RAPE—TESTIMONY AT FORMER TRIAL—ADMISSIBILITY—INSTRUCTIONS.

1. Where a witness has removed from the state permanently or for an indefinite time, his testimony on a former trial of the defendant for the same offense may be put in evidence against the defendant on any subsequent trial.

2. Return of an officer, showing that the prosecuting witness in a prosecution for attempted rape could not be found in the county of her former residence, and testimony of her brother that the mother, with whom she had lived, had moved to another state, having sold her house and lot and nearly all her household effects; that his sister also went to the other state, and was there about two weeks before the trial; that, prior to leaving, the sister had stated she would "rather die than come back to another trial and go through the same ordeal,"—sufficiently showed that she was permanently or indefinitely absent from the state to justify admission of her testimony on a prior prosecution of the defendant for the same offense.

3. A declaration made by the prosecuting witness in a prosecution for attempted rape to her brother, that she would "rather die than come back to another trial and go through the same ordeal," was admissible on an issue

whether she was permanently or indefinitely absent from the state.

4. In a prosecution for attempted rape, a charge that if defendant induced the prosecuting witness to go with him to an assignation house by a false representation of its character, and there did certain specified acts, "the jury are authorized to look at those facts, if they be facts, in connection with all the other evidence, in determining whether or not the defendant assaulted P. [the prosecuting witness], and, if he did so assault her, whether he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose; and if the jury are satisfied, beyond a reasonable doubt, that defendant did assault P., and had at the time such intent, he would be guilty of assault with intent to ravish,"—was too favorable to defendant, because authorizing conviction only in case the facts absolutely existed.

5. Fault in an instruction in singling out certain facts to the exclusion of others would not require reversal.

6. Any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault.

7. In a prosecution for attempted rape, a charge, "In a charge to commit rape, the evidence, to be sufficient to justify conviction, must," etc., was properly refused; the prosecution not being for rape.

8. Refusal of a requested charge is not ground for reversal where its substance is given in another request.

9. A charge that "before the jury can find the defendant of an assault," etc., was properly refused because of the omission of an important word.

10. It is not essential to the crime of assault with intent to commit rape that the perpetrator should have intended that his accomplished act should be rape.

11. A charge: "The court charges the jury that the state is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant, before he can be convicted. If from the evidence all to be proved,"—was properly refused as elliptical and incomplete on its face.

12. In a prosecution for attempted rape, a charge that if the jury believed from the evidence that the prosecuting witness did anything to impliedly consent to defendant's liberties, etc., he could not be convicted, was properly refused, where not supported by evidence.

Appeal from city court of Montgomery; W. H. Thomas, Judge.

Sanford Jacobi was indicted and tried for an assault upon Lizzie Parker, "a woman, with the intent forcibly to ravish her, against the peace and dignity of the state of Alabama," and was convicted of the offense charged in the indictment, and sentenced to the penitentiary for 20 years. He appeals. **Affirmed.**

The appeal in this case is taken from a judgment rendered on the second trial. The first trial resulted in a mistrial. At the first trial, Lizzie Parker, the person assaulted, was present, and testified as a witness. Lizzie Parker was not present at the second trial, but secondary evidence was introduced as to what she testified upon the first trial. The defendant objected to the introduction of this evidence, and separately excepted to the court's overruling each of his objections.

The facts relating to the introduction of the secondary evidence are sufficiently shown in the opinion.

The evidence for the state tended to show that Miss Lizzie Parker arrived in Montgomery at night from Butler county, where she had been visiting; that she was on her way to Clanton, in Chilton county, where she resided with her mother; that the train on which she came to Montgomery did not make connection with the train going to Clanton, and that it was necessary for her to remain in Montgomery overnight; that she had some relatives living in Montgomery, and that, while talking to a transfer man about going to the house of her relatives, her conversation was overheard by the defendant; that the defendant stated to her that he knew her relatives, and where they lived, and, after some conversation, induced her to let him go with her to the place of business of her said relative; that, after going to the place of business, the defendant and Miss Parker walked to the principal street in Montgomery, where he secured a hack; that defendant gave instructions to the hackman to take him and Miss Parker to an assignation house; that upon arriving at said house he went in the room with Miss Parker, and attempted forcibly to ravish Miss Parker; and that while so attempting two policemen came to the door of the room where the defendant and Miss Parker were. The theory of the defendant was that there was no attempt forcibly to ravish Miss Parker, but that what was done by the defendant was the outgrowth of passion, and was not seriously objected to by the prosecutrix.

Upon the introduction of all the evidence, the court, at the request of the state, gave to the jury two written charges. The second of these charges is copied in the opinion. The first charge was as follows: "(1) If the jury believes from the evidence, beyond a reasonable doubt, that in this county, and within three years before the finding of this indictment, the defendant, by a false representation of the character of the house, induced Miss Parker to go with him to an assignation house; that, arriving there, he locked the door of the room, took off his coat, and put his arm around her, and asked her to have sexual intercourse with him; that she refused, and moved her seat; that he followed her to the bed when she sat down upon the side thereof, if she did so sit, and again put his arm around her, forced her down upon the bed, and threw his leg over her, at the same time having his pants unbuttoned and exposing that part of his person, and that while in said room said Jacobi told her that she had to stay with him; that afterwards she got away from the bed and started across the floor, he again caught hold of her, and was holding her, when there was a knock upon the door, and he then released her and started to putting on his clothing,—the jury are authorized to look at

these facts, if they be facts, in connection with all the other evidence in the case, in determining whether or not the defendant assaulted Miss Lizzie Parker, and, if he did so assault her, whether or not at the time of such assault he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose; and if the jury are satisfied beyond a reasonable doubt that defendant did assault Miss Lizzie Parker, and had at the time such intent, he would be guilty of an assault with the intent to ravish, and the jury should so find." To the giving of this charge the defendant separately excepted. The defendant also separately excepted to the court's refusal to give the following charge requested by him: "If the jury believe the evidence in this case, they must find the defendant not guilty of the charge of an assault with the intent to ravish, as charged in the indictment." The defendant also separately excepted to the court's refusal to give each of the following charges requested by him: "(1) In a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant that there is no reasonable doubt of his intention to gratify his lustful desire notwithstanding any resistance on the part of the female. (2) Before the jury can find the defendant of an assault to ravish in this case, the jury must believe from the evidence, beyond all reasonable doubt, that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation, and the like, necessary to accomplish the purpose. (3) The court charges the jury that the state is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant, before he can be convicted. If from all the evidence to be proved. (4) If the jury believe from the evidence that there was anything in the conduct of Miss Parker which impliedly gave her consent to the defendant to put his arms around her and take liberties with her, and he did not put his hands upon her in a rude or angry manner, but under the mistaken belief that she consented thereto, then, upon this state of facts, without more, the defendant would not be guilty of an assault, or an assault and battery."

A. A. Wiley, Jno. W. A. Sanford, Jr., J. M. Chilton, and Henry L. Lazarus, for appellant.
Chas. G. Brown, Atty. Gen., for the State.

McQUELLAN, C. J. Upon a full and exhaustive consideration of the question on principle and authority, this court, in *Lowe v. State*, ruled that "the testimony of a witness on a former trial or prosecution of the defend-

ant for the same offense is admissible as evidence against him on a second trial, if the witness is beyond the jurisdiction of the court, whether he has removed from the state permanently or for an indefinite time," or, to state the ruling perhaps more accurately, that, when the witness has removed from the state permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial. 86 Ala. 47, 5 South. 435. This decision has been often followed and reaffirmed by this court. We are entirely satisfied of its soundness, and we now again follow and reaffirm it.

Whether the predicate for the introduction of secondary evidence reproducing the testimony of Miss Parker on the former trial was sufficiently and properly laid on the last trial is another important question for adjudication on this appeal. Of course, the burden was upon the prosecution to show to the reasonable satisfaction of the trial judge that the witness had left and was out of the state at the time of the trial, and that her absence was of a permanent or indefinite nature. On this matter evidence was adduced before the judge of the city court that process to secure the witness' attendance had been sent to the counties of Chilton, Jefferson, and Butler. Chilton was the county of the witness' last known residence in this state. The process was returned from that county "Not found." It does not appear in evidence why process was sent to the county of Jefferson. It, too, was returned "Not found." It appeared that the witness had at some indefinite time in the past taught school in Butler county, that after this she returned there in the summer of 1900 on a visit, and that she was returning from that visit to her home in Chilton county when the assault was committed on her by the defendant. This writ to Butler county had not been returned. The further evidence adduced by the state tending to prove that the witness was permanently or indefinitely beyond the jurisdiction of the court was the testimony of O. E. Thomas, as follows: "That he is a half-brother of Miss Lizzie Parker [the absent witness], of Clanton, Alabama; that he resides in Birmingham, Alabama, and has been residing and was so residing there on the 23d day of June, 1900 [the date of the offense]; that he had not resided with his mother and sister for the past five or six years; that on or about the 23d day of June, 1900, his mother, who was then residing in Clanton [Chilton county], became quite ill, and wired for witness to come to her bedside; she also summoned his sister, Miss Lizzie Parker, who was on a visit to relatives at Chapman, in Butler county, and that she arrived at Clanton on Sunday, the 24th day of June, 1900; that his sister said nothing to him as to what occurred between her and Sanford Jacobi in Montgomery on the previous night, and that he knew nothing

ing of it until he saw and read a publication thereof in the Montgomery Advertiser on Tuesday morning, June 26, 1900; that he then mentioned the matter to his sister, and she said she was sorry any publicity had been given to the matter, as it would tend to injure her; that Miss Lizzie Parker was about twenty-three years old in June, 1900, and lived with her mother at Clanton, Alabama, and that she had no other home than with her mother, and that her mother had no other home in June, 1900; that his mother is a widow; that some time in the month of January, 1901, his mother broke up her home in Alabama, and sold her house and lot, and sold off all her household goods, except a little furniture, which has not yet been sold, broke up housekeeping, and went to Georgia; that his sister, Lizzie Parker, had gone to Georgia before her, about the 1st of January, 1901; that he had received a letter from his sister, Lizzie, which he knew to be in her handwriting, about two weeks before the date of this trial [August 5, 1901], from Buena Vista, Georgia, the envelope containing said letter being postmarked, 'Buena Vista, Ga.'; that his sister is an unmarried woman, and has no home other than that of her mother; that witness at the time she left Alabama did not say anything about a change of domicile, or about leaving the state permanently, or about acquiring a residence elsewhere than in Alabama; that witness did not know when his sister would return to Alabama, if at all, and that he knew nothing whatever about her intentions upon this subject; that his sister, Miss Lizzie Parker, had testified as a witness for the state at the October term, 1900, on the trial of the case of the state against Sanford Jacobi under this indictment, and that said trial resulted in a mistrial; and that shortly after the former trial, which occurred in November, 1900, he had a conversation with his sister, Lizzie Parker, in reference to said trial, in which she stated, 'I had rather die than to come back to another trial and go through the same ordeal.' " On the cross-examination of the witness Thomas, in answer to a question propounded by defendant as follows, "Are you able to state whether or not your sister's stay in Georgia is indefinite," the witness said he could not. In answer to another question propounded by defendant, witness said he "was not able to state whether or not his sister, Lizzie Parker, was in the state of Alabama at this time or not; nor was he able to say whether or not she had been continuously absent from the state of Alabama from the time she left Clanton, in January, 1901, up to the time witness received said letter from some point in Georgia, the envelope of which was postmarked, 'Buena Vista, Ga.,' as he had before testified."

The absence of a witness from the state may, for the purpose under discussion, be shown in two ways: It may be made to appear by evidence of a proper and fruitless

search for him in every county in which there is any apparent likelihood of his being found, from which an inference may be reasonably drawn that he is beyond the jurisdiction of the court; or, without resorting at all to proof of such vain search, it may, of course, be shown directly that he is in another state under circumstances from which it is fairly inferable that his return is contingent, uncertain, and speculative. *Mitchell v. State*, 114 Ala. 1, 3, 22 South. 71; *Thompson v. State*, 106 Ala. 67, 74, 17 South. 512. And evidence of this latter character may, of course, be strengthened, in respect of the absence from this state, by the fact that officers charged under process with the duty of finding him here have failed to find him in the county of his former residence. We do not understand that it was sought to lay the necessary predicate in this case by evidence of the former class, but that the evidence of the issue and return of subpoenas or attachments was intended to be and was considered by the trial court only along with the other evidence as to this witness being in the state of Georgia. None of the evidence as to the writs was of importance, except that as to the process which went to Chilton county, the former home of the witness. It did not appear that there was any likelihood of the witness being in the county of Jefferson or in the county of Butler. It was not shown that she had ever been in Jefferson, or had any occasion to be there. So the fact that she was not there when the writ was in the hands of the sheriff of that county has no legitimate tendency to show that she was out of the state. As to Butler county, it was shown that she had been there temporarily at some unidentified time in the past engaged in teaching a school, but this engagement had ended some considerable time before the offense charged, and that just before the assault upon her she had returned to that county on a visit to relatives,—a necessarily temporary occasion, which had ended on the day of the assault. There being no likelihood of her presence in Butler county at the time of the trial, or just prior thereto, there was no occasion to send process to that county for her. The return of "Not found" on such process would not have shown that she was absent from the state; and the failure of the officer to return the writ at all neither authorizes an inference that she was in that county, nor goes to weaken other evidence tending to show that she was beyond the jurisdiction of the court. But the return of the sheriff of Chilton county that she could not be found in the county of her former residence was pertinent and competent, and entitled to consideration in connection with the other evidence going to show her absence from the state.

The inquiry then being whether the witness was beyond the jurisdiction of the court (that is, beyond the boundaries of the state), we have a return of an officer going to show that she could not be found in the county of

her former residence (the only residence there is any evidence tending to show she ever had in the state), and with this the testimony of her brother that her home had been up to January, 1901, with her widowed mother, in Clanton, Chilton county; that in said month this home had been entirely broken up; that the mother sold her house and lot (her home) in Clanton, and all her household effects, except a little furniture, "which has not yet been sold" (the inference being that even this remnant was for sale), "broke up housekeeping," "broke up her home in Alabama, and went to Georgia"; that his sister also went to Georgia; that she (the sister) was in Georgia six months after this removal, the prima facie presumption being that she had remained there during that time, and was in Georgia two weeks before this trial, the prima facie presumption being that she had continued there up to, and was there at, the time of the trial, and, in effect, that, if either the mother or sister had ever returned to Alabama, he (the son and brother) knew nothing of it. In addition to this there is evidence of a motive on the part of Miss Parker to remove herself beyond the jurisdiction of the court, and to remain out of the state indefinitely. She declared to her brother some time within the period of less than two months intervening between the time of the first trial and her departure to Georgia that she had rather die than return and go through the ordeal of another trial; her precise language being, "I had rather die than to come back to another trial and go through the same ordeal." Here there is proof of adequate motive for Miss Parker to leave and to remain indefinitely out of the state. Here is proof that the only home she had or ever had in the state was broken up, and the house that sheltered her and the household goods sold. Here is proof that the mother, with whom she lived, and had always lived, and naturally would live as long as she remained unmarried, having no longer a home in Alabama, nor aught else, so far as the evidence goes, to keep her here or to bring her back, but having thus disposed of all her effects, went to Georgia, and the daughter with her, and prima facie that since they went they have there remained, and were there at the time of the trial. Being there under these circumstances, there is no warrant for saying their stay is of a temporary nature, but every pertinent consideration points to its indefiniteness, if not, indeed, to its permanency. So we conclude, in line, we believe, with all of our adjudications, all which have been attentively considered, that the evidence, with requisite clearness, showed that the witness Lizzie Parker was permanently or indefinitely absent from the state at the time of the trial below, and that the city court properly admitted evidence of her testimony on the former trial.

We have not been inattentive to the objection and exception reserved in the court be-

low to the admission in evidence of the declaration of Miss Parker that she "had rather die than to come back to another trial and go through the same ordeal," nor to the strong argument of counsel in support of that exception. But we are of opinion that the position is not tenable, and that the declaration belongs to that class of expressions of present mental conditions which are competent, as exceptional from the rule against hearsay, and wholly apart from the doctrine of *res gestæ*. There being evidence of Miss Parker's having left and being absent from the state, the further inquiry was whether that absence was of a temporary or of a permanent or indefinite nature; and this was largely a matter of intention on her part, deducible from the considerations and purposes which actuated her in leaving and remaining out of the state. Expressions by her of mental conditions having a bearing on this inquiry, which to all appearances were made naturally and sincerely, are admissible as original evidence. It is of this class of declarations, among others, that Mr. Greenleaf says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence; and whether they were real or feigned is for the jury to determine [the court in this instance]. In the words of Lord Justice Mellish: 'Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.' This use of such statements is often spoken of as admissible under the *res gestæ* notion, or as 'original' evidence; i. e. not an exception to the hearsay rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the hearsay rule; e. g., where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice, or where running away is taken as indicating fear. But where a distinct assertion in the form of words predicated a mental state is offered,—as 'I have a pain in my side,' or 'I have the intention of going out of town,' or 'I do this for such and such a reason,'—this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of Lord Justice Bowen, "The state of a man's mind is as much a fact as the state of his digestion;" and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the hearsay rule. To admit them

then is to make an exception to the hearsay rule. The different kinds of facts that may be the subject of such assertions may be grouped as follows: (1) Assertions of pain or other physical conditions; (2) assertions of plan, design, intention; (3) assertions of feeling, emotion, motive, reason; (4) sundry assertions by a testator. The existence of a person's design or plan to do a thing is relevant circumstantially to show that he ultimately did it. The presence of the design or plan may be evidenced circumstantially by conduct; but the person's assertion of a present design or plan, when made in a natural way, and not under circumstances of suspicion, is admissible under the present exception. The *res gestæ* notion is often put forward, but improperly, as the justification of this. For the reason already explained, such statements must be regarded as admissible by virtue of the present exception. They are generally treated as admissible, though a few courts are found to exclude them, usually through a misapplication of the *res gestæ* principle. Statements of intent, where the intent becomes material in determining a person's domicile, are sometimes treated as admissible by reason of the *res gestæ* or verbal act doctrine, but it is perhaps better to regard them as governed by the present exception. Statements of intent accompanying an alleged crime are usually admitted according to the *res gestæ* doctrine. Statements of reason, motive, feeling, emotion are equally included under the general principle, and are admissible so far as they appear to be natural and sincere. For example, where the reason or motive for the departure of certain workmen was a part of the plaintiff's case, the statements of the workmen to the superintendent, when leaving, as to their reason for it, were admitted. * * * So, also, statements describing one's fear, belief, cheerful or malancholy feelings, or the like, physical disgust, hostility or affection, and the like." 1 Greenl. Ev. §§ 162a-162d. The supreme court of Minnesota applied the principle just stated to the declaration of an absent witness that he was then domiciled in another state, in connection with evidence that he had left the state of the forum, and held, on evidence very like that in the case before us, that the testimony of the witness on a former trial was admissible. *King v. McCarthy*, 54 Minn. 190, 55 N. W. 96. In a leading case in Massachusetts, the court held: "Declarations of a person accompanying a change of his abiding place have always been held competent to explain the change, as a part of the *res gestæ*, but declarations in such cases are often admissible on a broader ground than as part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced, if it is free from objection in other particulars. The intention may be in-

ferred from acts and conduct, and conduct which tends to show the intention is competent for that purpose. Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention." *Viles v. City of Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311.

The declaration of Miss Parker showed a state or condition of her mind bearing directly on the inquiry whether she had left the state, and whether her absence was temporary, or indefinite or permanent, and tended naturally to show such motive and intent in leaving as supports the conclusion that her absence is at least of an indefinite nature. It was properly received in evidence and considered by the city court, under the authorities and principles to which we have adverted, and is a part of the evidence for our consideration here in determining whether the witness is indefinitely absent from the state. The declaration is a perfectly natural one for Miss Parker to have made under the circumstances, and entirely in line with the disposition to avoid putting herself forward, and publicity, which she has shown throughout this case. There can scarcely be a doubt that the declaration was a sincere statement of the condition of her mind on the subject of attending another trial of this defendant,—a condition which would naturally lead her to leave and remain away from the state.

It may be that the evidence before the judge of the city court, other than this declaration, was sufficient to establish the necessary predicate for proof of Miss Parker's former testimony. We have not considered it, except in connection with the declaration, deeming that clearly competent. And if such other evidence was sufficient, the admission and consideration of this declaration by the city court, conceding that action to have been erroneous, would not require or authorize a reversal. This issue upon which the declaration was received was one solely for the determination of the judge. The evidence was addressed to him alone, and not to him and the jury,—as, for instance, evidence to lay a predicate for confessions is addressed; and the question here is not whether he received irrelevant or otherwise incompetent evidence, but whether the competent evidence before him proved the preliminary facts involved in the inquiry. *Burton v. State*, 107 Ala. 68, 18 South. 240.

The first charge given at the request of the state is not open to the criticisms made by counsel. The charge, in its fore part, requires the jury to believe the facts hypothesized beyond a reasonable doubt, and then, before directing the jury as to any conclusion upon them, the charge declares that the jury are authorized to look at these facts, if they be facts, in connection with all the other evidence, etc.; thus authorizing a consideration of facts stated hypothetically, not if believed by the jury merely, and not even merely if believed beyond a reasonable doubt by the jury, but if, and only if, the facts

absolutely exist. The charge in this respect is too favorable to the defendant. If it is faulty in singling out certain facts to the exclusion of others, that fault would not require a reversal for the giving of it.

We do not feel that any argument or suggestion is necessary to sustain the proposition of the second charge: "Any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault."

That there was evidence before the jury tending to support every material allegation of the indictment there can be and is no sort of doubt, and for the court below to have given the affirmative charge requested by the defendant would have been a most palpable and flagrant invasion of the right and exclusive province of the jury to pass upon the sufficiency of this evidence.

Charge 1 was properly refused to the defendant, for that it assumes that the charge against him was rape; and, if this fault were eliminated, its refusal would yet not work a reversal, because the substance of it was given the jury in another instruction requested by the defendant.

Charge 2 refused was properly refused, both for the reason that an important word intended to be in it is omitted from it, and for the further reason that with the word supplied the charge is unsound. It is not essential to the crime of assault with intent to ravish that the perpetrator should have intended that his accomplished act should be rape. The expression of the charge is inapt and inaccurate.

Charge 3 refused to defendant is elliptical and incomplete on its face.

Charge 4 refused to the defendant was abstract. There was no evidence of any conduct or anything in the conduct of Miss Parker which impliedly or otherwise gave her consent to the liberties taken by defendant with her person. The charge also specifies some facts, and excludes others from the jury's consideration.

We find no error in this record, and the judgment of the city court must be affirmed. Affirmed.

STATE ex rel. SCOTT v. WALLER, Sheriff.
(Supreme Court of Alabama. June 3, 1902.)

MANDAMUS—RELEASE OF LEVY—ADEQUATE REMEDY—COURTS—CONTROL OF PROCESS.

The purchaser of a decree in the chancery court of Montgomery county was not entitled to mandamus from the city court of the city of Montgomery to compel the sheriff to release a levy of execution issued on the decree and to return the execution, the remedy, if the purchaser was entitled to any, being by an application to the chancery court for an order on the sheriff to release the levy, etc.

Appeal from city court of Montgomery;
A. D. Sayre, Judge.

Mandamus by the state, on the relation of Gaston Scott, to compel W. R. Waller, the sheriff of Montgomery county, to release a certain levy. From a judgment dismissing the petition, relator appeals. Affirmed.

The facts of this case are sufficiently shown in the opinion. The demurrer which was filed to the petition assigned substantially the following grounds: (1) Said petition and rule show that the relator has another and adequate remedy at law. (2) Said petition and rule fail to show that relator has any specific right. (3) Said petition and rule show that if any injury is done by the enforcement of the execution in controversy, it will be to the respondents in the decree, and not to the relator. (4) Said petition and rule show that the rights of a third party who can not be made a party to the proceeding will be decided without an opportunity of being heard. (5) Said petition and rule show that the grant of a writ of mandamus would necessitate the decision collaterally of the rights of a person who is not a party, and who has not the opportunity to be heard. (6) Said petition and rule show that respondents would be required to pass upon the validity of the assignment of the decree in question and still be liable to the true owner if said assignment be invalid. From the judgment of the court sustaining these demurrers discharging the rule nisi and dismissing the petition, the present appeal was prosecuted and the rendition of said judgment was assigned as error.

Gordon Macdonald and Geo. F. Moore, for appellant. Wm. C. Oates and Harmon, Dent & Wells, for appellee.

HARALSON, J. It may be stated generally as true, that when the plaintiff has ceased to have any interest in a judgment or decree of a court in his favor, by reason of his having assigned it to another, his right to control the process has ceased, and the assignee may control the execution. 1 Freem. Ex'ns, p. 61, § 21.

"The invariable test by which the right of a party applying for mandamus is determined, is to inquire, first, whether he has a clear legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right." Withers v. State, 36 Ala. 252; Murphy v. Same, 59 Ala. 640.

It is a well-recognized principle, that each court, by virtue of its inherent powers, has control over its processes, such as enables it to act for the prevention of all abuse thereof; and the power to stay proceedings for the purpose of exercising equitable control over the parties or proceedings, to the end that justice may be promoted, is everywhere conceded to be inherent in courts of general jurisdiction. 1 Freem. Ex'ns, p. 115, § 32; 20 Enc. Pl. & Prac. 1252.

Again, it seems clear, "that an order to stay proceedings cannot be made, as a general

rule, except by the court where the proceedings or execution remain, and the motion must be made to a court having jurisdiction of the matter." 20 Enc. Pl. & Prac. 1276; Freem. Ex'ns, p. 115, § 32.

In this case, as shown by the petition, one Reeves, on the 13th January, 1902, obtained a decree in the chancery court of Montgomery county, against Mary A. Scott as executrix, J. P. Knabe and James Chappel, for \$2,735.81; that an execution was issued on said decree in favor of the complainant therein and placed in the hands of the sheriff of Montgomery county, which was levied by him on lands belonging to James Chappel, one of the defendants; that on the 3d February, 1902, after the issuance of said execution and before its return, Gaston Scott, for a valuable consideration, purchased said decree from the complainant, Reeves, and obtained a written assignment of it from her; that thereupon said Gaston Scott presented to said sheriff an order to release the levy of said execution and return the same to the chancery court whence it issued, which the sheriff refused to do.

Thereupon, on the 21st February, 1902, said Gaston Scott presented this petition to the Honorable A. D. Sayre, judge of the city court of Montgomery, stating the foregoing facts, alleging that petitioner had no legal remedy in the premises save by the writ of mandamus from that court, praying for an alternative writ of mandamus to issue out of that court directed to W. R. Waller, sheriff of Montgomery county, commanding him to release said levy, and return the execution to the said chancery court of Montgomery, and that, on final hearing, said sheriff "be restrained from selling or attempting to sell said lands so levied on under said execution, and that he be ordered to take no steps regarding the enforcement of said execution until the further order of said city court."

The respondent demurred to the petition on many grounds, and moved to dismiss the same. The cause coming on to be heard in said court on the demurrer and motion to dismiss the petition, the demurrer was sustained; the rule nisi which had theretofore been granted was discharged and the petition dismissed. This appeal is to reverse that decree.

We have no difficulty in holding, under the foregoing principles and authorities, that the petitioner had another and adequate remedy; that he ought to have applied to the chancery court in which the decree was rendered, on which the execution was issued, for an order on the sheriff to release the levy, and return of the execution. It was the province of that court, and not of the city court of Montgomery, if complainant was entitled to any relief, to grant the same upon the proper presentation of a case for relief, and upon the proof thereof. For the city court to interfere to control said execution, in the manner prayed, if not a breach of comity between courts

of the character of these two, might lead to complications of jurisdiction of an unfortunate character. The remedy, if complainant was entitled to any, was as open to him in the chancery as in the city court, and he should have resorted to the former and not to the latter court.

It is unnecessary to consider other grounds of demurrer.

Affirmed.

ADAIR et al. v. FEDER et al.

(Supreme Court of Alabama. June 4, 1902.)

CREDITORS' SUIT — ATTACHMENT — FRAUD — PLEADING—ABANDONED MOTIONS—TAKING ISSUE—NONRESIDENT DEFENDANTS.

1. A motion to strike out pleas not tried or submitted to be passed on will be deemed abandoned.

2. Where a cause was submitted for final decree on pleas to which an objection had been entered, but which was not urged, issue will be presumed to have been taken on them.

3. A bill by creditors to set aside alleged fraudulent attachments should be dismissed as to nonresident defendants.

4. In a suit by creditors to set aside attachments by other creditors as fraudulent, the existence of the debts on which they were issued, and circumstances tending to show probable cause therefor, were shown. There was no evidence that the debtor retained any interest in the property, or received any benefit by such attachments; and only one creditor testified that the debtor assented to the attachments and was present when they were sued out, which was denied by the constable serving the writs and the debtor; and the good faith of one of the attaching creditors (a bank) was sworn to by two of its officers. *Held*, that the evidence of fraud was insufficient to sustain the averments thereof.

Appeal from chancery court, Henry county.

Suit by H. & G. Feder and others against J. R. Adair and others. From a decree in favor of the complainants, the defendants appeal. Reversed.

J. B. Dell, for appellants. H. A. Pearce and Espy, Farmer & Espy, for appellees.

SHARPE, J. Creditors of J. R. Adair & Co. seek by this bill to have annulled proceedings in certain attachment suits whereunder the goods of that firm were seized and sold, and to hold the plaintiffs in those suits to account, as trustees in invitum, for the proceeds of the goods. The alleged ground upon which the relief is sought is that the attachments were sued out in collusion with the debtors, without the existence of any statutory ground for such process, and for the purpose of hindering, delaying, or defrauding the complainants and other creditors.

Only the defendant Bank of Dothan filed an answer. Decrees pro confesso were taken against the members of the firm of J. R. Adair & Co., and the remaining defendants, John Ginn and Margaret Keller, each filed a plea setting up their nonresidence as a bar

to the court's jurisdiction to decree relief as against them. The legal sufficiency of these pleas was not tested, for, though a motion to strike them out was filed, that motion was not tried, or submitted to be passed on, and therefore must be treated as abandoned. *Mortgage Co. v. Inzer*, 98 Ala. 608, 13 South. 507; *Land Co. v. Morgan*, 88 Ala. 434, 7 South. 249; 6 Enc. Pl. & Prac. 370. The cause having been submitted for final decree on these pleas, among other matters, without objection urged, it is presumed that issue was taken on them. *Tyson v. Land Co.*, 121 Ala. 414, 28 South. 507. Without dispute, the nonresidence of the two last named defendants was proven, and for that, if for no other reason, they were entitled to have the bill dismissed as to them. *Tyson v. Land Co.*, supra; *Johnson v. Common Council (Ala.)* 28 South. 700.

The evidence does not, in our opinion, sustain the bill's averments of fraud. Without conflict, it proves the debts on which the attachments were issued in favor of the defendants, respectively, and also circumstances tending strongly to show there was at least probable cause for their issuance. There is nothing to show that Adair & Co. retained any interest in the goods, or received any benefit from the transaction. If they did so, and if the fact be material, the burden of proving it was on the complainants. *Murray v. Heard*, 103 Ala. 400, 15 South. 565.

It appears the several attachments were sued out about the same time and by the same attorneys, and that complainants' witness Baker was one of the attaching creditors. His testimony tends to show defendant J. R. Adair assented to the suing out of his attachment, and was present at the office of those attorneys when the other attachments were being sued out, and had knowledge of what was being done. Complainants' only other witness was the notary who issued the attachments. He first testified that, according to his recollection, J. R. Adair was in the office of the attorneys referred to when the writs were issued to the constable; but on cross-examination he said he was not positive that Adair was then present, and that, if he was, he neither said nor did anything about the attachments. On the other side is the testimony of the constable, denying that Adair was present when he received the writs, and of the two bank officers affirming the good faith of the bank's action, and that of Adair, which, if true, is inconsistent with collusion as between him and any of these defendants. If it should be assumed as proven that Adair was in active accord with the bringing of Baker's suit, his attitude towards the suits of these defendants would still be left conjectural. Certainly Adair's mere knowledge of defendants' purpose to sue, or his willingness to be sued, if shown, would not of itself warrant the conclusion that defendants

were parties to any covinous agreement, or were acting in fraudulent concert with the defendants in attachment. *Warren v. Hunt*, 114 Ala. 503, 21 South. 939.

The decree appealed from will be reversed, and one will be here rendered dismissing the bill, and directing that complainants pay the costs in the chancery court, as well as costs of appeal.

LASTER et al. v. BLACKWELL et al.
(Supreme Court of Alabama. June 3, 1902.)
EJECTMENT—SUIT BY REMAINDER-MAN—
DEATH OF LIFE TENANT—EVI-
DENCE—SUFFICIENCY.

1. The only evidence in ejectment by plaintiffs, who claimed under a lost deed to their mother, which they contended gave her a life estate, with remainder to plaintiffs, was introduced by plaintiffs, and four of their witnesses testified that the deed gave a remainder to plaintiffs; but their testimony was more of a construction of the deed than a recital of its contents, and two of the witnesses had never read the deed, but had only heard it read 40 years before. Three other witnesses, called by plaintiffs, had read the deed, and testified on cross-examination that it did not convey a remainder to plaintiffs. *Held* sufficient to sustain a judgment for defendants.

2. A remainder-man, whose estate is limited to commence after a precedent life estate, cannot maintain ejectment against third persons, commenced before the death of the life tenant.

3. Where the only evidence of the death of the life tenant, in ejectment by remainder-man, commenced several years before trial, is depositions stating that the life tenant died about a year before, and there is nothing in the record on appeal to show when the depositions were taken, judgment for defendant will be sustained for want of proof that the life tenant died before the action was commenced.

Appeal from city court of Gadaden, John H. Disque, Judge.

Ejectment by William Laster and others against Glenn Blackwell and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The plaintiffs claim to be the owners of the lands sued for under and by virtue of a deed executed by Micajah Sanson and Lemile Sanson, his wife, to Eliza Laster, for and during her natural life, and at her death to her children. All of the plaintiffs are the children and heirs at law of the said Eliza Laster. The defendants claim through a deed alleged to have been executed by Micajah Sanson and Lemile Sanson, his wife, to Eliza Laster, but which defendants contend was an absolute warranty deed, and neither reserved nor limited any remainder or estate to her children. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Grigsby E. Thomas, Jr., and Henry F. Reese, for appellants. James Aiken and Dortch & Martin, for appellees.

DOWDELL, J. This is a statutory action of ejectment. The case was tried in the court

below without the intervention of a jury, and a judgment was rendered by the court in favor of the defendants. While there are several assignments of error, only one is insisted on in brief of counsel for appellants, and that is that the trial court erred in rendering judgment in favor of the defendants on the evidence. The evidence was in conflict, and the rule in such cases is not to disturb the judgment unless it is plainly erroneous. *Scarborough v. Borders*, 115 Ala. 436, 22 South. 180. The burden of proof was on the plaintiffs to make out their case. The only witnesses testifying in the case were introduced by the plaintiffs. The material contention in the case was as to the contents of a lost deed, upon which plaintiffs relied for their title to the land in question. Their contention being that this deed conveyed a life estate to their mother, one Eliza Laster, with remainder in fee to them. The tendency of the evidence of four of plaintiffs' witnesses was to support plaintiffs' contention, while the tendency of the evidence of three other witnesses, who were sworn on behalf of plaintiffs, on their cross-examination, was to disprove plaintiffs' contention. The plaintiffs, in introducing these witnesses, vouched for their credibility as much so as those witnesses whose evidence tended to support their theory of the case. Under this conflict in the testimony, we cannot say that the judgment of the court on the evidence was plainly erroneous. On the contrary, after a careful review and consideration of the evidence, we are clearly of the opinion that the conclusion of the trial court was right, and its judgment proper. The testimony of those witnesses that tended to show that a life estate to the mother with a remainder to her children was conveyed, as evidence of the contents of a lost deed, was of a character not very satisfactory, and of doubtful competency; but the question of its admissibility is not before us, as it was admitted. We say not of a nature very satisfactory, because their statements were rather more of the witnesses' construction of the deed than a statement of their recollection of its contents, or the contents in substance. Two of these witnesses had never read the deed, but had only heard it read about 40 years since. The three witnesses whose testimony was in opposition to this had read the deed, and stated positively that it contained no conveyance of a life estate to Eliza Laster, with remainder to her children, but was a straight deed to Eliza with warranty, and said nothing about a life estate. With this decided conflict in the evidence, and between witnesses introduced by the plaintiffs, with the burden upon them of proving their case to the reasonable satisfaction of the court, a case is not presented on appeal for the reversal of the judgment of the trial court as being plainly erroneous.

There is another question in the case, which is fatal to appellants' right of reversal of the judgment. To reverse a judg-

ment on appeal there must be manifest error appearing in the record. The plaintiffs claim title under the lost deed as remaindermen. If it were conceded that this deed conveyed title to them as remaindermen, there is no evidence in the record that the life tenant was dead at the commencement of the suit. It is an elementary principle in actions of ejectment that the plaintiff, in order to recover, must have title at the commencement of the suit as well as at the trial. The only evidence as to the death of Eliza Laster, the supposed life tenant, is to be found in the depositions of two of plaintiffs' witnesses, one of whom says, "She died last June a year ago." The other witness says, "She has been dead two years." This suit was begun on the 23d of July, 1894, and the trial was had on the 4th day of October, 1900. There is nothing in the record to inform us when the depositions of the witnesses who testify as to the death of Eliza Laster were taken. For aught that appears, these depositions may have been taken in the year 1900, when the trial was had, and, if so, she was not dead at the commencement of the suit, and then the plaintiffs, as remaindermen, could not maintain this action. Error on appeal will not be presumed, it must be shown.

Affirmed.

IN RE GILES.

(Supreme Court of Alabama. June 5, 1902.)

MANDAMUS—SUPREME COURT—ORIGINAL JURISDICTION—MANDAMUS TO BOARD OF REGISTRARS.

Const. 1901, § 140, gives the supreme court original jurisdiction to issue writs of injunction, quo warranto, and such other remedial and original writs as may be necessary to give it general superintendence and control of inferior jurisdictions. Code, § 2825, relative to mandamus and remedial writs, provides that all applications for mandamus shall be by verified petition, etc., and section 2827 provides that from the judgment of any court in such proceeding an appeal lies to the supreme court. *Held*, that the supreme court has no jurisdiction to entertain a petition for mandamus to compel the board of registrars of a county to register the relator as an elector; the board not being a "jurisdiction" which the supreme court may control by original writ, and mandamus and other superintending writs for the control of such boards being issuable only by the circuit court, or other courts of like jurisdiction.

Petition by Jackson W. Giles for mandamus to compel the board of registrars of Montgomery county to register the petitioner as an elector. Rule nisi denied.

Wilford H. Smith, for petitioner.

McCLELLAN, C. J. This application is *sui generis*. It is a petition filed originally in this court for a writ of mandamus to compel the board of registrars of Montgomery county to register the petitioner as an elector. The supreme court has no jurisdiction of the pro-

ceeding. It is not appellate jurisdiction that is invoked, and the matter is not within the very limited original jurisdiction of this court "to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it general superintendence and control of inferior jurisdictions." Const. 1901, § 140. A board of registrars is not one of the "jurisdictions" which this court may control by original writs. And if it were, yet it can never be "necessary" for this court to control such board by any original writ, since whatever writs may under any circumstances be proper or necessary to be issued in superintendence and control of these boards may be and can only be issued by *nisi prius* courts,—the circuit courts or other courts of like jurisdiction. Therefore it is that, if the petitioner is entitled to the writ he here prays,—a question we do not consider,—his petition should be addressed to and presented in the circuit court of Montgomery county or the Montgomery city court. Code, §§ 2825-2833, and 3826.

Rule nisi denied.

SOUTHERN EXP. CO. v. COUCH.

(Supreme Court of Alabama. June 3, 1902.)

MALICIOUS PROSECUTION—LIABILITY—ACTS OF AGENTS—EVIDENCE—ADMISSIBILITY.

1. Defendant may be liable for a malicious prosecution commenced by another where the commencement by the other is instigated by defendant through its agent, though the agent lacks authority to actually install defendant as prosecutor.

2. In an action against an express company for maliciously prosecuting plaintiff for robbery it appeared that the prosecution had been actually commenced by a third party, but plaintiff claimed that it was instigated by defendant through its agents, and an agent, though disclaiming authority to prosecute in defendant's behalf, admitted that it was his duty to investigate crimes against the company, and bring wrongdoers to justice. *Held*, that inquiries and statements made by the agent, made after plaintiff had been arrested, and before his discharge, concerning plaintiff's movements and expenditures of money, etc., were admissible as indicating that defendant employed efforts to obtain evidence for use in the prosecution.

3. A question asked the prosecutor on his cross-examination as to whether a certain detective employed by defendant had not expressed the opinion that the prosecutor had sufficient evidence to convict was properly allowed.

4. It was error not to allow defendant to show that the prosecutor had taken the advice of counsel, and been advised that there was evidence to justify a conviction, since such evidence would have shown the prosecution to have been commenced independently of any conduct on the part of defendant.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Robert Eugene Couch against the Southern Express Company. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint as originally filed contained two counts. In the first count the plaintiff counted upon a recovery of \$20,000 damages for malicious prosecution. In the second count the plaintiff sued to recover \$20,000 for false imprisonment. The court gave the general affirmative charge in favor of the defendant on the second count. The defendant pleaded the general issue, and the cause was tried upon issue joined upon this plea. It was shown by the evidence that on May 14, 1898, an express car attached to the train of the Alabama Great Southern Railroad Company was robbed in Sumter county, Ala.; that the Southern Express Company offered a reward for the apprehension and conviction of the persons who robbed said car; that one W. H. Mothershed, on August 12, 1898, made out an affidavit before the probate judge of Sumter county charging the defendant with the robbery, and upon this affidavit a warrant for the arrest of the plaintiff as one of the robbers was issued, and was executed in Birmingham; that the plaintiff, after being arrested under said warrant, and detained in the Jefferson county jail, was carried to Sumter county, where he remained in jail for 30 or 40 days; that he was subsequently discharged on habeas corpus proceedings, and has never been required to answer an indictment for train robbery, and has never been arrested since upon said charge. The plaintiff testified as a witness in his own behalf that he had nothing to do with the train robbery, and knew nothing about it; and there was other evidence tending to show that the plaintiff was not guilty of said charge. There was evidence on the part of the plaintiff tending to show that his arrest and prosecution were instigated and encouraged by the defendant through its authorized agents. It was shown that P. R. Burns was a detective or special agent in the employ of the defendant, and his duties were to ferret out crimes which were committed against the defendant company. There was some evidence on the part of the plaintiff tending to show that the said Burns, who was investigating the train robbery in question, had authority and power to cause the arrest of persons whom he suspected of offenses committed against the express company, and against whom he believed he had sufficient evidence to convict them, and that said Burns counseled and advised the arrest of the plaintiff. The defendant's evidence tended to show that the defendant had nothing to do with the arrest of the plaintiff, that the prosecution was commenced and the arrest made by Mothershed on his own responsibility, and that the defendant expressly declined to instigate the prosecution or to cause the arrest of the plaintiff. There was other evidence for the defendant tending to show that Burns was without authority to cause the arrest or prosecution of any one suspected of crime against the company. During the examination of one J. W. Wilson,

a witness for the plaintiff, he was asked to state a conversation had between him and P. R. Burns, the defendant's special agent, about the plaintiff, Couch. This conversation was shown to be after the arrest of the plaintiff. The defendant objected to this conversation upon the ground that the declarations of Burns were not competent evidence against the defendant. The court overruled the objection, and the defendant duly excepted. The witness stated that Burns asked him if he knew the plaintiff; if he had ever seen him have any money, and when; and if he had ever seen him when he was spending money recklessly; and stated to him in the same conversation that Couch was suspected of the train robbery, and had been arrested. The defendant moved to exclude this testimony from the jury, and duly excepted to the court's overruling the motion. The other portions of the case, pertaining to the other rulings of the court upon the evidence, which are reviewed by the court upon the present appeal, are sufficiently stated in the opinion. The court, at the request of the plaintiff, gave to the jury several written charges. The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give the general affirmative charge in its favor requested by it. There were verdict and judgment for the plaintiff, assessing his damages at \$1,750. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Alex T. Loudon and John Loudon, for appellant. Bowman & Harsh, for appellee.

SHARPE, J. An actionable wrong involves liability to one by whom its commission has been incited or encouraged, as well as to its immediate perpetrators. Bish. Cont. §§ 523, 524. This general principle applies to cases of malicious prosecution. *Porter v. Martyn* (Tex. Civ. App.) 32 S. W. 731; 19 Am. & Eng. Enc. Law, 692. It was possible for the defendant express company to have instigated or encouraged the prosecution here complained of without ostensibly appearing therein, and for it to have done so through an agent lacking authority to actually install the defendant as the prosecutor. Its special agent, Burns, though disclaiming authority to order an arrest and prosecute in its behalf, testified his duties "required him, whenever a theft or robbery had been committed, to investigate the matter, and, if possible, find out who the robbers were, and bring them to justice." Inquiries and statements addressed by him to Wilson, if made, as some evidence tends to show, after the plaintiff had been arrested and before his discharge, concerning plaintiff's movements and expenditures of money recently after the robbery, were proper to be proven as indicating that defendant employed efforts to obtain evidence for use in the pending prose-

cution. The question asked on the cross-examination of Mothershed as to whether Burns expressed the opinion that he (Mothershed) had sufficient evidence to convict this plaintiff of the robbery was not subject to the objection. It called for testimony relevant upon the issue towards which the evidence on both sides was mainly directed, viz., whether the express company, through its agents, induced or encouraged Mothershed to prosecute. But, though defendant's conduct may have been calculated to further the prosecution, it was harmless if it did not conduce to that end. If Mothershed prosecuted independently of defendant's influence, and solely of his own volition or on the advice of others, defendant is not liable for that action, whatever its own efforts or motives may have been. As tending to show he did so, defendant should have been allowed to prove, according to its offer, that he submitted fully and fairly all the facts in regard to plaintiff's guilt to a responsible practicing attorney, and was by him advised that the evidence was sufficient to justify conviction. Direct authority for the admission of such evidence is found in *Chandler v. McPherson*, 11 Ala. 916, where, as here, the plaintiff's theory was that the defendant maliciously caused a third person to commence a prosecution. On the trial of that case the evidence was admitted against objection to the effect that the ostensible prosecutor, Mrs. Formby, made a statement of facts pertaining to the case to an attorney, and thereupon was by him advised that she could sustain a prosecution. This court justified the admission of that evidence, saying: "We think the testimony of the legal adviser of Mrs. Formby was admissible, not for the purpose of relieving the defendants from the imputation of malice, for there is no evidence to show that they were cognizant of this advice, but the testimony might have been considered by the jury upon an inquiry whether Mrs. F. was influenced by the counsel of the attorney or the prompting of the defendants. It may be that the defendants first instigated the prosecution, yet the prosecutor may have availed herself of the locus poenitentiae, and would not have become an actor but for the professional advice she received. If this hypothesis be well founded, then the defendants cannot with any propriety be said to have caused or procured the prosecution of the plaintiff, although they may have urged it; and no recovery could be had against them even if proof of malice and want of probable cause were satisfactorily established." We adopt the opinion quoted, and hold accordingly that in disallowing evidence of legal advice received by Mothershed there was error for which the judgment must be reversed.

Questions raised as to sufficiency of the evidence we forbear to discuss, since the evidence may be different on another trial.

Reversed and remanded.

(107 La.)

FRELLSEN v. RUDDOCK CYPRESS CO., Limited. (No. 14,061.)

In re RUDDOCK CYPRESS CO., Limited. (Supreme Court of Louisiana. May 12, 1902.)

WRIT OF REVIEW—WHEN GRANTED—REHEARING IN COURT OF APPEALS.

Rule 12 of this court (28 South. iv) is imperative, "No application for the writ of review will be considered unless an application for a rehearing has been first made in the court of appeals and refused." It must, under the rule, appear that an application has been made for a rehearing to entitle relator to a consideration of his application for a writ of review. A question similar in every respect has already been passed upon, and leaves no alternative to the court. The application must be dismissed. *Colomb v. Rolling*, 30 South. 293, 106 La. 40.

(Syllabus by the Court.)

Certiorari to court of appeals, parish of Orleans.

Action by Joseph W. Frellsen against the Ruddock Cypress Company, Limited. Judgment for plaintiff was affirmed by the court of appeals, and defendant brings certiorari. Dismissed.

Harry H. Hall, for applicants. Saunders & Gurley, for defendant.

BREAUX, J. This action was petitory. The parties traced their title by mesne conveyances to the state. In the district court plaintiff obtained a judgment. The defendant appealed to the court of appeals for the parish of Orleans, and that court affirmed the judgment. Defendant applies here for a writ of certiorari. An order nisi was issued directing the court of appeals to send up the record. In respondent's brief our attention is invited to the motion to dismiss, filed on the ground that no application for a rehearing was ever made to the court of appeals. Other grounds are set forth. We deem it sufficient to take up the ground just stated for decision. Relator, with the view of meeting this ground, sets up by way of answer to the motion to dismiss that the writ of certiorari has already been executed, and the court of appeals, in conformity with the order of this court, has sent up the record of the cause. In the second place, respondent admits that no application for a rehearing was made to the court of appeals, but that this was not done by reason of the fact that the court of appeals rests its decision upon the authority of the adjudications of this court, considering itself bound thereby, as will be seen by the following: "Repeated decisions of the supreme court of this state have settled it that, where two different parties hold title from the state to the same land, the title of the first purchaser must prevail, if not successfully impeached, even though the first purchaser's title is evidenced by a certificate of entry made under a land warrant, and the subsequent purchaser's title is evidenced by a patent,"—citing three decisions. The foregoing would

not be sufficient to justify us in taking the cases presented out of the effects of a court upon the subject. A similar question to the one here has been passed upon by this court. A writ of review had been issued directing the record of the cause to be sent up pursuant to article 101 of the constitution. The court of appeals returned that no application for a rehearing had been made. The record sustained the statement as correct. The court said: "The application for the writ of review was made without compliance with the amendment to rule 12 of this court (28 South. 1v), which declares that no application for the writ of review will be considered unless an application for a rehearing has been first made in the court of appeals and refused." Again: "It is considered that the rule of the court (being amendment to rule 12, adopted June 18, 1900) relative to the previous making of application for rehearing in the court of appeals and having the same passed upon before invoking the writ of review of this court has not been complied with." The court recalled the rule nisi, and dismissed the application. Unless the rule before referred to be changed, and the cited decision overruled, it is scarcely possible to sustain the application in this case. The rule is general, and admits of no exception. There must be an application for a rehearing made. *Colomb v. Rolling*, 106 La. 40, 30 South. 293. In the case here it escaped attention that the petition for the writ did not contain the usual averment with reference to the rehearing. But, without this averment, if it had appeared by the papers afterwards sent here in compliance with the rule that an application had been made for a rehearing and denied, it would have been sufficient for the purposes of the application. When it appears at the instance of the parties claiming the real interest in the case that the rule has not been complied with, we do not see our way clear to avoiding its enforcement.

For reasons assigned, the writ is recalled and denied, and the application for a writ of certiorari is dismissed.

(107 La.)

FRELLSEN v. STRADER CYPRESS CO.,
Limited (TAFFT, Intervener). (No.
13,984.)¹

(Supreme Court of Louisiana. Feb. 17, 1902.)

APPEAL—SEQUESTRATION—JUDGMENT—
REVIEW.

Plaintiff brought suit on a claim of \$1,000, and, alleging the amount to be secured by vendor's privilege, caused a sequestration to issue, under which a lot of lumber was seized. A third party intervened in the suit, claiming ownership of the property, and denying the existence of a privilege thereon. The property was delivered to him on a forthcoming bond. Judgment was rendered against the plaintiff in favor of the defendant and also in favor of the intervener against the plaintiff. The latter appealed to the court of appeals from the judgment on the main demand, and to the supreme court from that on the intervention. The supreme court postponed action

on the appeal before it until the issue on the main demand should have been finally adjudicated in the court of appeals.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Tangipahoa; Robert R. Reid, Judge.

Action by J. W. Frelsen against the Strader Cypress Company, Limited. Samuel H. Taft intervened. Judgment for defendant and intervener, and plaintiff appeals, and from a judgment affirming the same in the court of appeals he again appeals. Adjudication postponed.

Girault Farrar and Bolivar E. Kemp, for appellant. Lazarus & Luce and Stephen D. Ellis, for appellees.

NICHOLLS, C. J. Plaintiff in his petition alleged that the defendant company was indebted to him in the sum of \$1,000, for this: That in March, 1900, he made a contract with one H. E. Carroll and William Hart, stockholders and officers of said corporation, whereby the said corporation should cut, float out, and carry to the mills of said company at Strader, La., all of the available timber on certain described land in the parish of St. John the Baptist, the defendant to pay petitioner at the rate of \$2 per 1,000, board measure, and settlements to be made on the 15th day of each month after said timber was floated to the mill; and that partial settlements were made by said defendants, through Carroll and Hart, from time to time, down to about June 1, 1900, but that according to the measurements and estimates of said defendant there was due to petitioner on June 15th payment for 67,979 feet, board measure, and on July 15th settlements for 86,432 feet, and on August 15th settlement for two lots, consisting of 117,135 feet, and 77,052 feet, respectively, making a total of 348,598 feet, board measure, according to the scale sheets made at said mills and under the authority of said defendant,—all of which was converted into lumber by defendant, and piled in its lumber yard at said mill. That in addition to the above the defendant had deadened, cut, and removed from the land of petitioner, for converting into lumber, 150,000 feet of timber, for which no scale sheets had been made or furnished to petitioner, and that the defendant then owed petitioner, according to scale sheet and for timber not yet scaled, the sum of \$1,000. That he had a lien and privilege as vendor upon said timber in the hands of defendant, and that he feared that defendant would conceal, part with, or dispose of said movables in its possession, during the pending of the suit, and send the same out of the jurisdiction of the court, and that he was entitled to have the same sequestered. He prayed for a citation on the defendant company, and for judgment against it for \$1,000, with legal interest from August 15, 1900, with recognition of a vendor's privilege on the same property to secure payment of said amount, and for a writ under which the said property would be sequestered, and for

¹ Rehearing denied May 26, 1902.

general relief. The writ was ordered to issue as prayed for, and the same was executed by the sheriff by sequestering two lots of lumber, one of which was valued by him at \$500 and the other not exceeding \$1,500. The defendant was cited, and for answer pleaded the general issue. It prayed that the suit of the plaintiff be dismissed. Samuel H. Taft, a resident of Ohio, intervened in the suit. He averred that the plaintiff had in said suit prayed for and obtained a writ of sequestration against the defendant corporation, alleging an indebtedness due by it to him, and had sequestered, seized, and taken possession, through the sheriff, of a lot of lumber and timber lying in the yards of the defendant corporation, property belonging to him, the intervenor; that he individually purchased said property for his own account, paying value therefor, from the defendant company, and that actual delivery of the same was made to him through a special representative appointed for that purpose, who continued to hold the same for him; that said purchases were made by him during the months of May, June, July, August, and September, 1900, and the amounts were paid by him to the defendant company, he holding bills of sales therefor; that the plaintiff had no lien nor privilege upon said lumber seized and sequestered, and the seizure should be released; that he had been damaged in the sequestration in the sum of \$500; that the property sequestered was worth \$2,050. He prayed that after due proceedings there be judgment dismissing said sequestration and releasing his property, and a further judgment in his favor against plaintiff for the sum of \$500. Intervener, in his petition, prayed to be permitted by the court to bond the property upon his furnishing bond, placing the value of one of the lots of timber at \$2,050, and the other at \$400. What action was taken upon this petition does not appear in the transcript. Plaintiff answered the petition of intervention. After pleading the general issue, he averred that the pretended title set up by intervenor was a sham and a simulation, and was tainted with fraud, for this: That intervenor was ever, and had been since the organization of the defendant company, the president thereof, and a member of the board of directors thereof, together with H. E. Carroll, Wm. Hart, and John A. Bruce, the remaining members of said board, according to the charter thereof, and that as president he was by law clothed and charged with the duties and responsibilities of his office, and was charged with the full knowledge of the affairs of said corporation; and that his relation to said corporation and the affairs thereof and to the creditors and stockholders thereof was purely fiduciary, and that he was estopped by law and by equity from acquiring title from said corporation adversely to its creditors and stockholders to lumber manufactured or sawed by said company from logs sold to it; and that he, as president, was charged with full

knowledge of the fact that the lumber sequestered had never been paid for, and that defendant had a vendor's lien and privilege thereon; that he was estopped legally and equitably from denying that he, the respondent in intervention, from whose lands the timber had been cut, had by law a vendor's privilege on the same. These estoppels he specially pleaded. He specially denied that the intervenor had paid one cent to the defendant corporation as the pretended purchase price of the lumber sequestered, and that any lawful or actual delivery was ever made by the defendant corporation to him; and he averred that the sequestration of the lumber by the sheriff in the yards and possession of the defendant corporation was evidence of and a badge of fraud in the pretended title to intervenor to said lumber. He averred that Henry E. Carroll and William Hart, two of the said four directors of said corporation, having been the negotiators with him for the contract for cutting and sawing logs from respondent's lands, and having made the terms of payment, and being charged with notice of all the matters of said contract with him, each of them, as a director of defendant company, was estopped to act in fraud of his rights in the making of any bill of sale, title to, or muniment of title to the lumber sequestered to the intervenor; and he averred that all of said parties as directors were fully advised and informed, and each of them well knew, and were estopped legally and equitably from denying, that plaintiff, from whose lands the lumber was cut, had by law a vendor's privilege on the same, he charging them with full knowledge of the fact that the lumber sequestered had never been paid for, and that plaintiff, from whose lands the lumber had been cut, had a vendor's privilege thereon. He averred that intervenor and John A. Bruce, vice president of defendant company, were residents of Ohio. He denied that intervenor had suffered any damage from the sequestration. He prayed that the intervention be dismissed, that the sequestration be maintained, and that he have judgment against the intervenor and the surety on his bond and against the defendant as prayed for, and for full and general relief. The defendant corporation filed a supplemental and amended answer, in which it averred that it confirmed its original general denial, and specially averred that it purchased the lumber which had been seized in the case from Carroll and Hart; that it had paid for the same, and then sold it to the intervenor. Assuming the position of plaintiff in reconvention, it averred that the sequestration which had been issued was wrongful, unwarranted, tortious, and illegal, and that it had been damaged by the same to an amount of \$850. It prayed that plaintiff's demand be rejected, and that it recover judgment in reconvention for the sum of \$850. The district court rendered judgment in favor of the defendant and intervenor and against the plaintiff, dissolving the sequestration.

ustration which had issued in the cause, and decreeing the intervener, S. H. Taft, to be the owner of the lumber seized and sequestered, that intervener's claim for damages be reserved, and that plaintiff pay all costs. Plaintiff appealed to the court of appeals for the Fourth circuit from the judgment against him in favor of the defendant, and to the supreme court from the judgment against him in favor of the intervener. The defendant company moved in the supreme court to amend the judgment by either granting it a judgment for damages as claimed by it in its supplemental answer, or by reserving its right to claim such damages hereafter by an independent suit.

Until the issues raised between the plaintiff and the defendant are finally determined in the court of appeals, those between the plaintiff and the intervener must rest in abeyance, for plaintiff's legal interest in inquiring into the relations between the Cypress Lumber Company and Samuel H. Taft is dependent upon his having a legal personal claim against that company and a vendor's privilege upon the lumber which has been sequestered. He appears in this court with a judgment adverse to him as between himself and the defendant. A trial in this court with that judgment standing unreversed would have necessarily to be affirmed. The amount involved as between the plaintiff and the defendant carried the former's appeal to that court. We think that justice requires that we should stay proceedings in this branch of the case until that now before the court of appeals should be disposed of, since an affirmance by the court of appeals of the judgment of the district court might effectually dispose of the whole matter.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that an adjudication of the issues herein between the plaintiff and the intervener be postponed until after those between the plaintiff and the Cypress Lumber Company have been finally passed upon in the court of appeals, and this court are further advised in the premises.

(107 La.)

STATE v. WILLIAMS. (No. 14,430.)

(Supreme Court of Louisiana. May 26, 1902.)
CRIMINAL LAW—COMMENTS OF PROSECUTING ATTORNEY—INDICTMENT—FAILURE TO SIGN—APPEAL—REVIEW—BILL OF EXCEPTIONS.

1. While the character of defendant had not been put at issue, yet he had been a witness in his own behalf. Comments of the prosecuting officer are not cause to set aside the verdict, even though they may not have been directly suggested by the testimony. The closing remarks were immaterial, or at least were not prejudicial.

2. The oversight of the district attorney in not signing the bill of indictment was not fatal to the indictment.

3. It is settled that an averment that the verdict is contrary to law and evidence brings up no ground for review.

4. The statement of the trial judge, embodied in the bill of exceptions, that there was

a case pending in which the defendant attempted to bribe a witness, is accepted as correct, in the absence of testimony on the subject.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Union; Robert B. Dawkins, Judge.

Dennis Williams was convicted of bribing a witness, and appeals. Affirmed.

Ward D. Munholland, for appellant. Walter Gulon, Atty. Gen., and Fred F. Preaus, Dist. Atty. (Lewis Gulon, of counsel), for the State.

BREAUX, J. Attempting to bribe a witness was the crime with which Dennis Williams was charged, indicted, tried, found guilty, and sentenced to serve one year at hard labor in the state penitentiary. The case is before us on bills of exceptions, motion for new trial, and motion in arrest.

Taking up in the first place bill of exceptions No. 1, it appears that defendant's counsel timely objected to the words of the district attorney as follows: "I'll tell you, gentlemen of the jury, he is a bad man from Bitter Creek,"—used in speaking of the defendant in his closing argument. Counsel notified the court that the district attorney was speaking out of the record, in using such language. Counsel for defendant sets forth in this bill of exceptions that defendant's character had not been put at issue, and that the district attorney was not warranted in discussing his character; that the district attorney was not stopped by the court, and no attempt was made to correct the effect that the statement had made upon the jury; that this officer proceeded with his argument, and, discussing defendant's character, said, "The defendant is bad after women," although the only evidence on this point was that one (a married man) whose name is given in the bill was jealous of defendant on account of this party's wife. Defendant, it seems, was a witness in his own behalf. Counsel recites in the bill of exceptions that in response to this question of the district attorney, "You are bad after women, are you?" the defendant said, "I don't think I am;" that defendant's counsel a second time objected because the question, in view of the fact, was not one which the district attorney had the right to propound, in view of the issues. Defendant charges that this was error prejudicial to him in his defense. The trial judge's narrative in the bill of exceptions shows that the defendant testified as a witness in his own behalf, and on cross-examination the credibility of the witness was sought to be attacked inferentially by reference to the testimony which he had already given in his own behalf.

The first remark of the district attorney, the district judge, at the time, thought was made as an effort at humor. The court did not think that it had any undue influence on the jury, or that it created any prejudice against the defendant. The jury was composed of

intelligent men, who were instructed by the court not to give any weight to counsel's statement not borne out by the evidence. It must be borne in mind that the witness had testified, and that his testimony did not warrant the conclusion that defendant had always conducted himself as a peaceable and law-abiding man. Three bills of indictment, admitted in evidence at his instance, without restriction, go far toward showing that he had no very serious cause of complaint when he was referred to as before mentioned. It is true that the attorney for the state should not seek to assail the character of an accused whose character is not at issue, but reason and authority, we think, warrant the court not to set aside the verdict unless it clearly appears that the jury was influenced by the language of the prosecuting officer, subject to criticism, it may be, yet not affording ground sufficient to set aside the verdict. *State v. Procella*, 105 La. 518, 29 South. 967; *State v. Mack*, 45 La. Ann. 1155, 14 South. 141.

With reference to the second remark of the district attorney, made in the course of his argument, objected to by defendant, the trial judge is equally as positive that it did not prejudice the cause of the accused. The remark was scarcely germane to the subject, and should not, perhaps, have been made. We have conceived no reason to disagree with the district judge in regard to its not having been detrimental to the defense. "Where such statements, though of matters not in evidence, and hence improperly made, are immaterial, or at least not prejudicial, they will afford no ground for a new trial." 2 *Thomp. Trials*, p. 747.

In the next bill of exceptions, in the order in which they were taken, numbered 2, defendant, it appears, objected on the ground that the verdict is contrary to the law and the evidence. This ground, it has long since been settled, is not of itself reviewable on appeal. The other ground set forth in the bill, regarding the remarks of the district attorney in his closing argument, is only a repetition of the grounds heretofore decided, in passing upon grounds urged in bill number one. The next ground is equally untenable on appeal (that is, the alleged discovery of new evidence), in view of the fact that if the evidence is true, as alleged, it goes to impeach the testimony of witnesses who have testified in the case.

In his motion in arrest of judgment, defendant alleged "that the district attorney had not signed the bill of indictment; also that the indictment charges, substantially, that defendant did on the 30th of November, 1901, attempt to bribe a witness named —; that defendant shows that the foundation of the charge of attempting to bribe was set forth in the indictment to be in a case pending; that the burden of proof was upon the state, and the state failed to prove the most material part of the charge,—that a case was

pending at the time that the offense was alleged to have been committed." With reference to the district attorney's oversight in not signing the indictment, we find a ready answer in the fact that the authorities have long since settled that this is not fatal to the indictment. As relates to the fact asserted by defendant as set forth in the bill of exception from which we have before quoted, we are informed by the statement of the trial judge embodied in the bill that the evidence shows that a criminal case was pending against defendant, in the court over which he presided, on the 23d day of November, 1901, and that on that day the defendant attempted to bribe the witness Lethro Jackson. It appears from this statement that when the crime was shown to have taken place a criminal case was pending.

Our review of the different grounds has not resulted in our finding such error as would justify us in setting aside the verdict, sentence, and judgment of the court. It is therefore ordered, adjudged, and decreed, for reasons assigned, that the verdict, sentence, and judgment appealed from are affirmed.

(107 La.)

TEXAS & P. RY. CO. v. WILSON et al.
(No. 14,359.)

(Supreme Court of Louisiana. May 26, 1902.)
EXPROPRIATION—DAMAGES—QUESTION FOR JURY—APPEAL.

Where, in an expropriation proceeding, it is manifest that the amount allowed is either insufficient or excessive, it will be increased or reduced, as the case may be. But as the questions of value and of damage are required by law to be submitted to a jury composed of citizens having peculiar knowledge of the subject, the conclusion reached by them ought not to be disturbed, save in a perfectly plain case. (Syllabus by the Court.)

Appeal from judicial district court, parish of Red River; Charles V. Porter, Judge.

Action by the Texas & Pacific Railway Company against T. J. Wilson and J. J. O'Beirne. Judgment for defendants, and plaintiff appeals. Affirmed.

Wise & Herndon and Wilkinson & Carter, for appellant. Alexander & Wilkinson, for appellees.

MONROE, J. The plaintiff, claiming under the authority of certain acts of incorporation passed by the congress of the United States and by the general assembly of Louisiana, and of the general laws of Louisiana, alleges that it is engaged in building a branch railroad from or near Natchitoches to or near Shreveport, and that it is necessary for that purpose to expropriate a right of way through certain lands owned by the defendants in the parish of Red River, which are described in the petition; and it prays that, after the necessary proceedings, there be judgment accordingly. The defendants, after a general denial and admission of own-

ership, answer that the land sought to be expropriated will amount to 10 acres, and that it is worth \$100 per acre; that the proposed road will cut off from the main body 5 other acres, of a like value, and render the same useless; that it will bisect their plantation diagonally, and render necessary a readjustment of the roads, ditches, and cuts, thereby inflicting injury to the extent of \$500; that it will render access to the different parts of the plantation inconvenient, thereby inflicting injury to the extent of \$500; that it will injure the drainage and necessitate the cutting of other and larger drains, involving damage to the extent of \$800 or more; that it will demoralize the labor and afford means of access to tramps, etc., inflicting a further damage of \$800; and that the defendants will suffer loss to the extent of \$500 by reason of temporary inconvenience and annoyance resulting from the work of construction. They therefore pray that the plaintiff's demand be rejected, or, in the event of the rendition of a judgment of expropriation, that they be awarded \$4,300, as the value of the property to be taken, and of the damage to be sustained. A jury of freeholders of the vicinage found a verdict expropriating the land described in the petition, and allowing the defendants \$50 per acre therefor, together with \$250 as damages, and their verdict was made the judgment of the court. The plaintiff has appealed, and the defendants have answered, praying for an increase in the amount allowed, but have since abandoned their demand, and now content themselves with asking that the judgment appealed from be affirmed.

The right of the plaintiff to expropriate and the necessity for expropriation were not seriously disputed in the district court, and are not disputed here; the only point of difference between the litigants being as to the value of the land and the question of damages. The two defendants testify that the land is worth \$100 an acre. One witness sworn in their behalf testifies that it is worth from \$40 to \$60, and two other witnesses, that it is worth \$50 an acre. And this testimony is supported by others to the effect that the rental value of the land is from \$5 to \$8 an acre. Upon the other hand, it appears that the purchase price of the plantation of which the land in question forms a part, and which has recently been acquired, was \$10,000; that the plantation contains about 400 acres, of which, say, 225 acres are cleared, and the rest timbered; and that the timbered land is worth from \$10 to \$15 an acre,—from which it follows that, for the purposes of the purchase, the open land was valued at, say, \$32 or \$37 an acre, as we adopt the one or the other of the figures given as the value of the timbered land. And there are seven or eight witnesses sworn on behalf of the plaintiff who give testimony tending

to show that it is worth from \$25 to \$35 an acre. This testimony cannot be said, however, to justify the belief that a few acres can be bought at the same rate as a large tract. In fact, one of the defendants' witnesses, who owns, or is part owner in, 14,000 acres in that section, whilst expressing his willingness to sell the whole at \$30 an acre, says that he does not care to sell a small quantity at all, from which it may be inferred that he would not consider \$50 an acre too much to ask for any particular 10 acres of the open land that a bidder might want to buy. It is also to be taken into consideration that whilst the witnesses for the plaintiff are in the majority, and appraise the land in question somewhat lower than the witnesses for the defendants, the case was tried by a jury of experts, the weight of whose verdict is to be added to the testimony of the defendants' witnesses. It is, no doubt, true that where, in a case such as this, it is manifest that the amount allowed is either insufficient or excessive, it will be increased or reduced as the case may be. *Steamship Co. v. Barton*, 51 La. Ann. 1338, 26 South. 271; *Texas & P. Ry. Co. v. Southern Development Co.*, 52 La. Ann. 535, 27 South. 101; *Abney v. Railway Co.*, 105 La. 446, 29 South. 890. But as the questions of value and of damage are required by law to be submitted to a jury composed of citizens having peculiar knowledge of the subject, the conclusions reached by them ought not to be disturbed, save in a perfectly plain case. *Postal Tel. Cable Co. v. Louisville, N. O. & T. R. Co.*, 43 La. Ann. 522, 9 South. 119; *Railroad Co. v. Rabasse*, 44 La. Ann. 178, 10 South. 708; *Railroad Co. v. McNeely*, 47 La. Ann. 1298, 17 South. 798; *Railroad Co. v. Morere*, 48 La. Ann. 1273, 20 South. 733; *Postal Tel. Cable Co. of Louisiana v. Morgan's Louisiana & T. R. R. & S. S. Co.*, 49 La. Ann. 58, 21 South. 183; *Railroad Co. v. Smith's Heirs*, 51 La. Ann. 1079, 25 South. 955. And we are not prepared to say that the case now before us is of that class.

The judgment appealed from is therefore affirmed.

(107 La.)

STATE ex rel. BENEDICT v. SOUTHERN MINERAL & LAND IMP. CO. et al.
(No. 14,154.)

(Supreme Court of Louisiana. May 12, 1902.)

MANDAMUS—VERIFICATION—CORPORATIONS—
LOSS OF STOCK CERTIFICATE—IS-
SUE OF NEW STOCK.

1. The stock was owned by the relator. He advertised the loss of his certificate of stock.
2. The oath for a mandamus taken by the attorney to compel the corporation to transfer on the books of the company the original shares of stock and to deliver certificates in his name was prima facie legal and sufficient, particularly in the absence of all objection to it in the court of the first instance. The objection was only raised arguendo on appeal.

3. The loss of the certificates of stock was sufficiently shown to enable the relator to obtain certificates of stock.

4. More than 10 years have elapsed since relator became the owner. No one has laid claim to the lost certificates, and third persons can lay no claim to the stock after these many years of silence and inaction. *Parker v. Insurance Co.*, 8 South. 618, 42 La. Ann. 1172.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Application by the state, on the relation of William S. Benedict, for writ of mandamus against the Southern Mineral & Land Improvement Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Carroll & Carroll, for appellants. Benjamin Ory, for appellee.

BREAUX, J. Two hundred and fifty shares of the capital stock of the Southern Mineral & Land Improvement Company, valued at about \$20,000, are claimed by the relator as owner, he having bought them on February 3, 1891, at a bankruptcy sale of the property of Mr. John B. Lallande, to whom these shares had been issued by the company. The procès verbal of the auctioneer by whom the property was sold at public auction shows that 250 shares of the Southern Mineral & Land Improvement Company, represented by two certificates of shares, were adjudicated to relator. The sale was made in accordance with an order obtained by the syndic of Mr. Lallande's estate in due time, and directing the auctioneer to sell certain assets surrendered, among which was the stock in question. The secretary of the company, by his testimony, shows that certificates were issued to Mr. Lallande for this stock as per his receipt in the possession of this officer of the company. He said he did not know what had become of the certificates, but recalled that the syndic said to him at the time that these certificates were in his hands as assignee. In 1901—i. e., about 10 years after the stock had been issued—the relator gave notice, as required, in one of the local newspapers, of the loss of these certificates. It is well settled that mandamus will issue to compel the corporation to issue certificates to the owner. This was not denied, but it was, in the first place, contended by respondent that the mandamus should not be made peremptory because the petition was sworn to by the attorney for the relator, and not by the relator in person. Having gone to trial on the merits, it was too late to urge that objection on appeal. Besides, a presumption arises in favor of the oath either that the principal was absent or for other good reason was unable to take the oath, and that the attorney had needful authority. The principal is bound by the act of his agent. It was not a matter of great concern, under the circumstances here, wheth-

er the oath was taken by the principal or the agent. To all intents and purposes it was as if the oath had been taken by the principal. "Qui facit per alium, facit per se," is an applying maxim.

Another objection of the respondent is that the loss was not shown. The respondent admits that which is undeniable,—that notice of loss was advertised,—but it chooses to object because the testimony, as it suggests, does not give the particulars of the loss. We do not think that there was necessity, after these many years since the loss, to prove how it happened that they are lost. There is ample testimony showing that Mr. Lallande had not parted with his stock when it became part of the assets of his insolvency, and there is ample written evidence showing that the relator became its owner, that the two certificates were adjudicated to him at public auction of the bankrupt estate of Lallande. Manifestly, he is entitled to the certificates, and, as they are lost, he is entitled to duplicates showing that he is the owner, and recognized by the company as the owner. There is every reason to hold that these certificates are lost, but, even if they have fallen into the hands of others as a principle of commerce, it can well be laid down that one who remains quiescent these many years could not be heard to claim shares that are held by a transferee in good faith. *Friedlander v. Slaughter House Co.*, 31 La. Ann. 523. It will be borne in mind that these certificates were made not negotiable, and therefore third persons have not acquired rights which they can set up at this time. *Parker v. Insurance Co.*, 42 La. Ann. 1172, 8 South. 618. The respondent is not to be advantaged one way or the other. In this instance it is only concerned in issuing duplicate certificates to the true owner. The evidence shows that relator is the owner, and therefore they can with safety, as relates to this relator, be issued to the relator.

It is therefore ordered, adjudged, and decreed that the judgment of the district court making the alternative writ of mandamus peremptory and ordering the Southern Mineral & Land Company of New Orleans, La., to transfer on the books of the company the original shares of stock originally standing in the name of John B. Lallande as represented by certificate No. 7, for 5 shares, and certificate No. 29, for 245 shares, and to issue and deliver to W. S. Benedict new certificates in his name for said shares, is affirmed.

The Chief Justice is recused.

(107 La.)

STATE v. SONIER. (No. 14,409.)

(Supreme Court of Louisiana. May 12, 1902.)
ASSAULT WITH INTENT TO KILL—INDICTMENT.

1. Act No. 44 of 1890, when reasonably interpreted, is not obnoxious to the objection that it denounces as a crime an act which might be consistent with innocence.

2. It is a rule of universal application that when a statute creates an offense, and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute.

3. In order to justify the courts in holding a statute to be void, it must be alleged and proved that it is unconstitutional.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

Polite Sonier was convicted of assault with intent to kill, and appeals. Affirmed.

Daniel B. Gorham and Sompayrac & Toomer, for appellant. Walter Guion, Atty. Gen., and Joseph Moore, Dist. Atty. (Lewis Gulon, of counsel), for the State.

MONROE, J. The defendant appeals from a conviction and sentence under an indictment which charges that "he did, with a dangerous weapon, to wit, a knife, strike, thrust, cut, and stab one Solomon Botley, with intent him, the said Solomon Botley, then and there, to kill and slay, contrary to the form of the statute of the state of Louisiana," etc. He relies upon a motion in arrest of judgment, in which it is alleged that the indictment "describes no offense known to the law, or punishable under any of the statutes of the state of Louisiana; * * * that it is not charged that said act or intent were either willful, felonious, or even unlawful, hence no offense is charged." The indictment was framed in conformity to section 1 of Act No. 44 of 1890, which reads: "That whoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to kill, shall be deemed guilty of a crime, and, on conviction thereof, shall suffer imprisonment, with or without hard labor, for not more than three years." The learned counsel for the defendant say in their brief that it was not charged that the intent was willful, felonious, or even unlawful, and non constat but that the accused might have acted in self-defense, or to prevent the perpetration of a felony. In the case of *State v. Bolden*, 107 La. 116, 31 South. 393, it was said of this argument, "it has been again and again answered," and this court quoted with approval the following language from the opinion of the supreme court of the United States in *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, to wit: "The common sense of man approves the judgment mentioned by Puffendorf,—that the Bolognian law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, did not extend to a surgeon who opened the vein of a person who fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of 1 Edw. II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, for he is not to be hanged because he would not stay to be burnt." And it was held that the statute under considera-

tion, when reasonably interpreted, is not obnoxious to the objection urged. We adhere to the views thus expressed. Beyond this, it will be observed that the indictment in the instant case was framed in the language of the statute; and "while it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law, it is a rule of universal application that when a statute creates an offense, and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute." 10 Enc. Pl. & Prac. p. 483. In order, therefore, to justify us in holding the act now under consideration to be void, it would be necessary to allege and show that it is unconstitutional, which has not been done.

Judgment affirmed.

(107 La.)

MURRELL, Sheriff, v. BOKENFOHR. (No. 14,208.)¹

(Supreme Court of Louisiana. March 3, 1902.)

LICENSES—SEPARATE PLACES OF BUSINESS.

1. One who carries on transactions at a branch establishment, separate and distinct from his home mercantile enterprise, is conducting two places of business, within the intendment of the revenue law.

2. A license is required from both the principal and branch establishments when separate business is conducted at each.

3. It being the law that one who conducts a wholesale and retail business owes both a retail and wholesale license, it follows that one having more than one place of business owes a license on each.

(Syllabus by the Court.)

Appeal from Seventh justice's court, parish of Acadia.

Prosecution by Joseph L. Murrell, sheriff and ex officio tax collector, Acadia parish, La., against Jac Bokenfohr, to show cause why he did not pay a license. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph G. Medlenka, for appellant. J. E. Barry, for appellee.

BREAUX, J. Plaintiff proceeded by rule against the defendant to require him to show cause why he should not pay a license of \$50. The case comes before us on an agreed statement of facts, setting forth that defendant is a wholesale merchant doing business in the city of New Orleans, where he pays his license tax; that in January, 1901, he opened a store or depot in Crowley, and runs a wagon in that town; that the business in Crowley is conducted through the office in New Orleans, where all orders are sent and accounts kept, and where accounts are rendered. All collections made in Crowley are remitted to the store in New Orleans. Goods are shipped to the Crowley house, where they are kept and delivered to the Crowley retail customers as orders are re-

¹ Rehearing denied May 26, 1902.

ceived. The agreed statement further shows that the goods sold through this house amount per annum to not less than \$25,000. Defendant admitted that he paid a license tax to Crowley for the year 1901 as a wholesale merchant, and adds that it was paid under protest, and after the authorities had threatened to bring suit. He also admitted in this statement that demand for the amount claimed here was made prior to the institution of this suit by the sheriff and ex officio tax collector in behalf of the state, being the amount claimed from him as a wholesale dealer in Crowley for the year 1901. Defendant's contention is that this license tax would be a second tax on business upon which he had already paid his license tax in New Orleans. He pleads the unconstitutionality and illegality of the law upon which the claim is based. Plaintiff urges that this license is due, and that defendant's business falls within the provision of section 30 of Act No. 171 of 1898 imposing a separate license upon each place of business, while defendant seeks to meet this contention of plaintiff by urging that there must be something else besides the mere housing of goods, and the delivery to and from the place of storage, to bring it under the head of business subject to a license.

We understand that the business subject to license tax is a commercial enterprise; that it is a business for profit. Defendant has a "distributing depot or store," as shown by the facts of record, and "*the business* of the Crowley establishment is conducted through the New Orleans office." (Italics ours.) Defendant would be pleased to have the business considered as conducted exclusively at his commercial enterprise in New Orleans. We do not think that this view is sustained by the statement of facts, for the simple reason that, while it does appear that the goods to be sold are sent in accordance with orders forwarded from the Crowley establishment to the office of defendant in New Orleans, it does not appear that the shipments are made as each order for goods bought is forwarded to be filled. "Goods are shipped to the Crowley establishments in large lots and by car loads," says the statement of facts admitted, upon orders, as we take it, sent forward and filled to meet the demands of defendant's trade. This business, we conclude, requires men to deal with one another on a considerable scale. The goods are shipped on orders received from the branch establishment. In the second place they are "kept there," the evidence discloses, and "distributed and delivered to Crowley retail trade from there as orders are received." The conclusion is inevitable that he sells to all comers. The practical effect of this is to localize the business, and to get a profit from another branch of industry, distinct and separate from the home office of defendant's business. It is a business for profit to be gained at Crowley

through defendant's business, and not the mere consignment of goods to be delivered to a buyer or buyers at a private warehouse,—a case not before us for consideration. It is not the sending of an occasional delivery of goods, but a continuous business. This court said that one who conducts a wholesale and retail business owes both a license on the wholesale and on the retail business. *City of New Orleans v. Koen*, 38 La. Ann. 328. From this it may well be inferred that two separate wholesale places of business, respectively, owe a license. Each business establishment owes a tax. *State v. Holmes*, 28 La. Ann. 768, 26 Am. Rep. 110. A merchant carrying on two stores owes a license on each. *Walters v. Duke*, 31 La. Ann. 668. Defendant carries on a separate business. The law clearly requires a license from each business. One who owns two places of business, in the theory of the law, is supposed to receive more protection than the one who owns only one business house. Without the protection the taxes secure, he would not have two,—not even one. This, it is true, is no reason to condemn the mere act of delivering packages through agents subject to taxation, if it be not a business, within the law's intentment. Defendant's enterprise, as a branch of his store in New Orleans, is a business, as it consists in continuous sales and delivery of merchandise at the branch store.

The law and the evidence being in favor of plaintiff, the judgment is affirmed.

(107 La.)

THOMPSON v. NEW ORLEANS & C. R. CO. (No. 14,045.)¹

(Supreme Court of Louisiana. April 14, 1902.)
INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

1. There was great danger of accident in carrying on the work of reconstruction of the overhead electric lines and the railway track.
2. It was not made satisfactorily to appear that plaintiff's husband, a laborer employed by defendant, was guilty of contributory negligence.
3. Whatever special patrol or warning party there may have been, it is not shown that it sought to warn defendant of the danger by which he was surrounded.
4. The risk was not one assumed by the employees.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Lettie Thompson, tutrix, for the use of her minor children, against the New Orleans & Carrollton Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dart & Kernan (Purnell M. Milner, of counsel), for appellant. Oliver B. & Samuel Sansum, for appellee.

¹ Rehearing denied May 27, 1902.

BREAUX, J. Plaintiff, tutrix of her minor children, sues to recover damages against defendant for the death of their father, caused by an electric shock received by him while at work for the defendant company. At the date of the accident defendant was rebuilding its system of railway. The work consisted in reconstruction of both the overhead electric lines and the railway track. They were at the time also reconstructing the feeder system of electricity, taking out the smaller wires and putting in larger ones. The company had a night working gang and one during the day. The cars were operated as usual, but under much greater difficulties. Several hundred men were employed in breaking and digging up the soil, putting down new rails, and were doing corresponding new work overhead along the track. The company employed experienced electrical engineers, who had charge of the work, which altogether extended as far up as Carrollton from the point of beginning, which was at Lee's Circle. Their materials, we are informed by the record, were the best to be found, and the subordinates had had long experience, and great care had been given to select only competent employés. The company, through its representatives, says that all needful prudence was observed and warning given. None the less the accident occurred which resulted in the death of plaintiff's husband. In accordance with orders, plaintiff's husband and a number of other men were at work carrying heavy rails, weighing over 4,000 pounds each, from the street to the center of the neutral ground. They had carried one rail to where they had been directed to place it, near the iron trolley pole. The accident happened while they were carrying the second rail. Defendant's contention is that in depositing it they swung violently against this trolley pole, and it was then that the heavy glass insulator by which the feed wire was supported, and around which a tie wire was fastened, was broken, and thereby the iron screw was exposed, and it cut the tie wire, and left it rubbing against the iron pin, charging the iron pole, and inflicting a shock which was felt by the 20 men holding the rail, killing plaintiff's husband. This is one of the decisive issues of the case, plaintiff's contention being that the rail was not violently thrown against the trolley pole, while defendant insists that it was. We have examined the testimony as carefully as we could, bearing this contention in mind. In view of the great weight this crew was handling, it is possible that they brought the rail in contact with the trolley pole with some force; but of this we have no positive testimony. On the contrary, the testimony discloses that the men carried the rail as directed. It was then that the shock was received. In the presence of the positive testimony sustaining the contention of plaintiff that nothing unusual was done in laying the rail near the pole, we do not

think that we would be justified in adopting the theory that the violence of the contact between the rail and the pole caused the glass insulator to break, and disinsulate the wire. That view is not supported (but the reverse) by direct testimony of witnesses who were holding the rail just at the moment of the shock, and just as they were placing it close to the trolley pole. One of the contentions for the defendant is that, if the insulator had been broken two days prior to the accident, as averred by plaintiff, then that there would have been an alarm given at the power house by a machine referred to by witnesses as a circuit breaker. The testimony, while positive enough regarding the purpose of this machine in matter of giving alarm, did not satisfy us that it was so absolutely reliable that it must be taken as conclusive that the insulator was broken by a violent blow in laying down the rail, and that it was not broken at any time prior, for the reason that it (the machine) had not given any alarm. The reliability of the instrument was not sufficiently shown to render it evident that the glass insulator was not broken before the accident. We do not recall, after a careful reading of the testimony, that even at the moment of the accident, when defendants say the violent blow was struck, the alarm from this machine was heard by any one. According to defendant's theory, it would, at least at that time, have been heard, if it invariably gives the alarm. After having carefully considered the evidence, we infer that the report it gives depends upon the intensity of the "grounding" of the pole, and that a pole may be dangerously charged with electricity without invariably giving an alarm signal loud enough to call the attention of those not near. One of the electricians in charge of the works with clearness and precision said that he learned from the foreman in charge of the line of construction that the insulation covering the feed wire had been parted,—to just what degree he did not recall,—evidently due to its dropping from the pole on the arm, and then that it was further parted by rubbing, due to the curve in the feed wire at the point where the insulator was. Upon his arrival at the place of the accident he found that the feed wire had been lifted from the iron cross-arm, and was resting on a wooden board placed on top of the cross-arm. His conclusion was that a current not exceeding 500 volts was transmitted from this feed wire through the weakened insulation to the cross-arm, and thence to the pole, and that it was thus the electric shock was received. The liability of iron poles to become charged, we are informed by this witness, in the construction of an electric railroad property such as was under way in this instance, is not at all remote, and it is not an uncommon thing in such work for a pole to become slightly grounded, or, in other words, charged. Another of the electrical engineers, who was equally as direct in his testimony,

says that, in his judgment, the iron pole was charged with electric current transmitted from the abraded feed wire, which became abraded due to no neglect of any kind on the part of the company, but to a force of circumstances which are liable to occur in such work. All agree that there was great danger of accident in handling heavy rails, from the falling of poles, danger of wires coming in contact with "grounded" poles and forming circuits, and other risks attending the reconstruction of an electric railway. This being the case, it imposed a high degree of responsibility on the company, in order, by every reasonable means, to prevent injury to its employes. We are led to believe from the facts that there was a live wire uninsulated, or defectively insulated, resting on the pole in question. Companies are liable for accidents due to defective insulation, or to failure to take proper "precautions to prevent conductors of electricity from coming in contact with its trolley wires." 10 Am. & Eng. Enc. Law (2d Ed.) p. 889. There were officers, subordinates, and laborers employed. The officers, it is shown, gave themselves some concern to warn all the employes. But this warning did not reach all the employes. Whatever patrol there may have been against danger does not seem to have warned the working gang of which deceased was a member. The inspector at this particular place does not seem to have discovered that the covering of the wire had worn off, and that the insulation was imperfect. In a similar case this court held the defendant liable. *Myhan v. Power Co.*, 41 La. Ann. 964, 6 South. 799, 7 L. R. A. 172, 17 Am. St. Rep. 436. In another jurisdiction it was decided that it is the duty of the master to warn his servants of dangers in machinery. *Railway Co. v. Garrett*, 73 Tex. 262, 13 S. W. 62, 15 Am. St. Rep. 781. This, it occurs to us, is specially requisite when the danger is as great as it was in this case. We have specially referred to the testimony showing that those in charge expressed some apprehension lest accident, in view of the danger, would occur. This cannot have the effect of releasing the company from all responsibility. In the case before us, although the plan of general operations may have been good enough, and the officers mindful of their trust, it does not relieve the company from indebtedness for injury due to some oversight or negligence resulting in a fatal accident to one of a gang of 20 laborers. Our learned Brother of the district court saw and heard the witnesses. To his opinion, regarding its weight, must be given due importance. After hearing these witnesses, he came to the conclusion that the testimony sustained a claim for damages. We have not found that he has erred. He fixed the amount of damages at a sum we do not think we should increase. We therefore deny plaintiff's application here for an increase, and have concluded to affirm the judgment.

The law and the evidence being with plaintiff, the judgment of the district court is affirmed.

(107 La.)

STATE ex rel. KELLS v. NEW ORLEANS GASLIGHT CO. (No. 13,900.)¹

(Supreme Court of Louisiana. March 17, 1902.)

MANDAMUS TO CORPORATION—GAS COMPANIES
—USE OF FUEL GAS.

1. Mandamus, under the common law, is usually issued to enforce the performance of public rights and duties. Mandamus runs to a corporation to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. 13 Enc. Pl. & Prac. p. 493.

2. The Louisiana codal provisions are broader than under the common law.

3. The evidence shows that the consumer who has two sets or lines of pipes and two meters may discontinue one, and use the other. One set may be plugged or capped, or taken out entirely. This being the case, it follows that the consumer who has one set of pipes and a meter may, after proper notice to the company, and after having complied with its regulations regarding plumbing and safeguarding the company's interests, discontinue the use of the illuminating gas entirely, and use fuel gas.

4. In some instances fuel gas is supplied through a separate system, not varying to any material extent from relator's set of pipes and meter.

5. The plumbing must be done according to the company's requirement, and report made and certificate issued.

Nicholls, O. J., and Monroe, J., dissenting.
(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Thérard, Judge.

Application by the state, on the relation of O. Edmund Kells, Jr., for writ of mandamus against the New Orleans Gaslight Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Buck, Walshe & Buck, for appellant. Saunders & Gurley, for appellee.

BREAUX, J. Relator desires to use gas in his office for heating purposes, and, to that end, sues for a writ of mandamus against the defendant company to compel it to furnish him with gas, and a meter to record the quantity used. The company has a franchise, and is, in consequence, bound to furnish gas for either lighting or fuel purposes to consumers along its line of mains. Relator is a dentist, and fuel is necessary in his office. He sets out that his office is properly piped for fuel gas, and that he has received a certificate from a competent plumber, and that it is in proper condition. He also says that he does not use gas for lighting purposes, and that he only proposes to use it for heating purposes; that the respondent company discriminates against him, as it furnishes others with fuel gas. He, in sup-

¹ Rehearing denied May 26, 1902.

port of his application, invokes the charter of the company, by the terms of which it is made its duty to supply every one with gas who pays the usual price. The respondent interposed the objection of no cause of action disclosed; and, in the second place, it pleaded the terms of its charter, and alleged, in substance, that the gas manufactured is the same, whether for fuel or lighting purposes, and that in order to increase the consumption, under explicit regulations, it supplies gas for fuel at reduced rates, and that resulting increase of consumption enables it to deliver the gas at lower rates. The respondent company also alleges that it delivers gas at reduced rates only to those who put in distinct meters and systems of piping,—one for the lighting, and the other for the heating and cooking,—and that only where there are two systems of piping, as just stated, is gas for cooking and heating furnished at reduced rates. The testimony shows that the relator had been a consumer of illuminating gas. He had the meter removed, and discontinued the service. Subsequently he applied to the company for heating gas and for a meter.

The company made respondent is under the obligation to supply every one with gas who conforms with its reasonable regulations, and pays the price of the gas. It offers gas to its customers as a heating power for use in grates and cooking stoves at a reduced rate of 50 per cent. It has adopted general rules as to pipes and meters. The consumer who has complied with these rules should have, and we think he has, a remedy more speedy than the ordinary. No good reason suggests itself why mandamus should not go to the company, when it is evident that the one who desires to use gas is entitled to the light for which he seeks, or to the heat he needs for cooking and other purposes for which gas is utilized. While mandamus will not lie to enforce mere contract obligations, it will issue to a corporation when the duty of the respondent is plainly and positively stated, as in the case before us.

One of the objections urged is that the company owns large interests, and that its control over its business should not be interfered with. From that point of view an issue of considerable importance arises. We readily understand that no action should be taken in its regard, and no remedy sanctioned, that would interfere with its operations, or lessen the security it should have in compelling its customers to comply with their obligations to the company. Mandamus will issue to compel a quasi public corporation to give equal service to all. *State v. Texas & P. Ry. Co.*, 52 La. Ann. 1850, 28 South. 284. The writ of mandamus, if the duty of the company to the public, or to any one of the public, is manifest, cannot have the effect which relator seems to apprehend. Under the common law mandamus would is-

sue in such cases. Codal provision as to mandamus being broader than it is at common law, as has been repeatedly decided by this court, mandamus is the remedy to compel performance of the duty for which relator asks.

Consumers are entitled to gas at reduced rates for fuel purposes. We understand that its charter provides that it shall be its privilege to furnish gas as before mentioned. This implies its exercise to all alike who conform with reasonable requirements. The evidence of the respondent company does not establish that there is any necessity of putting in separate pipes and meters. Its interest can as well be safeguarded by permitting the consumer of gas for heating and cooking purposes to put only one set of pipes and a meter as by requiring, as the respondent company asks, that a double set of pipes be put in. There is no difference, we are led to believe, between pipes and meters for illuminating purposes and those for heating purposes. The company, none the less, requires both when gas for heating purposes is used. After the double set is in, the consumer can continue the use of one set, and take out the other, although originally he must put in the two. "Question. Now, then, to sum up, Mr. Jones, I understand that if Dr. Kells put in other pipes, side by side, that then you would give him fuel at gas rates? Ans. Yes, sir. Question. If he discontinued the lighting gas, you would still give him the fuel-gas rates? A. Through the other pipes; yes, sir. Q. Then you would object to his taking out the pipes formerly put there for illuminating? A. And leaving those— Q. Leaving the others only? A. No, sir; we could not object to that." Mr. Jones is the secretary of the company. The rule that permits the consumer to take out one of his pipes, and the meter with those pipes, or to stop using them, is not consistent with the rule that compels him, when he begins to use gas for cooking and heating, to put in two sets of pipes and meters. If he can take out one of the sets, and continue to use the other, he should have the right to put in only one set. As one has the right to take out one of his pipes, he should have the equal right to put in only one of the pipes for gas to be used in heating or cooking. The company's interest is as well safeguarded when one set of pipes is put in as when there are two, as we gather from the evidence. The evidence discloses that there are business offices where gas is used for fuel purposes exclusively through a separate system. We have not found that the company's interest is to be less safeguarded in this case than it is in others where a new pipe and meter is put in. While we think that the rule of equality and uniformity of service is the purpose of the company, as a matter of judgment, in this instance, with the evidence before us, we are of the opinion that the relator is entitled to the gas he seeks to have sup-

piled. More than one year has elapsed since this case has been tried in the district court. Changes may have taken place in that time. Besides, the rules of the company that are reasonable and general should be complied with. We understand that the company requires (rightly, we think) the gas fitter to go over the work in accordance with the company's regulations, and to make his report. Then an inspector is sent to make an inspection. This requirement should be complied with in this case, and, after a proper report by the plumber and the report of the inspector, then the judgment appealed from should be complied with; for relator is entitled to gas for heating purposes without first having to put in another set of pipes.

The judgment appealed from is amended so as to require sufficient examination of relator's line of pipes by a plumber, and a report to the company, upon which a certificate is to be issued; and in all other respects the company's interest is to be safeguarded without requiring relator to put in a separate set of pipes to use fuel gas exclusively. The judgment as amended is affirmed.

NICHOLLS, C. J., and MONROE, J., dissent.

(107 La.)

S. D. MOODY & CO., Limited, v. CHADWICK. (No. 13,919.)¹

(Supreme Court of Louisiana. April 14, 1902.)

APPEAL—JURISDICTION—TAX—LEGALITY.

1. The legality of the exaction imposed upon defendant's property for a sidewalk construction being at issue, this court has jurisdiction of the appeal without regard to the amount involved.

2. On the authority of *Bruning v. Chadwick*, 29 South. 301, 104 La. 718, the judgment appealed from is reversed and case remanded.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by S. D. Moody & Co., Limited, against E. H. Chadwick. Judgment for defendant, and plaintiff appeals. Reversed.

Buck, Walshe & Buck, for appellant. George L. Bright, for appellee.

BLANCHARD, J. Plaintiffs are appellants from a judgment dismissing their suit on exceptions, which put at issue the legality of the tax or exaction imposed upon defendant's property for the construction of a banquettes or sidewalk along the front of same. The legality of this tax being at issue this court has jurisdiction of the appeal. *Kelly v. Chadwick*, 104 La. 719, 29 South. 295. The case is identical with that of *Bruning v. Chadwick*, 104 La. 718, 29 South. 301. The petition in that case and the one in this are the same ex-

cept as to the plaintiffs' names and the amount claimed—defendant in both cases being the same. The *Bruning Case* was dismissed on identically the same exceptions as here urged. This court reversed that judgment as erroneous and remanded the case for trial on its merits. The like ruling must be made in the instant case.

It is ordered and decreed that the judgment appealed from be avoided and reversed, and that this cause be remanded for further proceedings according to law, costs of appeal to be borne by defendant and appellee.

(107 La.)

Succession of LACOSTE. (No. 13,998.)¹
(Supreme Court of Louisiana. April 14, 1902.)

PHYSICIANS—COMPENSATION.

Question at issue—amount of physician's bill. Reduced from \$803 to \$300 by the trial judge, and his ruling is sustained.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

In the matter of the succession of Marie Appoline Lacoste. From the final accounting, P. H. Le Blanc, opponent, appeals. Affirmed.

Henry Chiapella, for appellant. Hubert M. Ansley, for appellee Albert U. Forestier. James David Coleman, for appellee Mrs. E. E. Le Blanc.

BLANCHARD, J. Mrs. Lacoste died intestate. Her sister, Mrs. E. E. Le Blanc, qualified as administratrix. There were no forced heirs. The collateral heirs are the sister, appointed administratrix, and a nephew, Albert U. Forestier, son of a deceased sister. The estate was inventoried at \$5,750, but did not realize that amount at the sale. The most valuable piece of real property was incumbered with a special mortgage, and the creditor, after the death of Mrs. Lacoste, took out executory process and caused the property thus mortgaged to be sold. Its proceeds—in amount not sufficient to pay the mortgage debt—did not pass into the hands of the administratrix. All the remainder of the property was sold at succession sale, and realized \$3,335, but after deducting auctioneer's bills, taxes due on the property at the date of sale, etc., and a balance due on another mortgage, there passed into the hands of the administratrix the sum of \$2,917.15 only, for distribution among creditors and heirs. This amount is sufficient to pay the creditors in full, and leave a small balance for the heirs. A final account was filed. As made out by the administratrix it showed the balance left over for the heirs after payment of debts to be \$295.20, or \$147.60 for each heir. But oppositions were presented contesting many of

¹ Rehearing denied May 2, 1902.

¹ Rehearing denied May 28, 1902.

the items of debit on the account. These were for the most part withdrawn. Among the items contested was one in favor of Dr. P. H. Le Blanc for \$803 for medical services rendered the deceased. It was opposed by Forestier, one of the heirs, and reduced to \$300 by the district judge. This increased by \$503 the amount to be distributed between the heirs. Dr. Le Blanc appeals and the issue presented by his appeal is the only matter before the court.

Ruling—The appellant was the nephew of the deceased and is the son of the administratrix, who is one of the two heirs of the dead woman. The administratrix, his mother, not only allowed in full his bill of \$803 by placing the same on her account, but at the argument, both orally and by brief, in this court her counsel advocates the reversal of the judgment which reduces it. It is a circumstance not without weight that were this bill allowed in full, the administratrix and her family would be receiving "the lion's share" of this estate as against the other heir.

Thus, her son, Dr. Le Blanc, claims \$	803 00
The administratrix as heir, as per the showing made by her account, will receive	147 00
Her commissions as administratrix, placed on the account at 2½ per cent. on the aggregate of the inventory, amount to	143 75
Due Security Brewing Company on note drawn by L. H. Le Blanc and for which Mrs. Lacoste was security—placed on the account at	200 00
Due Gustave Seeger on lease and notes of L. H. Le Blanc and for which Mrs. Lacoste was security, amounting, as placed on the account and increased by the district judge, to	253 85

Total amount to the Le Blanc family \$1,548 20,
—As against \$147.60 to the other heir, A. U. Forestier.

Besides, it is shown that Lewis Le Blanc, son of the administratrix and brother of Dr. B. H. Le Blanc, lived with his aunt, Mrs. Lacoste, for 10 years, and was living there when the medical services of Dr. Le Blanc were rendered for which the charge of \$803 is made. It is shown that while Dr. Le Blanc's medical attention to his aunt extended through a period of 20 months, at no time did he, while she was alive, present a bill to her, or make any charge against her. The evidence fails to show he ever intended to send a bill to her. Asked that question by his counsel, he answered only that it was understood he was to be paid for his services, and gives as the only basis for this understanding that "on several occasions I wanted to employ the services of another physician, but she said she preferred my services." His claim was placed on the account in lump sum and while the opposition filed to the same by his cousin, the coheir of his mother, called for an itemized statement, showing dates, character of

services, etc., the only response he made was the following:—

Attack of la grippe—winter 1898-1899..	\$150
Attack of pneumonia—winter 1899-1900	300
For last illness, month of April, 1900....	200
Fifty-one visits during winter of above..	153

Total \$803

Evidently, he had kept no record of services rendered to her and for which he intended to charge. It would seem that nothing was booked against her. When called on for dates he could give none except by years—not even for the 51 visits charged for. It is shown that the immediate cause of her death was a stroke of apoplexy to which she succumbed within two days of the attack, and while he charges \$200 on account of services during her last illness in the month of April, 1900, it appears she was up and about in that month, going downtown, attending to her business affairs, etc.

The bill is attacked by the coheir as exorbitant and out of proportion to the services rendered. The trial judge, who saw and heard the witness, agreed with this view. Taking into consideration all the surrounding circumstances, the kinship, situation of the parties; etc., we are not prepared to say the judge erred. We are impressed with the belief that no such bill as the one now urged against the estate would ever have been presented to Mrs. Lacoste had she lived. It looks a good deal as though the bill, especially in its amount, has much of "the afterthought" about it. The size of this estate does not warrant any such charge being made against it. The doctor, himself, testified that "there is no special charge by a physician; it depends upon the means of the patient." The means of this patient did not justify the charge he makes.

The judgment appealed from is affirmed at the costs of the appellant.

(107 La.)

PIRDY v. PHELPS. (No. 14,158.)
(Supreme Court of Louisiana. May 26, 1902.)

APPEAL—REVIEW—AFFIRMANCE.

Where, in a suit for divorce, it appears that the evidence offered on behalf of the plaintiff, when considered in connection with that offered by the defendant, is insufficient to entitle the plaintiff to the relief prayed for, and would still be insufficient, even though certain evidence offered on the trial to impeach one of the witnesses who testified for the defendant had not been excluded, it would serve no useful purpose to remand the case, and the judgment rejecting the plaintiff's demands will be affirmed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by A. J. Pirdy against Florinda Phelps, his wife, for divorce. Judgment for defendant, and plaintiff appeals. Affirmed.

Dennis M. Sholars, Boatner, Dodds & Boatner, and Gabriel Fernandez, for appellant. Horace E. Upton and John R. Upton, for appellee.

MONROE, J. Plaintiff alleges that he was married to the defendant in 1888, that he separated from her in 1897 because he discovered that she was maintaining illicit relations with another man, and that she has since been living in concubinage and adultery with other men, and particularly with an individual whom he names, and with whom, as he alleges, she lived in adultery during the years 1899 and 1900. He further alleges that there were two children born of the marriage, whom the wife is without means to support, and therefore, and by reason of her manner of life and dissolute conduct, is unfit to have charge of. And he prays for judgment decreeing a divorce and awarding him the custody of the children. The defendant admits the marriage, and the birth and existence of the children, and alleges that she has maintained them since their abandonment by their father in 1897, and is now sending them to school, and providing for them as best she can. She denies the charges which plaintiff makes against her, and prays for judgment rejecting his demand. There was judgment in the district court rejecting the plaintiff's demand, and he has appealed.

It does not appear from the record that the plaintiff offered any evidence to prove that his wife had misbehaved up to the time that he left her, or that she has since then lived in concubinage or led a dissolute life, as alleged in the petition. Nor does it appear that since he abandoned them he has contributed anything towards the support of his children, or in any way concerned himself about them. On the other hand, it is shown, without attempt at contradiction, that the defendant since that time has lived with her mother and sisters, and has supported herself and children by working as a domestic servant; and there are several witnesses who testify that she has conducted herself with propriety. On the trial the plaintiff undertook to prove a specific act of adultery said to have been committed by the defendant in 1898, in the house where she was living with her mother and sisters; and the testimony relied on is that of a single witness, who claims to have been visiting a sister of the defendant, and to have obtained his information by peeping through the blinds into one of the rooms. The character and credibility of this witness are, however, attacked, and his evidence discredited by the defendant's sisters, and he is contradicted by the man whom he attempts to implicate. Beyond this, the same witness, as also the wife of the man above referred to, testify as to certain statements or admissions said to have been made by the latter out of the presence of the defendant, and the witness last mentioned gives some testimony as to a conversation between the defendant and another person in which the name of her (the witness') husband had been mentioned. The charges made in the peti-

tion would, if true, be easily proved. Instead of attempting to prove them, the plaintiff (no objection being made) offered evidence as to a specific fact which he had not alleged or referred to in his petition. That evidence, consisting of the uncorroborated and contradicted testimony of a witness whose character is impeached not only by other witnesses, but by the very testimony that he himself gives, is insufficient for the purpose for which it was offered, and is not materially strengthened by the testimony given by the wife of the man said to have been implicated as to the latter's admissions, not with regard to the particular act in question, but as to his general relations with the defendant. It is said that certain testimony offered on behalf of the plaintiff to impeach the testimony of the man last above mentioned, who denies the act and the admissions charged against him, was improperly excluded, and that his testimony, in view of the position in which he was placed, was not to be relied on. The correctness and force of this view may be conceded, but the testimony upon which the plaintiff relies is insufficient, without that particular contradiction, to make out a case entitling him to the relief prayed for. It would therefore subserve no useful purpose to remand the case, and the judgment appealed from is accordingly affirmed.

(107 La.)

STATE v. CARTER. (No. 14,427.)

(Supreme Court of Louisiana. May 12, 1902.)

HOMICIDE—DYING DECLARATIONS.

A dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone, would be inadmissible.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lafourche; Louis P. Caillouet, Judge.

Willie Carter was convicted of murder, and appeals. Affirmed.

John S. Billin, for appellant. Walter Gulon, Atty. Gen., and Whitnell P. Martin, Dist. Atty. (Lewis Gulon, of counsel), for the State.

PROVOSTY, J. The accused was convicted of murder, and sentenced to be hung. No one has appeared for him in this court, and no brief has been filed in his behalf. The only thing we find in the record calling for our attention is a bill of exceptions reserved to the action of the trial court in admitting in evidence the dying declaration of the deceased. Certain statements contained in this dying declaration are pointed out as being inadmissible in evidence because not relating to the immediate circumstances of the killing, and on account of these ob-

jectionable statements the dying declaration is objected to as a whole. This is the second time that this same dying declaration has been objected to on this same ground. On the previous occasion we disposed of the matter briefly, as follows: "A written dying declaration is not inadmissible because sworn to; nor because some of its statements of themselves, and if standing alone, would not fall within the rule admitting dying declarations. The declaration must go in as a whole." *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293. We see no reason for changing this ruling. The dying declaration is a peculiar species of evidence admitted ex necessitate, in flagrant violation of all the ordinary rules of evidence. It violates the rule against hearsay; it has not the sanction of an oath; it cuts off the opportunity for cross-examination; it rides roughshod over the sacred constitutional right of an accused to be confronted with the witnesses against him. To all these grievous faults it may add the inherent infirmity of emanating from impaired faculties, benumbed already, or disordered by the panic of momentary death. All these objections are overborne by the one consideration of public policy that society may not be deprived of the evidence such as it is, and whatever it may be worth. After all this, is the declaration to be excluded simply because the dying man has wandered off to some matters not pertaining to the immediate circumstances of the killing? Verily, if the law so decided, it would have strained at a gnat after swallowing a camel. Where a dying declaration, otherwise admissible, happens to contain some extraneous matter, there is presented a choice between three courses: First, of admitting it in its entirety, such as it is; second, of eliminating the objectionable parts; and, third, of excluding it. The first course would violate the rule by which dying declarations must be confined to the circumstances of the killing; the second would violate the rule by which dying declarations must go in as a whole; the third would deprive society of the benefit of the declaration, after, for the sake of its admission, sacrifice had been made of such precious inheritances as the right of cross-examination and confrontation with witnesses. Under these circumstances our ruling was that the declaration should go in, and we adhere to the ruling. Better let the declaration go in as a whole, such as it happens to be, with appropriate instructions from the court, rather than open the door to the dangerous process of revising or editing it, by which the sense of it might, in particular cases, be destroyed or distorted. The rule against fragmentary declarations has been established in the interest of the accused.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(107 La.)

LOUISIANA & N. W. R. CO. v. STATE BOARD OF APPRAISERS (PARISH OF CLAIBORNE et al., Interveners). (No. 14-238.)

(Supreme Court of Louisiana. April 14, 1902.)

TAXATION—EXEMPTION—RAILROADS.

1. The words "substantially completed," as used in article 230 of the constitution, apply to a railroad, the "roadbed" of which was in such condition that the most that is now claimed for it is that it lacked 20 per cent. of completion, as also possibly a total of 815 feet of bridge and trestlework in a distance of some 18 miles, when the constitution was adopted; and hence such road is not entitled to exemption from taxation under that article.

2. If the question were more doubtful than it is, the claim for exemption would be denied, as the case belongs to a class in which every reasonable doubt is resolved adversely to the claimant.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Claiborne; Benjamin P. Edwards, Judge.

Action by the Louisiana & Northwestern Railroad Company against the state board of appraisers. The parish of Claiborne and another intervened. Judgment for defendant, and plaintiff and interveners appeal. Affirmed.

John A. Richardson, for appellant railroad company. McClendon & Seals, for appellant interveners. Walter Gulon, Atty. Gen., and John C. Theus, Dist. Atty. (McClendon & Seals and Lewis Gulon, of counsel), for appellee.

MONROE, J. Plaintiff, having been assessed for the years 1899 and 1900 upon 18.48 miles of railroad (main track) and $\$2,100$ of a mile of siding and switch track, lying between Homer, in the parish of Claiborne, and the Arkansas state line, brings this suit to annul the assessment, on the ground that the property sought to be taxed is exempt under so much of article 230 of the constitution as provides that "there shall also be exempt from taxation for a period of ten years from the date of completion any railroad or part of such railroad that may hereafter be constructed, and completed prior to January 1st, 1901." The defense is, practically, that the stretch of road in controversy falls rather within the meaning of a subsequent clause of the same article, which reads: "Nor shall the exemption hereinbefore granted apply to any railroad, or part of such railroad, the construction of which was begun and the road bed of which was substantially completed at the date of the adoption of this constitution." The police jury of Claiborne parish and the town of Homer have intervened, and claim that, even though it should be held that the road is exempt from state taxes, it is nevertheless liable for parish and municipal taxes. There was judgment in the district court rejecting the demand of the plaintiff and dismissing the

¹ Rehearing denied May 26, 1902.

intervention, and the plaintiff and the interveners have appealed.

Whether the roadbed of the road for which the exemption is claimed was "substantially completed," within the meaning of the constitution, at the date of the adoption of that instrument, is the only serious question in the case. The constitution was adopted May 12, 1898. Article 326. From the pleadings and evidence in the record before us it appears that prior to 1897 the plaintiff owned and operated a railroad from Homer, in the parish of Claiborne, to Bienville, in the parish of Bienville, a distance of about 36 miles, in a southerly direction, and that in June, 1897, it located an additional 36 miles from Homer northward to Magnolia, in the state of Arkansas; and that, of this extension the 18.48 miles which is the subject of the present controversy, with the sidings and switches heretofore referred to, lie within the state of Louisiana and the parish of Claiborne. It also appears, at least as a fair inference from the evidence, that the work of construction followed the location of the extension, and went on continuously until its completion. The only witnesses examined were those called by the plaintiff. T. D. Beardsley was its general manager in 1897 and 1898, and has been ever since. He testifies that, with the exception of that part of the road which runs through the town of Homer, a little more than a mile in length, the work of building the extension was done by contractors, from whom it was accepted July 26, 1898, and that they were paid in full upon the following day, though he also states that the road was not then completed, and that in some places it was still incomplete at the time that he was testifying. Being asked, "Aside from the work done by the company in or near Homer, what was the dirt work, or other dirt work to be done, on the 12th of May, 1898, in Louisiana?" to which he replied: "I could not give that of my own knowledge. I depended entirely upon the engineer's reports, and their testimony gives a summary of all the information I have." J. C. Allen was assistant engineer during the period of construction, and is so at present. He testifies that they reached the Louisiana state line in the construction of bridges and track laying about August 1, 1898, up to which time no work of that character had been done in Louisiana, except, perhaps, within the corporate limits of Homer. He does not pretend to know the amount of earthwork done for the purposes of the road, but states that they were still grading after the 12th of May, 1898. G. Knoble is an engineer. He testifies that the roadbed of a railroad is the foundation upon which the superstructure rests, and that it includes everything from the bottom of the cross-ties down to the natural surface, and to the foot of the driven pile in bridges. The following are two of the questions propounded to him under commission, and his answers thereto: "Q. Is the roadbed of a railroad substantially

completed that has no piling delivered on the road and none driven, no bridges or trestling built, and, say, one-tenth of the earthwork done? A. A roadbed of a railroad cannot be called completed until all the work and material necessary for grading and bridging such road is placed in the proper position, as shown by the established grade line. Q. Is a roadbed of a railroad substantially completed that is wanting in any of these requisites? A. It is not." W. M. Washburn is a civil engineer, and was in charge of the work of constructing the road from Homer, in Louisiana, to Magnolia, in Arkansas, a distance of 36 miles; and we understand him to testify that there are 41 bridges on the entire line, and that the total length of the bridges and the trestles is 1,680 feet. He also testifies that the roadbed between the corporate limits of Homer and the state line, about 17 miles long, contains 212,201 cubic yards of earth, and that the work done by the company in the town amounts to 60,000 yards, making a total of 272,000 or 273,000 yards. He says: "I made monthly estimates of all the work done on the line during construction. I have no copy of monthly estimate for April, 1898. My recollection is that less work was done in April than was done in March. Up to the 1st of April 136,767 yards had been moved. During April, and up to the 12th of May, in the neighborhood of 40,000 yards were moved. No bridging or trestling was done on that part of the line prior to May 12, 1898. * * * My estimate would be that 20 per cent. of the grading on that part of the line remained to be done May 12, 1898. * * * I should not consider a deficiency of 20 per cent. very near completion. * * * The amount of grading, in cubic yards, was in the neighborhood of 270,000 yards, of which between 50,000 and 60,000 yards was done subsequent to May 12, 1898." He further testifies that, whilst some right of way was probably cut in Louisiana in August and September, the work of grading did not begin until December, 1897. The only testimony as to the proportion of bridging on that end of the road is the statement of the witness that about 600 piles were required. The maximum grade of the road is shown to be about 1 per cent., and, as the witness Knoble estimates the cost of "clearing and grubbing the right of way and the grading and bridging of the roadbed" at only \$2,000 per mile, it is evident that the average grade was very light. This testimony leaves much to be desired in the way of convincing force. The only witness who undertakes to be at all definite as to the proportion of the roadbed which had been constructed prior to May 12, 1898, is the engineer, Mr. Washburn, and whilst he is specific enough as to the total quantity of earth to be moved, and no doubt testified upon that subject from his records, he seems to have fallen back upon his recollection when attempting to state the proportion of the work which had actually been moved prior to May

12, 1898, and has, apparently, fallen into some confusion in giving the percentage. Thus, if it be true, as he states at one time, that 136,767 yards had been moved up to April 1st, and that about 40,000 yards were moved between that date and May 12th, the total would be 176,767 yards; and if we put the whole amount at 273,000 yards, the highest figure stated by him, there would still be 96,000 yards, or over 35 per cent., to be moved, whereas at another time he states that the amount moved after May 12th was between 50,000 and 60,000 yards, which he estimates to have been 20 per cent. of the whole. Several years had elapsed between the time at which the work was done and the date of the giving of the testimony, and it was not to have been expected that the witness could have carried figures of that kind in his memory. It may be, therefore, that the amount of work done after May 12th was less than 50,000 yards, or over 60,000, but, as it is not suggested that the monthly estimates upon which the contractor was paid have been lost or destroyed, the question which presents itself to us is why, in a matter of this kind, should the important fact upon which the plaintiff relies be left in such uncertainty? The same condition exists with regard to the bridges and trestles. We are informed that there are 41 bridges and 1,680 feet of bridges and trestles on the line,—meaning, as we understand it, the entire line from Homer to Magnolia; but we are not informed what proportion of this work is on the Louisiana side. The witness Knoble makes no distinction between a roadbed that is completed and one that is "substantially" completed; for, whilst he testifies that it is "completed" when all the work and material required for grading and bridging is placed in its proper position, he also testifies that it is not "substantially completed" if it lacks any of these requisites, so that, according to his view, it must be completed in order to be substantially completed. The framers of the constitution evidently intended, however, that the distinction which we think exists should be recognized, otherwise the participle "completed" would have been used without the qualifying adverb. As is very justly said by the learned judge of the district court, "the intention of the framers of the constitution * * * was to encourage the building of railroads throughout the entire state," but it was not the intention, and the fact is made manifest, to exempt from taxation roads already established, or the work upon which had so far progressed as to render it reasonably certain that they would be established without such encouragement, and we agree with our learned Brother that the road in question was in the latter condition. If, however, the question were more doubtful than we think it is, we should still be constrained to affirm the judgment rejecting plaintiff's demand. The case belongs to a class of which it has been said: "The rule of construction in this class of cases is that it should

be most strongly construed against the corporation. Every reasonable doubt is resolved adversely. Nothing is taken as conceded but what is given in unmistakable terms, or by an implication equally clear. Silence is negation, and doubt is fatal to the claim." *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Railroad Co. v. Thomas*, 132 U. S. 185, 10 Sup. Ct. 68, 33 L. Ed. 302; *Ford v. Land Co.*, 164 U. S. 666, 17 Sup. Ct. 230, 41 L. Ed. 590; *City of New Orleans v. Robira*, 42 La. Ann. 1098, 8 South. 402, 11 L. R. A. 141. The police jury and the town of Homer had an interest which justified their intervention, since, if the claim for exemption had been sustained, it would have applied to parish and town as well as to state taxes. Code Prac. art. 390.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as it dismisses the intervention of the parish of Claiborne and the town of Homer, and that there now be judgment maintaining said intervention, at the cost of the plaintiff in the suit; and it is further ordered, adjudged, and decreed that in all other respects said judgment be affirmed.

(107 La.)

STATE ex rel. TAYLOR v. JUDGES OF COURT OF APPEAL, PARISH OF ORLEANS, et al. (No. 14,423.)¹

(Supreme Court of Louisiana. May 12, 1902.)
APPEAL—JURISDICTIONAL AMOUNT—REMITTITUR.

When by remittitur entered before judgment in the lower court the amount in dispute is reduced to below the jurisdiction of the appellate court, the latter court has not jurisdiction.

(Syllabus by the Court.)

Application by the state, on the relation of Jos. D. Taylor, for writs of mandamus, prohibition, and certiorari to the judges of the court of appeal, parish of Orleans, and others. Writs denied.

James B. Rosser, Jr., for relator. Respondent judges, pro se. Joseph Brewer, for respondent Ida Ober.

PROVOSTY, J. Miss Ida Ober brought suit in the civil district court of the parish of Orleans against relator for \$104.16, and before judgment entered a remittitur for \$20.83, leaving \$83.33 as the amount of her demand. Judgment was rendered in her favor for this amount, and from this judgment the relator took an appeal to the court of appeal of the parish of Orleans, the lowest limit of whose jurisdiction in appeals from the civil district court is \$100. On exception that court dismissed the appeal, and this is an application to compel it to entertain jurisdiction. How can it do so, when the lower limit of its

¹ Rehearing denied May 26, 1902.

jurisdiction in such cases is \$100, and the suit involves only \$83?

The application must be denied and dismissed, and it is so ordered.

(107 La.)

STATE ex rel. EDWARDS v. LEE, Judge.
(No. 14,435.)

(Supreme Court of Louisiana. May 12, 1902.)

CRIMINAL LAW—ADJOURNMENT—ORDER OF APPEAL.

1. There was a disagreement between relator's counsel and respondent regarding the date of the court's adjournment, which led counsel, in good faith, to arrive at a conclusion different, the trial judge says, from that which he intended.

2. The junior counsel was in court when the defendant was sentenced. He had previously informed the judge that he understood that no appeal would be taken. No bill of exceptions was presented, or motion for new trial made.

3. The court, after adjournment, had no authority to grant an order of appeal in a criminal case, which, under the statute, must be applied for and entered in open court prior to adjournment.

(Syllabus by the Court.)

Application by the state, on the relation of J. B. Edwards, for a writ of mandamus against J. B. Lee, judge of the Twelfth judicial district court, parish of Vernon, and for a writ of habeas corpus. Application denied.

Charles C. Egan, for relator. Respondent judge, pro se.

BREAUX, J. Plaintiff asks that a writ of mandamus be made peremptory, directing the district judge to sign bills of exceptions attached to his petition for a mandamus, and that when the mandamus shall have been made peremptory, and the appeal ordered, a writ of habeas corpus issue, directing the warden of the state penitentiary to return relator to the parish jail at Leesville, Vernon parish. Relator was tried under an indictment for murder. The jury returned a verdict of manslaughter, and recommended the accused to the mercy of the court, on April 11, 1902. He was sentenced on the 16th of that month to a term of seven years at hard labor in the penitentiary. He was taken by the sheriff from the parish jail in Vernon parish on the 17th day of April, 1902, and conveyed to the state penitentiary. Relator avers that the leading counsel in the case asked the presiding judge when court would adjourn, and that in answer he said that he expected court would adjourn on Friday, the 18th of April; that previous to this conversation he had mentioned to the judge the matter of taking an appeal in this case, and had said to the judge that he intended to appeal; that this counsel was detained in Shreveport, but wired to the judge that he would return on Thursday, acting under the belief that prisoners would not be sentenced until Friday; that when he returned he found that relator had been sentenced, and was on his way to the penitentiary; that the court had been adjourned. He

further avers that his counsel called on the judge, and found him willing to do anything possible in order not to deprive relator of his right of appeal, but that the judge could not find authority for then signing bills of exceptions and granting the appeal. There were three counsel in the case. One, the senior, was in Shreveport; the other had returned to his home; and the junior counsel was the only one present when the defendant was sentenced. Relator alleges that there was a misunderstanding between court and counsel, which resulted in his losing his right of appeal, unless the remedy here applied for is granted.

The judge of the district court, in his answer to the rule nisi, says that, five days after the defendant had been convicted, he pronounced sentence. He further says: That counsel who urges the application for a mandamus came to him a short while after defendant had been convicted, and said he thought he would appeal the case. That he was asked by this counsel how long court would be in session. That his (the judge's) reply was that he was waiting for the report of the grand jury, then in session, and that court would adjourn immediately after the end of their labors; that he could not say when they would make their final report; and that it might be as late as Friday. He (counsel) then remarked that he was going to Shreveport, and, if anything came up, not to assign it to be heard before his return, to which he replied, "All right." That counsel made no mention of an appeal. That no bill of exceptions had been presented to him, and no motion for a new trial, although a number of days had elapsed from the day of defendant's conviction to the day he was sentenced. That he could know of the intention of counsel only by his acts in open court. That he had been informed by the junior counsel, Mr. Huson, that there had been a consultation held, and that no appeal would be taken, as will appear by his affidavit, made part of the return to the rule nisi. That the grand jury made their final return on Wednesday. That he then notified the sheriff to bring convicted defendants into court, and he imposed sentence on relator in open court in the presence of his attorney, Huson. We can only regret that this misunderstanding arose between counsel and the court. We understand that, in the course of a friendly conversation, counsel concluded, from the utterances of the judge, that the court would not adjourn before his return, while, on the other hand, the judge did not think that he had said anything to justify that inference. Counsel, with fairness which does him credit, says in his petition that he does not wish to reflect on the district judge, and that the result came about purely from a misunderstanding between court and counsel. As regrettable as the disagreement is, we are constrained to the conclusion that the court has been regularly adjourned. Even if there had been some haste

to adjourn, we would not see our way clear to decide that the case should be reinstated, and an appeal granted. It will be borne in mind that relator has not made the least showing, in due form, of the acts prejudicial to his cause during the trial. But we are informed by the court that there was no undue haste, that all matters requiring attention during the term had been disposed of, and that nothing remained to be done. "The statement of the judge is usually accepted, when a difference arises between him and defendant's counsel with regard to the facts." *State v. Melton*, 37 La. Ann. 77; *State v. Beck*, 41 La. Ann. 584, 6 South. 431. In our view of the law and of the judge's authority, we are led to the conclusion that the adjournment was legal and regular, and that, in view of the statement in the return, the defendant not having objected, through the counsel by whom he was assisted, when sentenced, he can no longer be heard to urge the complaint here urged. The judge is concluded by the order of adjournment, and could not rescind it. The term had been brought to a final close. The power of the court came to an end by its final adjournment. It loses its control over cases decided, unless its jurisdiction is kept alive by motion or other proceeding to that end. In our view of the law, no alternative is left to us, except to recall the rule nisi.

It is ordered, adjudged, and decreed that the rule nisi which was issued in this case be recalled. The application is denied, and the suit dismissed.

(107 La.)

SCOTT et al. v. PARRY et al. (No. 14,275.)
(Supreme Court of Louisiana. May 12, 1902.)

TAX SALE—VALIDITY—PRESCRIPTION.

1. To constitute a valid adjudication of property at tax sale, there must have been an assessment sufficiently accurate, as to description, to identify it.

2. The prescription of three years given by the act of 1874 must have for its basis the actual possession of the tax purchaser.

3. The vice in a tax sale arising from an assessment of property by a description which does not identify, is more than informality, and the prescription of five years is inapplicable.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by L. A. Scott and others against Robert H. and Agnes M. Parry. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wells & Wells, for appellants. Thomas Fletcher Bell, for appellees.

BLANCHARD, J. This is an action to annul a tax of land, which took place in August, 1891. Several grounds of nullity are set up. It is necessary to notice only one of these. The land in question was assessed as "one hundred and sixty-two acres, being north fractional section two, township 15 N., range 13 west." It was advertised by that

description and the deed executed by the tax collector to the tax purchaser so describes it. The assessment was made to the heirs of J. B. Gilmer. But the true description of the property owned by the heirs of J. B. Gilmer was the north fractional half of section two, township fifteen north, range thirteen west. "North fractional section two" is not the same thing as "north fractional half of section two." The word "half" cannot be supplied. It would be just as reasonable to supply the word "third," or "quarter," or "fifth." Without it, "north fractional section two" means nothing unless it means the whole of fractional section two—the word "north" being superfluous. We make out from the scanty documentary evidence offered, unaccompanied by explanation or map, that J. B. Gilmer entered from the government fractional section 2, township 15, range 13, containing 162.88 acres, but there then follows, as part of the same record evidence, certain other descriptions of lots and lands on the same fractional section, aggregating 195.24 acres. Whether they were, too, entered by Gilmer we are not apprised. But we take the document offered as showing other lands than the 162.88 acres in the fractional section. Other persons may, therefore, own the land in the fractional section south of the line which bounds on the south the north half of the fractional section. Again, 162 acres in that fractional section were assessed. If the whole of the section is included in the description contained on the tax roll in the assessment made against the heirs of Gilmer, in what part of it are we to locate the particular 162 acres, which is the subject of this controversy? We are constrained to hold that the description of the property is too vague and indefinite to operate a conveyance of title, or to serve as a basis of a valid tax title. *Gibson v. Hitchcock*, 37 La. Ann. 214; *Augusti v. Lawless' Heirs*, 45 La. Ann. 1370, 14 South. 228; *Improvement Co. v. Succession of Fasnacht*, 47 La. Ann. 1294, 17 South. 800. "When," said the court in *Wilson v. Marshall*, 10 La. Ann. 329, "the power of government is interposed to divest private titles to real estate, it is necessary, under pain of nullity, that the estate sought to be divested should be so described that it may be identified." An assessment is invalid unless it give such a description of the lands that the parts of the government subdivisions belonging to the taxpayer may be ascertained and separated from the parts of the same subdivision belonging to other persons. *Person v. O'Neil*, 32 La. Ann. 228.

Defendants pleaded the prescription of three years against the action to annul the tax title, but it is the prescription declared in Act No. 105 of 1874—not that given in article 233 of the constitution of 1898, for this suit was filed within three years of the adoption of the constitution of 1898. To support the plea of prescription of three

years under the statute of 1874, the tax purchaser must show actual possession of the property for three years prior to the suit to annul. *Barrow v. Walson*, 39 La. Ann. 409, 2 South. 809; *Breaux v. Negrotto*, 43 La. Ann. 428, 9 South. 502; *Russell v. Lang*, 50 La. Ann. 38, 23 South. 113; *Hansen v. Civil Sheriff*, 52 La. Ann. 1568, 28 South. 167. The burden is on him to establish the basis of the prescription. Here, defendants did not show actual possession by them of the land for three years. They offered no evidence at all on the question of possession. It is true, there is in plaintiffs' original petition the averment that Agnes M. Parry "is in possession of said land under a deed from her father Robert Parry and refuses to surrender the possession to petitioners." This was an admission that one of the defendants was in possession of the land at and prior to the institution of the suit, but it was not an admission, and did not dispose with proof, that defendants were or had been in possession, prior to the suit, for a length of time sufficient to predicate the prescription of three years upon.

Defendants also pleaded the prescription of five years as against all informalities affecting the tax sale. This prescription is inapplicable. The vice in a tax sale arising from an assessment of property for taxation by a description which does not identify, is more than an informality. *Person v. O'Neil*, 82 La. Ann. 228; *Millaudon v. Gallagher*, 104 La. 713, 29 South. 307; *Hansen v. Civil Sheriff*, 52 La. Ann. 1569, 28 South. 167.

It is ordered that the judgment appealed from be affirmed.

(107 La.)

STATE ex rel. RICHARDSON v.
SCHWARTZ FOUNDRY CO.,
Limited. (No. 14,142.)

(Supreme Court of Louisiana. May 12, 1902.)

APPEAL—AFFIRMANCE.

Where a party becomes the owner of stock in an incorporated company, is in possession of the certificates, and demands the transfer of the same, and, after judgment ordering the transfer, and an appeal therefrom, the respondent and appellant appears in this court, through its counsel, only for the purpose of consenting that the judgment appealed from be affirmed, such judgment will be affirmed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Application by the state, on the relation of F. L. Richardson, receiver of the American National Bank, against the Schwartz Foundry Company, Limited. From an order granting the writ, defendant appeals. Affirmed.

Farrar, Jonas & Kruttschnitt and Lazarus & Luce, for appellant. Richardson & Soule, for appellee.

MONROE, J. Relator alleges that, in his capacity of receiver of the American National

Bank of New Orleans, he obtained judgment in the civil district court against Sumpter Turner and Ed Weil, syndics of M. Schwartz & Co., insolvents, and against Moses Schwartz and Meyer G. Weil, members of said firm, individually, for \$74,045, with lien and privilege upon certain shares of stock; that the judgment so obtained was affirmed by the supreme courts of the state and of the United States, and was recorded and ordered executed, and that thereunder the property mentioned, consisting of 700 shares of the stock of the Schwartz Foundry Company, Limited, was adjudicated to him (purchasing for the benefit of the creditors of the defunct bank, of which he is the receiver) at \$87 per share, or a total of \$60,900, and that the sale was duly approved by the district court; that thereafter relator presented the judgment so obtained, the procès verbal of the sale, and the certificates of said stock, with transfers and powers of attorney annexed, to Moses Schwartz, the president of the Schwartz Foundry Company, Limited, and demanded the transfer of the stock on the books of the company, but that the demand was refused. He accordingly prays for a mandamus ordering the transfer and the issuance of new certificates. The facts alleged in the petition are admitted, and whilst the defendant appears to have set up a nominal defense in the district court, and to have appealed from a judgment making peremptory the mandamus, it has appeared in this court, through its counsel, only for the purpose of consenting that the judgment appealed from be affirmed, which consent we find justified by the record.

The judgment is accordingly affirmed.

(107 La.)

CITY OF SHREVEPORT v. SHREVEPORT BELT RY. CO. (No. 14,408.)

(Supreme Court of Louisiana. May 12, 1902.)

MUNICIPAL IMPROVEMENTS—STREET RAILROADS—PAVING ROADBED.

1. The difference between plaintiff and defendant grows out of the measurement of defendant's roadbed in order to fix proportion of cost of paving due by defendant to plaintiff.

2. The statute looks only to the roadbed in fixing the amount. Plaintiff's contention is that this roadbed is seven feet wide; the defendant's that it is less. When ties are used, the rail rests on the inside and outside of the track the length of the ties. When girders or sleepers are used, the width of the roadbed is less. The roadbed consists of the foundation on which the superstructure rests. The rails are the superstructure, and rest on the girders.

3. The proportion of the space being limited to the roadbed, the court holds that it is without authority to take the outside of the track into account on the ground that the road is benefited by the adjacent pavement. Roadbed owes the proportion of cost of paving. This does not include part of the adjacent roadway on which rails do not rest.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by the city of Shreveport against the

Shreveport Belt Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward Hughes Randolph, City Atty., for appellant. Wise & Herndon, for appellee.

BREAUX, J. Plaintiff brought this suit to recover the proportion of cost of paving streets in Shreveport in which the defendant railway company has its tracks. The amount claimed by plaintiff is arrived at by taking 7 feet as the width of construction for which it claims the defendant is liable, while, on the other hand, defendant's insistence is that it owes the cost of construction on the basis of a roadbed 5 feet $\frac{5}{8}$ inches in width. Heretofore wooden cross-ties were used in the construction of roadbeds. They measured 7 feet in width, and this heretofore has been taken as the width of the roadbed itself, and the cost of construction was fixed on that measurement. This court has decided with reference to measurement for paving purposes when cross-ties are used by the defendant company that the roadbed must be taken as measuring seven feet in width; "that if the cross-ties extend to a width of seven feet, it follows that the roadbed is seven feet wide." *City of Shreveport v. Shreveport City Ry. Co.*, 104 La. 276, 29 South. 129. Of late years in several cities a change has been made, and a new method of laying roadbeds adopted. The defendant road adopted the new plan, and used stringers or girders to support its rails. On defendant's theory, the superstructure of railroads is supported on this plan by a foundation less wide than under the old plan of construction. Plaintiff's able counsel, in endeavoring to meet this theory, says that there has been no change in the width of the tracks, and that they occupy superficially as many as seven feet of the track, and that they derive as much benefit from the paving, and that, in consequence, the assessment should be the same. Tracing plaintiff's power of assessment in matter here to the statute No. 10 of 1896, it is plainly evident that where a railway bed and track occupies a portion of the street it shall pay in proportion to the space occupied by its roadbed. Section 2 of the statute. This has been interpreted by this court as extending to a width of seven feet, because that was the length of the ties, taken as constituting the width of the bed. Here there are no ties, and it appears that the same weight as when ties were used is supported by a roadbed less wide. The gauge has remained the same, but the roadbed has been curtailed of its proportion. This roadbed alone is to be taken as the width in fixing defendant's proportion of costs. "The roadbed is the foundation." 1 Elliott, R. R. § 5; *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 34. The word "roadbed," as relates to railroads, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think

it correct. *City and County of San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, 49 Am. Rep. 98. "The rails in place constitute the superstructure resting upon the roadbed." *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 34. The track is not supported and buttressed by the paved street on each side of the roadbed to such an extent as would warrant us in adhering to the first measurement—i. e., of seven feet—because of benefit derived thereby. If the benefits be as great as contended for by plaintiff, they are not included within the roadbed. The law fixes the width; i. e., it specifically limits it to the roadbed. It is not left to us to fix it by reference to the benefit which may be received by other physical agencies not included in or forming part of the roadbed. The extent of the adjacent support is lacking in certainty. Should we take the space of six inches on each side as the measure representing this support, the question would no longer be within the limit laid down in the statute, viz., the width of the roadbed; and, should we consider this six-inch strip, we would be justified in construing the statute as including the whole space on each side of the roadbed,—that is, from curb to curb. This would be trenching upon legislative functions specifically prohibited.

But plaintiff earnestly invokes the rule laid down in our own decision cited supra as one of property, which should remain unchanged. True, when the facts upon which the rule is founded are about the same, the rule of stare decisis should govern; but if the defendant were to construct a narrow-gauge road on a four-foot foundation or roadbed, under the statute the roadbed would represent the width for assessment of defendant's costs, and not the adjacent concrete, which forms no part of the roadbed. The argument of the learned counsel that on unpaved streets the defendant still uses the old cross-tie plan of laying its road seven feet in width, and that this is demonstration enough that the benefit derived is at least equal to the number of feet to make it seven, as contended by plaintiff, would be unanswerable were it not for the limitation to roadbed upon which we have heretofore dwelt. The argument for plaintiff sets forth that there is already trouble about the superstructure of the track, and in order to build and strengthen the concrete cubes it would disturb and weaken at least a foot of the street on the outside of each bed. There is testimony in support of the argument. We infer that the necessity of these changes or repairs is very remote; besides, if it should arise, in our view it would devolve upon the defendant to make the repairs at its costs. Moreover, a question very similar was passed upon in the case before cited, from which we quote: "The idea in fixing upon a width of seven and three-quarters feet being that the cross-ties are seven feet long and that in renewing them it would be necessary to disturb the pavement for sev-

eral inches on either side, where it is shown that by cutting a defective tie in the middle it may be drawn from either end, and hence that the excavation need not be wider than the length of the tie. [This is, in substance, one of defendant's answers to one of plaintiff's demands.] Beyond which it is also shown that, as the roads in question are built, it is not contemplated that the ties will ever be renewed." This is precisely the position of defendant now with reference to its girders, concrete, and rails,—that it is not contemplated that they will require renewal.

The legislative will leaves no room for interpretation that would include anything outside of the line of the roadbed. It only remains for us to affirm the judgment. For reasons assigned, it is affirmed.

BLANCHARD, J., recused, on account of interest in the result.

(107 La.)

ELLERBUSCH v. KOGL. (No. 14,051.)
(Supreme Court of Louisiana. May 12, 1902.)

DIVORCE—ALIMONY.

1. The demand of the wife for alimony finds no support in law or fact.

2. After two years had elapsed, and no reconciliation had taken place, the defendant husband recovered a judgment for divorce, based upon the judgment of separation from bed and board obtained by the wife. Act No. 25 of 1898. Held, that the judgment is valid and legal.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Adline Ellerbusch, wife of John Kogel, against John Kogel. Judgment for defendant, and plaintiff appeals. Affirmed.

Ernest Lee Sansum, for appellant. Joseph B. Derbes, for appellee.

BREAUX, J. Plaintiff brought this suit against her husband for a separation from bed and board and for alimony. She recovered judgment in June, 1898, of separation from bed and board. She was by the judgment allowed alimony at \$15 per month. In 1899 defendant sued out a rule against plaintiff, asking for a suspension of the allowance to his wife which had been decreed as just mentioned. The rule was made absolute in due time. The ground on which the court acted in setting aside the decree of alimony was that no domicile had been appointed by the court as required by articles 147 and 148 of the Civil Code. No appeal has been taken from the judgment decreeing a discontinuance of the allowance in question to the wife. In April, 1901, more than two years after the plaintiff had obtained a judgment of separation from bed and board, the defendant husband presented a petition to the court for a divorce, grounded upon the decree of separation from bed and board which had been obtained by his wife.

The statute (Act No. 25 of 1898) renders it possible for a married person against whom a separation from bed and board has been rendered, at the expiration of two years from the date of the judgment, if there has been no reconciliation between the parties, to obtain from the court that rendered the judgment of separation from bed and board a judgment of divorce. In the last suit, in which the husband appeared as plaintiff for divorce, the wife, Mrs. Adline Ellerbusch, appeared by way of reconvention, and again asked for alimony. The husband recovered a judgment for divorce, and again the question of alimony came before the court. As no domicile was appointed by the court, and as it follows that she did not prove that she had resided at an appointed domicile while the proceedings were pending before the court, she cannot recover alimony. The following excerpt is in point: "Inasmuch as the defendant confessedly left the domicile of her husband without obtaining from the judge an order assigning her a domicile pending the suit," she has no right to alimony. The statute imposed the burden of proof on the one suing for alimony. *Suberville v. Adams*, 46 La. Ann. 125, 14 South. 518. The record does not contain evidence sustaining the demand for alimony, and no bill of exceptions showing that the court's ruling excluding testimony regarding a demand for alimony was erroneous. The appeal before us was taken from the judgment of divorce obtained by the husband. We have found no reason on which to disturb it, and it only remains for us to affirm the judgment of the district court.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(107 La.)

STATE v. MILLER. (No. 14,406.)
(Supreme Court of Louisiana. May 12, 1902.)

CRIMINAL LAW—NEW TRIAL—APPEAL—REVIEW OF EVIDENCE.

1. The failure of defendant in a criminal case to introduce evidence in his own behalf which was within his control for the reason that he did not believe it was called for under the evidence which the state had adduced against him, furnishes no reason for a new trial.

2. In the district, and not the supreme, court is vested the right and power of determining whether a verdict rendered against defendant in a criminal case was justified by the weight and sufficiency of the evidence adduced against him. When the district court overrules a motion for a new trial, holding that the verdict was justified, the supreme court cannot review his conclusion, even though in a bill of exception reserved to this ruling is embodied a résumé of the testimony which was taken on the trial, signed by the district attorney and counsel of the accused.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Joshua G. Baker, Judge.

George Miller was convicted of larceny, and appeals. Affirmed.

Paul C. La Salle, for appellant. Walter Gulon, Atty. Gen., and J. Ward Gurley, Dist. Atty. (Lewis Gulon, of counsel), for the State.

Statement of the Case.

NICHOLLS, C. J. Defendant appeals from a sentence for larceny, urging his grounds of complaint in a bill of exceptions taken to the refusal of the district court to grant him a new trial. The grounds which he assigned as those entitling him to a new trial were: (1) Because the verdict was contrary to the law and the evidence. (2) Because the evidence did not establish beyond all reasonable doubt the guilt of the defendant as the law required. (3) Because the ownership of the property had not been proven as laid in the information, nor had there been any proof to show that the prosecuting witness was ever in possession of the property used as evidence and alleged to have been stolen by the defendant. (4) Because the state had failed to establish beyond all reasonable doubt the corpus delicti; that there was no proof to show that the property in question, or any similar property, had ever been taken and stolen by the defendant from the prosecuting witness. (5) Because the property in question, and which was used in evidence on the trial, is the property of the defendant; that the reason defendant had not established by proof his ownership of the property on trial was by reason of the fact of the want of proof on the part of the state to establish the corpus delicti, and that, therefore, defendant was not compelled under the law to make any defense thereto; that the property alleged to have been stolen by defendant was given and sold to defendant by Jack Kelly, a person whom defendant prays the court will cause to be summoned in court so as to enable defendant to secure and have the benefit of his testimony, and to have the same made a part of the motion, as though written and embodied therein. The court caused Kelly to be summoned, and his testimony taken. The motion for a new trial was then taken up and argument heard. The court overruled the motion, and the defendant appealed. Defendant annexed to his bill, as part thereof, his motion for a new trial and the evidence taken. In the bill it is stated that the judge overruled the motion for reasons orally assigned. What those reasons are we are not informed. We find in the record a paper headed "Statement of Facts," which is signed by the district attorney and the counsel of the defendant. It purports to recite the testimony given on the trial by the different witnesses. We have repeatedly decided that the supreme court is without jurisdiction in a criminal case to review the evidence which was submitted to the jury which went to show the guilt or innocence of the accused, in order to ascertain whether the conclusions reached by the jury on

the evidence before it was correct or not. This is true, whether this testimony be brought before us incorporated in a bill of exceptions taken to the ruling of the court refusing a new trial, or whether it comes up in the record as an agreed statement of facts signed by counsel of both parties. In the district judge is vested the right and power, after the jury has returned its verdict, to determine whether, on the evidence which has been submitted to it, and upon which its verdict rested, a new trial should be granted or not. When his conclusions as to the guilt of the accused under the evidence which was adduced on the trial are in accord with those of the jury, and he refuses the new trial, we are powerless to review the ruling. If there was any legal complaint to be made of this evidence, whether because improper or illegal evidence was admitted, or proper and legal evidence was not allowed to be introduced, objections on that score should have been presented to us at the time in bills of exception then taken. If defendant conceived there was any legal reason why the jury could not or should not return a verdict of guilty on the evidence submitted to it, defendant should have stated his grounds to the court, and called upon it so to charge, and, on refusal to charge as requested, he should have taken a bill. On the other hand, if the court itself should have given instructions to the jury of which defendant could legally complain, he should then have objected, and reserved a bill.

The court allowed the testimony of Kelly to be taken in order to enable it, by taking that testimony in connection with that which had been adduced before the jury (of which it was itself legally advised), to grant a new trial, if it thought it legally right that this should be done. Even with that additional evidence before him, taken in connection with that which had been adduced on trial, the judge was of the opinion that the state had made out its case, and refused to reopen the case. Appellant complains of his action. It is very clearly shown that while the testimony taken on the trial of the case was before the district judge himself to be considered by him (coupled with the new evidence adduced) in order to determine him as to what his course should be, that evidence cannot be brought before this court for its consideration in the matter, and that the only evidence which could be before us would be that taken on the trial of the motion for a new trial, when embodied in a bill of exception taken to the ruling of the judge on that motion as involving an error of law. Kelly's entire testimony was received below without objection, and no question of law arose from it, or in the ruling of the district court refusing a new trial. We certainly could not undertake to say on Kelly's testimony alone, and without any knowledge legally of what the evidence tak-

on on the trial had been, that the defendant was entitled to a new trial. We may say here, however, that a defendant who had failed to introduce certain testimony on his own behalf because he erroneously supposed it was not required by the necessities of his case, would not be entitled to a new trial in order to rectify his own error, unless under very extraordinary circumstances. Such a course would hold out a direct inducement to counsel of accused parties to commit errors.

The judgment appealed from is affirmed.

(107 La.)

COTTON v. JENNINGS IRRIGATING CO., Limited. (No. 14,254.)

(Supreme Court of Louisiana. May 26, 1902.)

IRRIGATION—CONTRACT—BREACH—INABILITY TO PERFORM.

1. In a contract made by a rice farmer with the officers of a canal irrigating company which was in process of construction the only obligation entered into by the farmer was to pay two sacks of rice per acre "for the land irrigated," the farmer leaving himself at liberty to plant what land he pleased, and to call for irrigation or not, as he might think proper. By a clause in the contract it was declared in behalf of the company that "it would use all reasonable means" to supply water. Such a clause, under such circumstances, has to be liberally construed in behalf of the corporation. The mere fact that the canal company failed to have had the canal completed, though it was physically possible to have done so, did not carry with it liability for damages.

2. The putting in default in presence of an acknowledged inability to perform or in case of an absolute denial of the existence of any contract cannot be exacted. *Beck v. Fleitas*, 37 La. Ann. 492; *Allen v. Steers*, 2 South. 196, 39 La. Ann. 586.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

Action by L. Cotton against the Jennings Irrigating Company, Limited. Judgment for plaintiff, and defendant appeals. Reversed.

Cline & Cline, for appellant. McCoy & Moss, for appellee.

NICHOLLS, C. J. Plaintiff alleged that on or about the 15th of May, 1900, he entered into a contract with the defendant company by which the latter contracted to furnish plaintiff a sufficient amount of water through its canal and pumping plant, which, taken together with the natural rainfall, would properly flood and irrigate certain described land for the season of 1900; that during the spring of 1900, relying upon the said contract, he prepared about 100 acres of land, and planted same with the best seed rice obtainable, and obtained a good stand thereon, and properly leveed the land, the levees being located by a civil engineer; that they were strong and compact, and of sufficient height to thoroughly flood the land. That he did other things required of him by the contract; that on 21st of July, 1900, he, being then in need of wa-

ter, made a demand upon D. E. Sweet, who was the president of defendant company, and upon C. L. Pardee, manager, which demand was made in presence of two witnesses, that the company furnish him forthwith and immediately a sufficient amount of water to properly grow and mature said crop; that both before and after said date he had made personal demand upon the manager and other employes for water, all of which was without avail; that if he had obtained through the canals and pumping plant of defendant an ample and sufficient supply of water at the proper season, he would have raised not less than 1,000 sacks of rice at a value of \$3.50 a sack, but that through the failure of defendant to furnish water as agreed he raised a little over 3 sacks per acre, resulting in a loss to him of 700 sacks, or \$2,450; that he called upon defendant for an arbitration to adjust the damages, but the request was ignored. He prayed for judgment for the amount stated. The defendant, after pleading the general issue, specially denied that C. L. Pardee was authorized to enter into a contract with plaintiff as alleged, and, if any such contract was attempted, which it denied, that it was its contract. It averred contingently that at the time the contract was alleged to have been executed its irrigation canal was a long distance from plaintiff's farm, and not yet completed; that plaintiff knew it could only supply water through said canal, and that its completion to his farm in time to flood the crop of 1900 was very uncertain; that prior to the 15th of May, 1900, plaintiff was preparing his ground and planting his rice crop; that in fact defendant was in the act of extending its canal in the direction of plaintiff's farm, and used all possible means to complete it in time for the irrigation of the crop of 1900, but that heavy and long-continued rains at a season very unusual retarded the work, so that the canal could not be completed in time; that it had been at all times impossible for defendant to irrigate the farm of plaintiff, and he well knew the fact both before and after the 15th of May, 1900. Plaintiff filed a plea of estoppel on the part of the defendant to contest the authority of Pardee to execute the contract,—First, because of its allegations that it attempted to comply with it; and, second, because of furnishing water and collecting rent from other parties and other contracts signed by Pardee as manager the defendant held him out to the public as being vested with all the authority incident to making such contract; third, because when notified of the contract it stood silent, did not deny the authority, but promised to furnish water in accordance therewith, and subsequently promised to settle all damages occasioned by failure to furnish water. The plaintiff introduced in evidence the instrument on which his suit was based. It bears date the 15th of May, 1900. It is signed "L. Cotton, per F. Cotton," and "Jennings Irrigation Company, Ltd. C. L. Pardee, Manager." Par-

deed declared himself in the body of the act as being the duly authorized manager of the company, and on its behalf (as the party of the first part) agreed and bound itself to maintain a pumping plant and irrigating canals as now (then) located in Calcasieu parish, and agreed to furnish a quantity of water, and to use all reasonable means to supply through its said pumping plant, canals, and laterals an amount of water which, together with the natural rainfall, will be sufficient to irrigate lands described in this contract; but is not to be held liable for any damage that may be caused by its failure to get a sufficient supply of water from Bayou Nez Pique, for accidents to machinery, nor other failures or accidents over which they had no control, but shall only be bound to make all repairs necessary with reasonable dispatch. In the instrument declared upon there is a blank left unfilled as to the number of acres which the plaintiff is to plant or to cause to be planted, the agreement reading: "Said party of the second part [plaintiff] agrees to plant or cause to be planted on the S. E. $\frac{1}{4}$ section 36, township 8, R'g 4 W., La. Mer., at least ——— acres each season thereafter until ———." The plaintiff agreed that "he would construct, maintain, carefully watch and keep in the best of repair and condition such levees, lead ditches, and drains as are necessary for the safe and economical cultivation of rice on the land described." It was stipulated in the agreement that whenever the plaintiff should desire to water his lands as provided therein he should give to the defendant at least 10 days' notice before the water was to be turned on, stating as near as possible the number of acres he wished to irrigate; that defendant was not to irrigate every part of the land described at once, but to proceed with the flooding as rapidly as possible.

The first defense urged is that Pardee, who signed the contract on behalf of the defendant company which was declared on, was not authorized to do so. The plaintiff introduced testimony showing that several other contracts were executed by him with other parties, and that the defendant made settlements with the rice planters with whom they were made. Plaintiff himself testified that when he notified the president of the company that he needed water, the latter raised no question as to the nonexistence of the contract, but in the presence of two other persons (who testified to the same effect) answered, "All right"; that later, when he made a proposition to compromise his claim, the president and members of the board of trustees met together the same day, and at that meeting (though the proposition was not accepted) there was nothing said looking to a repudiation of Pardee's action in making the contract. The president of the company, as a witness on the stand, admitted having been notified by the plaintiff to furnish water. His version of the interview differs from that of the witnesses testifying to the same only as to

the answer which he made on that occasion. His testimony on that subject was: "Mr. Cotton came in with two witnesses, and served notice on me he was ready for water,—would be in ten days; and I made the remark, 'All right, we will get it to you just as soon as we can.'" He testified that the first intimation he had as to the plaintiff's claiming to have a "contract" with the company for irrigating was the day he was so notified; that he told the plaintiff several times that "the company was not making contracts, especially west of Grand Marais, that they (the farmers) could see what was to be done to get the water to them, and they would have to take their chances." Asked on cross-examination whether he had, on receiving notice to furnish water, denied the authority of Mr. Pardee to make the contract, he answered that "he did not know that he did." Asked whether there was anything said between plaintiff and himself about recognizing any written contract which plaintiff claimed he had entered into with the company, he answered, "He did not think there was." He denied having made settlements with other parties on the basis of their having "contracts with them." He dealt with parties, as he "had done the year before," upon merely "verbal agreements that, if the company furnished the water, they would pay two sacks to the acre; if it did not furnish the water, of course it would not collect rent." These parties, as witnesses, testified that the settlements with them were made as compromise settlements. The company was not paid at the full rate of two sacks per acre, but they paid one-fifth on account of "not getting the water quite early enough to make a good crop." The compromise was made with Capt. Sweet, the president. "No contract was produced as the reason for collecting rent." The next defense is that the company made no absolute contracts with any one in the neighborhood of the Grand Marais to furnish water for irrigating purposes; that all that the company undertook was to irrigate the farmers' crops for 1900, should matters get into position such as to enable it to do so. Should it be able to, if it did irrigate, it was to be paid two sacks of rice per acre for the land irrigated. Defendant denies it ever entered into any legal obligation to have its canal ready. The company simply promised to make reasonable exertions to complete it. It contends it did make such exertions, but that the wet season of 1900 prevented it from accomplishing more than it did. The third defense is that, if the defendant was contingently liable, it was not placed in default. Our attention is called in this respect to the fact that plaintiff was under obligations (if the contract was binding) to himself construct the lead ditches to and over his land, and he never did so; that he was, therefore, never ready, and had never placed himself in position to receive water from the defendant.

Article 1913 of the Revised Civil Code de-

clares that in commutative contracts, where the reciprocal obligations are to be performed at the same time, or one immediately after the other, the party who wishes to put the other in default must at the time and place expressed in or implied by the agreement offer or perform as the contract requires that which on his part was to be performed, otherwise the opposite party will not be legally put in default. We are not prepared to say that a mere preliminary notice by the plaintiff to the defendant that he needed water, that he would be ready to receive it in 10 days, and that defendant must furnish it at that time, would have been such a compliance with the law as to place defendant in default; but before reaching that point the question arises whether a putting in default could have been exacted in this case. In the first place, it is shown under the evidence that defendant was not in a position to have been able to comply with the demand, and in the next place it denied absolutely any obligation on its part to furnish water to the plaintiff under the circumstances. While it was right and proper for plaintiff to have made a demand for the water, we do not think, in view of the fact that defendant was never in fact in a position to supply it, that defendant can set up the want of a strict putting in default. It is true that plaintiff never constructed the lead ditches, but this was obviously for the reason that it was apparent that the canal would not be completed to plaintiff's farm so as to make the ditches necessary. Had occasion called for the same, they would unquestionably have been dug. The evidence shows it would have taken very little time to have prepared them. We may say here incidentally that when article 1913 speaks of the party who desires to place the other in default being required to "himself perform that which was on his part required to be performed," reference is made to some act to be performed by that party in favor of the other contracting party, as a consideration for what that other was called upon to do. We are satisfied, under the evidence, that defendant's canal could have been brought forward so as to have enabled it to irrigate plaintiff's land had it made great exertions. The case was not one of "force majeure"; it was physically possible for defendant to have completed the canal to that point. Defendant, of course, knew the usual character of the seasons in May and later months in lower Louisiana, and the character of the country in and around Grand Marais, and that a rainy season would be likely to retard, if not actually put an end to, work on that portion of the line of the canal. It was possible for it to have postponed work elsewhere, and concentrated it at the Marais. Phillips, however, who was the contractor for the work, and one of the directors of the company, and also a rice farmer in the neighborhood east of Grand Marais, used a portion of his working force to construct laterals for

irrigation upon his own farm. We are not informed how many persons other than plaintiff would have required or would have been afforded water through this additional exertion, which evidently called for heavier outlay. So far as the record discloses, plaintiff was the only party (and he only contingently) interested in that matter, and that fact calls to special attention the wording of the instrument upon which he has declared. By it the defendant was to be paid two sacks of rice "for the land irrigated." Plaintiff did not bind himself to plant any particular number of acres of rice, nor of those planted did he bind himself to have any part of the same irrigated by the defendant. He was foot-loose to take the chances on a successful "Providence" crop, and to abstain, if he thought proper, from making any demand whatever upon the defendant. The defendant was not in position to require him either to plant or to irrigate any given number of acres. Had defendant pushed the work forward to meet its alleged obligation to do so under plaintiff's contract, it might well be that on reaching the place plaintiff might declare that he needed no water, and either make no demand for the same or a demand for an insignificant amount. There was no aggregatio mentium as to the land to be planted and to be irrigated. The thing in respect to which the contract was made was not fixed and determined. Under plaintiff's construction of it, there was no equality or mutuality of obligation. In construing the contract we must look at the circumstances under which it was made. At its date the canal was over a mile away from plaintiff's farm, with great uncertainty as to when and how far it would be extended that summer beyond the point it had then reached. We have no idea, when plaintiff gave notice to the defendant that he needed the water, and he must prepare to furnish it in 10 days, that he expected this demand would or could be complied with. So far as the record discloses, he made no demand for any specific supply at that time. He testified that he told him (the president of the company): "I am here. I want water, and I want it bad, and, as the contract provided for ten days, I want you to get ready for it. I need it bad." We may say here that the evidence shows that plaintiff was preparing to make a crop long before the date of this contract (as far back as January). An examination of the evidence causes us to reach the conclusion that Pardee, who signed that contract, had been in the habit of calling himself the "manager" of the company (though he was not such in fact), and the president of the company was aware of his doing so; that he was not aware, however, that he had made the contracts of the character such as plaintiff claimed his to be; that Pardee was not authorized to make contracts binding the company as to completing its canal up to a particular place at any particular time; that, if he was authorized to make

contracts at all, it was limited to making contingent contracts, and fixing the price of irrigation; that the plaintiff was not aware, when his own particular contract was signed, of the existence or terms of the contracts which he introduced in evidence which were executed by Pardee with other parties; that the president of the company had not seen the contract on which plaintiff declares at the time that the latter called for water. Considering this matter under all its surrounding circumstances, and assuming that the defendant company, by not expressly repudiating the authority of Pardee to make this particular contract at the time plaintiff made a demand for water, became committed to the recognition of Pardee's authority, and assuming that under this contract the company was obligated towards plaintiff to make reasonable exertions for completing the canal to his farm, that clause, we think, should be construed very liberally in defendant's favor. We do not think that it was called upon to go to unreasonable additional expense to meet mere possible demands to be made upon a single contract, and one so uncertain in its terms as that which plaintiff held. We think that both parties looked to and contemplated the possibility of noncompletion of the canal in time for the irrigation of the crop of 1900, and the actual contractual relations of the parties were based contingently upon the canal's reaching plaintiff's farm. We do not think it can be said, under the circumstances of this case, that the defendant company failed in "using all reasonable means" to furnish the plaintiff with water; that he came under legal liability to plaintiff for not using greater means than it did. Under that view of the rights and obligations of parties, the judgment appealed from is erroneous, and it must be reversed.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiff's demand be rejected, and his suit dismissed, with costs in both courts.

(107 La.)

VILLERE et ux. v. Succession of SHAW (BRAUN, Intervener). (No. 13,896.)¹

(Supreme Court of Louisiana. March 3, 1902.)

LANDLORD'S LIEN—SUCCEEDING TENANTS—STATUTORY PLEDGE.

1. The landlord has a privilege on the property that remained on his premises after the lease had expired.

2. The landlord's possession is not changed by the effect of agreements between tenants succeeding each other as tenants.

3. The statutory pledge, when the pledgee continues in possession, is as effective in suspending prescription as the contractual pledge.

Provosty, J., dissenting.

(Syllabus by the Court.)

Certiorari to court of appeals, parish of Orleans.

Action by Omer Villere and wife against the succession of John T. Shaw. Frank W. Braun intervenes. Judgment affirmed by the court of appeals, and intervener brings certiorari. Dismissed.

Rufus E. Foster, for applicant. Saunders & Gurley, for respondents.

BREAUX, J. This was a suit on a note and for the provisional seizure of a show case and other articles on the premises leased. The defendant answered, pleading the prescription of five years. Frank W. Braun intervened in the suit, and he also pleaded prescription. The judge of the First city court rendered judgment for plaintiffs against defendant, and dismissed the intervention. The intervener appealed to the court of appeals, and in that court the judgment of the First city court was affirmed. In due time after the judgment of the court of appeals had been rendered, the intervener applied to this court for a writ of certiorari and review, and his contention now is in support of his application that plaintiffs' note is prescribed. The facts are that John T. Shaw, tenant of Peter O'Donnell, sold out his stock and fixtures in the leased premises to T. J. Tully in 1896, who succeeded Shaw as O'Donnell's tenant, and bought Shaw's stock and fixtures. A short time afterward Tully sold to Byrnes, who in turn sold to Clark, and Clark to Braun, the intervener before mentioned. These parties became successively the tenants of O'Donnell, and the property provisionally seized remained on the premises of the lessor from 1894 to date. It appears that Shaw's lease was transferred to the first tenant, Tully, direct, without his assuming any back rent, and that none of Shaw's successors owe any rent. O'Donnell was informed of Tully's intention to buy out Shaw, and consented to transfer the lease to him. He also allowed a soda fountain, valued at \$500, which Tully did not buy, to be removed from the premises. Plaintiff in the suit, who succeeded O'Donnell as owner (respondent here), denies knowledge of Mr. Braun's purchase. She sets out in the agreed statement of facts that she always considered the articles seized as burdened with the landlord's privilege, and had no knowledge, until shortly before suit, of defendant's (intervener's) purchase of these articles. She considered them sufficient in value to secure her claim, and thought it useless to press same by suit. Relator (intervener Braun) alleges, in substance, that the questions of law involved are prescription vel non of the debt and estoppel vel non of the landlord to claim a lien. The question, in our mind, is in great part, if not entirely, one of possession. If plaintiff parted with possession more than five years prior to instituting suit, then the note sued on is prescribed. If, on the con-

¹ Rehearing denied May 26, 1902.

trary, the landlord continued in possession, as he claims, the note is not prescribed. The lessee's possession is the lessor's. He holds for the owner. The lessee, it is true, as relates to his own property, ordinarily holds for himself. Here an exception arises. By operation of law the lessor may "take the effects themselves and retain them until he is paid." Civ. Code, art. 3218. After the expiration of the lease, if the property remains on the premises of the lessor, it is considered, under the plain provision of the Code, in his possession until the rental is paid. The tenant cannot, by a sale, take from him the right which he has on the property. "The lessor, on the contrary, may take the effects themselves and retain them until he is paid." Id. art. 3218. The articles were in the premises subject to the lessor's right, and without some downright act changing the possession they remain subject to the lessor's claim. If removed, in the course of a few days, the privilege is lost, but if it continues on the premises it is then to be held for account of the lessor, unless it be evident by some act he has lost his possession. But this is not evident, as will be seen by the following: The lessor claims that the landlord, O'Donnell, through whom Mrs. Villere holds, was informed of the intention of Tully to buy Shaw out, and that he none the less transferred the lease to the former without saying anything to Tully about his claim for rent. In this, we think, there was error, for the reason that it nowhere appears in the record that O'Donnell (or his successor as owner) knew that an attempt would be made to take property on which he had the lessor's privilege. The agreed statement of fact does not show any such special knowledge, nor the act of sale by Shaw to Tully, submitted with the application for this writ. We can hardly be wrong in supposing that the lessor, not having been notified, knew nothing of the sale of these particular articles. The evidence does not show that he ever intended to abandon any of his rights on the property. The articles consisted of things that would suggest the necessity of a buyer's inquiring when buying from a tenant. They consisted of "show cases, doors, and counters." The least inquiry would have been sufficient. The tenant must be held to have known that, if there was a balance due on the lease, the property could be held. Despite this knowledge, he chose to buy without the least inquiry, and now assumes that the landlord must have known of his purchase, and must be held to have abandoned his right as lessor, although the evidence does not show that he knew that this particular property would be included in the deed.

Plaintiff (intervener Braun) in this application for the writ seeks to lay down a difference between a contractual pledge and

a statutory pledge. As relates to the right of retention, we have not found that there is any material difference when the statutory pledgee, as in this case, remains in possession. A pledge is a privilege with the right of retention of the property pledged. This is precisely the lessor's right. The right of retention is formally recognized in a number of articles of the *Olivil Code*, notably 1268, 2740, and 3178. In these and other articles, when the creditor is in possession, prescription is suspended. It is the possession which suspends the prescription, and this without regard whether the pledge is statutory or conventional. With reference to the right of retention, *Dalloz Journal du Palais* (Supplement, vol. 2, p. 810) says every one knows that the right of retention is derived from the law or from contract. The right of retention and rights incidental thereto fall with loss of possession of the thing. The creditor who has dispossessed himself of the thing only has a personal action. *Trolong, Privileges & Mortgages*, No. 259. We have dwelt more particularly on the possession because, in our view, it must follow, if the lessor continued in possession, the claim for which the property was held was not prescribed. *Latiolais v. Bank*, 33 La. Ann. 1452.

These being our reasons, it is therefore ordered, adjudged, and decreed that the rule nisi issued in this case be recalled and discharged, and the application of the relator and intervener is rejected.

PROVOSTY, J., dissents.

(107 La.)

MILLER v. KLINE. (No. 14,146.)

(Supreme Court of Louisiana. May 12, 1902.)

ACTION ON CONTRACT—PLEADING.

A petition that alleges a contract and the breach thereof shows a cause of action.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by Arthur A. Miller against William Kline. Judgment for defendant, and plaintiff appeals. Reversed.

Benjamin Rice Forman, for appellant. Bernard Titche and Leon L. Labatt, for appellee.

PROVOSTY, J. Plaintiff has appealed from a judgment sustaining an exception of no cause of action. The petition is as follows: "The petition of Arthur A. Miller, sojourning in New Orleans, but a resident of the city of New York, respectfully shows: That William Kline, residing in this city, and doing business under the name and style of the Metropolitan Hardware Company, Limited, at 407 Magazine street, and William Klein & Co., Limited, at 113 Chartres street, and William Klein & Co., or Manhattan

Store, No. 937 Canal street, New Orleans, is indebted to your petitioner in the sum of two thousand one hundred dollars and upwards, because your petitioner was, previous to the 18th of March, 1891, employed in a prosperous hardware business in the city of New York, and familiar with the hardware trade, and having considerable skill and experience in the handling of hardware, on the 18th day of March, 1901, he made a contract with the said William Kline in New Orleans, by which William Kline employed your petitioner as manager and buyer for the hardware and house furnishing business in New Orleans for one year from the 1st of May, 1901, and agreed to pay your petitioner a salary of one hundred dollars per month, and, in addition to such salary, one-half of the net profits of said business. Said William Kline further agreed to furnish all the necessary capital for the successful carrying on of said business, and further agreed, if it should be profitable and successful, that your petitioner, at the expiration of one year,—that is, from and after the 1st day of May, 1902,—should receive a salary of one hundred dollars per month, and, in addition thereto, one-third of the profits. Now, your petitioner shows: That in the discharge of his duties as manager and buyer for the hardware and house furnishing goods he faithfully attended to the same, but that the said William Kline neglected and failed and refused, although repeated demand was made, to furnish the necessary capital for the successful carrying on of said business, and arbitrarily and without any just cause or excuse repeatedly canceled orders for goods which could have been sold at a good profit, and for which there was constant orders and demand, and so crippled the said business. That said William Kline attempted to take advantage of the ignorance of your petitioner of the laws of Louisiana, and convert the said business and turn it into a corporation, under the act of 1898, known as the Metropolitan Hardware Company, Limited, and, after the said act of incorporation was drawn, carried on the said business in the said name; but that the said attempted incorporation was wholly void, because the terms and conditions of the statute in such cases were not complied with. The said William Kline never at any time put into the said business, nor paid into the said business, the sum of five thousand dollars; neither did any one else; so that the aggregate amount of capital paid into the said business never reached the sum of five thousand dollars, but in fact did not exceed three thousand dollars, neither in money or goods of that value, and the terms of the act of 1898 have never been complied with. The said Metropolitan Hardware Company, Limited, never became a legal corporation, nor could it ever become such under the prohibitory provisions of article 268 of the constitution. And now your petition-

er shows that without any just cause or excuse, on or about the 12th of July, 1901, the said William Kline illegally broke the said contract with your petitioner, discharged him, and refused to any longer permit him to enter the establishment. Thereupon your petitioner protested against the said breach of said contract, and tendered his services, and offered to continue to perform his part of the contract, which Kline refused to permit him to do, and the said Kline therefore owes him as wages for services actually rendered \$25 for the second week of the month of July, and for damages for the breach of the said contract salary for one year, \$950. Now, your petitioner further shows that if the said Kline had furnished the capital necessary to make the said business successful, as he was obliged under his contract to do, the business would easily have made twenty-five hundred dollars a year net profits after the payment of all expenses. Now, your petitioner shows that, being entitled to an interest in the profits of the said business conducted at 407 Magazine street, he has a right to ascertain the profits, and the said Kline, contriving how to defraud and cheat your petitioner, is endeavoring to sell out his property, especially the stock, good will, and book accounts, carried on by him in the name of the Metropolitan Hardware Company at 407 Magazine street, and is negotiating for the sale thereof in bulk, so as to put the said property beyond the reach of your petitioner, and deprive him of his rights to his share of the profits. Said William Kline has grossly mismanaged and is grossly mismanaging the said business, and is wasting, misusing, and misapplying the funds, sending consignments that properly belong to the said business to other stores and firms in which the said Kline is interested for the purpose of breaking up the said business in which your petitioner was employed and ruining him. That he has been negotiating with Henry L. Cohn to sell out the said stock and business in order to defeat the rights of your petitioner. That the said William Kline has further violated the law, publishing letter heads and doing business without the name 'Limited' in the name 'Metropolitan Hardware Company,' heading it as follows: 'Metropolitan Hardware Co., William Kline, Proprietor,' and has thereby made himself liable personally for any obligations of the said Metropolitan Hardware Company, Limited, even if it had been legally incorporated. That the written contract between petitioner and the said Kline is hereto annexed, and made a part of this petition. Wherefore petitioner prays that William Kline be cited to appear and answer this petition, and also be cited as proprietor of the Metropolitan Hardware Company, Limited, or Metropolitan Hardware Company, and that he be ordered to show cause why a receiver should not be appointed on a date to be fixed by the court to take pos-

session of the stock and business, ascertain the profits that have been made, and that he be condemned to pay your petitioner the sum of \$25 for salary actually due, and the further sum of \$950 damages for the breach of contract of employment for salary at the rate of one hundred dollars per month for one year from the 1st of May, 1900, and the further sum of \$1,150 profits that have been made and that could have been made if the said William Kline had not broken his contract with your petitioner, with five per cent. interest from judicial demand, and for costs and for general relief; and that it be ordered, adjudged, and decreed that the Metropolitan Hardware Company has not been organized according to law, and is not a lawful corporation; that William Kline and the Metropolitan Hardware Company, Limited, be cited to appear, in order to show cause, on the — day of July, 1901, at 11 o'clock a. m., why a receiver should not be appointed to take charge of the business at 407 Magazine street, and at 113 Chartres street, and No. 937 Canal street, collect the debts, and administer the assets to the best advantage of the parties in interest."

As reasons why a cause of action is not shown, defendant assigns the following: "The plaintiff is estopped to deny the validity of the act of incorporation. *Anderson v. Thompson*, 51 La. Ann. 727, 25 South. 399. The petition shows that plaintiff abandoned his contract with William Kline, and became one of the incorporators of the Metropolitan Hardware Co., Limited. Thereafter he worked for that corporation, and, of course, ceased to have a claim against William Kline. This is evident upon a mere perusal of the petition. He seeks to avoid the necessary consequences of this action by pretending ignorance of the laws of Louisiana, though he does not aver wherein he has since discovered our laws to be different from those of New York, of which he appears too willing to admit his knowledge. Admitting his ignorance of our laws, that cannot excuse him. Second. By pleading that said incorporation was and is wholly void. He is estopped from making this averment. If plaintiff has a claim, it is against the Metropolitan Hardware Company, Limited, which he has not cited. It is evident that he has no claim against William Kline."

We have read the petition carefully to discover this allegation here referred to of plaintiff's having become one of the incorporators of the Metropolitan Hardware Company, Limited, and have failed to find such an allegation. Perhaps plaintiff did in point of fact become one of the incorporators, but he does not so allege. Nor do we find any allegation of the petitioner's having abandoned his contract. As we understand the theory of the petition, it is that the same contract went on. The distinct allegation is that the Metropolitan Hardware Company,

Limited, never came into existence, and that the business continued to be that of William Kline, individually, and that the latter continued to be liable individually under the contract. It may be that at the formation, or supposed formation, of the corporation a new contract was entered into, superseding the old, and that plaintiff has declared on the wrong contract; but this does not appear by the allegations, except possibly as a matter of vague inference. The prayer for citation of the Metropolitan Hardware Company, Limited, and for the appointment of a receiver, having been abandoned, the suit is one distinctly on the violation of a contract, and in consequence the petition shows a cause of action.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the case be remanded to be proceeded with according to law.

(107 La.)

McKINNEY v. McNEELY et al. (No. 14,149.)
(Supreme Court of Louisiana. May 26, 1902.)
INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

A personal injury turning upon facts. Judgment of the district court is affirmed in favor of the defendant.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Richard W. McKinney against H. P. McNeely and S. S. Brown. Judgment for defendants, and plaintiff appeals. Affirmed.

Fenner, Henry & Riviere, for appellant.
Guy M. Hornor, for appellees.

Statement of the Case.

NICHOLLS, C. J. The plaintiff's action is for damages for the loss of his hand while engaged in certain work upon the tug *Corsair*, of which the defendant Brown was the owner and the defendant McNeely was the captain. The injury was alleged to be the result exclusively of the negligence of McNeely and his employer and the defective appliances upon the boat, and he (plaintiff) was no wise in fault. He himself was an employé of the Johnson Iron Works, and was sent by his employers to do the work upon the boat which would be indicated to him by McNeely. His averments are that, while acting "under the orders and direction of McNeely, he was directed to fit a new bushing on the pintle of the rudder; that he calpered the pintle and bushing, and found that a lump would have to be filed off the pintle before the bushing should be shrunk onto it; that the captain insisted that it should be shrunk on without moving the lump; that after repeated efforts it was found it could not be done in that way; that thereupon the captain ordered him to try to force the bushing on by putting the weight of the rudder upon it; that,

In order to accomplish this, it was necessary to remove the lower friction plate, situated near the head of the rudder, whereupon McNeely ordered two negroes in his employ to jack the rudder up in order to prevent the same from falling while he (plaintiff) was at work; that he (McNeely) refused to allow blocks to be placed as an extra guard, or to remove the lower friction plate, and ordered him (plaintiff) to remove the friction balls from said friction plate; that by the raising of the rudder the upper friction plate was raised some inches above the deck, and to remove the balls he was required to place his hand in the rudder hold of the deck; that while he was thus engaged and acting under the orders of the captain and removing the balls, and after he had removed eight of the same from the friction plate in which they were then resting, the jack holding the rudder slipped, or gave way, thereby causing the rudder to fall, bringing the upper friction plate in contact with his wrist, and severing his hand; that McNeely, in declining to permit the blocking of the rudder, and the removal of the friction plate, and in compelling him to remove the balls while the rudder was insecurely jacked, was negligent, and he was relying upon the rudders being safely and securely jacked, and was acting under the guaranty and assurance of the captain that the jackscrew would not fall; that all of the persons assisting in the work were the employees of the boat, and he (plaintiff) was acting under the control and direction of the captain in connection with the work then in progress; that he had no control over the jacking of the rudder, and relied upon this being safely done in the guaranty and assurance of McNeely that the jack would safely hold the rudder, and that the boat was steady, and that the rudder would not fall. Brown, the owner of the boat, being a nonresident, could not be reached by personal citation, and the case went to trial as against McNeely, resulting in a judgment in favor of the latter, from which the plaintiff appealed.

It is beyond question that the rudder was insecurely held in position at the time of the accident, and that it was exceedingly dangerous for plaintiff, under the circumstances, to have placed his hand where it was. The case turns upon who was at fault in the matter. There was very considerable conflict of testimony, as is usual in such cases. Defendant positively denies that he gave any orders to the plaintiff to remove the balls, or that he had anything whatever to do with the matter of the securing of the rudder. The testimony shows that the plaintiff was below where the rudder was jacked up after McNeely had left to go upon the deck above. The district judge, in a carefully written opinion, discussed the testimony of the different witnesses, and gave his conclusions upon the same: "There can be no doubt that plaintiff was a skilled and reliable mechanic, and that his services were engaged on this ac-

count. It is equally true that defendant was only the captain of the boat, with knowledge of its parts, and some experience, but in no sense a mechanic. It is a reasonable conclusion of fact that plaintiff's skill was relied upon by all for the success of the work in hand. There can be no doubt that he was in the hold after the defendant started to go on deck, and that he knew that the wooden blocks were not supporting the jacks. He knew the exact situation of all things, and when he went on deck he knew the situation there. If it be conceded, for argument sake, that defendant refused his request to have the blocks put in to support the jacks, his skill as a mechanic told him there was danger of the rudder falling. If it be conceded that defendant told him to put in his hands and remove the friction balls, his skill as a mechanic warned him that there was danger of losing his hand. He was a free agent, and not bound blindly to obey orders that put him in peril of life or limb. He must have known that defendant was not a mechanic, and that defendant's knowledge and skill in such matters as those then in hand were not equal to his own. All that he had to do was to refuse to put his hand into the place where danger was apparent; nay, more, where to his certain knowledge danger was imminent, for he knew that the jacks were the sole support below, and that this heavy rudder was suspended at an inclination, on the edge of the friction plate, where, in the absence of proper supports below, its fall was a certainty on the least provocation. To undertake to remove the balls from the plate with a man below pressing up against the plate was such forgetfulness of his own safety as to amount to recklessness. Therefore the conclusion seems irresistible that, if defendant was in fault in ordering the plaintiff into a position of such danger, plaintiff was in equal fault in obeying the order. His skill and knowledge were superior to defendant's skill and knowledge, and defendant had no authority to coerce him. It is the settled rule of law that if a servant, knowing that proper safeguards have not been taken for his protection, and that his service will expose him to a danger which is apparent and imminent, voluntarily goes on with his work, regardless of the danger, he will be held to have assumed the risk. It is equally the rule that a servant cannot, under such conditions of fact, necessarily excuse his own negligence and want of care of himself by pleading that he relied upon the superior skill and care of the master. *Jenkins v. Cotton Mills*, 51 La. Ann. 1011, 25 South. 643; *Dandle v. Railroad Co.*, 42 La. Ann. 686, 7 South. 792; *Wallis v. Steamship Co.*, 38 La. Ann. 156; *Carey v. Sellers*, 41 La. Ann. 500, 6 South. 813; *Smith v. Sellers*, 40 La. Ann. 527, 4 South. 333. It may therefore be conceded that defendant ordered the plaintiff to take out the friction balls from the friction plate, and also that defendant neglected, or even

refused, to have the blocks put in to support the jack when plaintiff suggested this, and the fact remains that plaintiff had full knowledge of the danger that resulted when he put his hand in to remove said balls, and this knowledge is fatal to his claim for damages. The authorities cited for plaintiff I have examined, and they are not applicable to the case at bar."

We have examined the record with care. A preponderance of evidence sustains defendant in contending that he gave no orders to the plaintiff to place his hand where he did, and that he had nothing to do with the insecure position in which the rudder was at the time of the accident, and that he in no manner contributed to its falling. We think the judgment correct, and it is hereby affirmed.

(107 La.)

BURBANK v. BUHLER. (No. 14,052.)¹
(Supreme Court of Louisiana. May 12, 1902.)
**PARTNERSHIP—MORTGAGE OF REALTY—DEATH
OF PARTNER—DESTRUCTION BY FIRE—
APPLICATION OF INSURANCE.**

1. Three partners of a commercial firm mortgaged real estate in which they each had an equal interest to secure a debt due to A., for which they had executed their joint several solidary notes individually and as partners. C., one of the partners, dying, the survivors bought out his partnership interest and his interest in the mortgaged property, assuming this particular debt and all outstanding liabilities of the firm. They formed a new partnership, and borrowed additional amounts from A., part of which they secured by second mortgage on the entire property, and part of which was unsecured. In each of the special mortgages the mortgagors stipulated to take out five policies on the property mortgaged, to the extent of the debt, and transfer the same to the mortgagee as collateral. The property was destroyed by fire. Policies were held at that time by the mortgage creditor as collateral to an amount in excess of the first mortgage debt, and the owners held additional policies on the property which they had not transferred. The proceeds of all the policies were turned over to the creditor, who imputed the insurance money to an amount in excess of the first mortgage to the payment of the unsecured indebtedness, returning the notes evidencing that indebtedness to his debtors, who received them without objection, though without consenting. The creditor then foreclosed the first mortgage notes and bought in the property, and the price being insufficient to pay the same, brought suit against C.'s heir for the balance. *Held*, that the insurance money should not have been diverted to the payment of the unsecured indebtedness, but to the payment of the first mortgage notes, and the effect of this diversion was, quoad C.'s heir, to extinguish the notes.

2. The rules in the Civil Code (article 2163 et seq.) govern in the settlement of accounts between a creditor and debtor, but they are not to be applied, necessarily, where the interests of other persons are involved.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Edward W. Burbank against Christine Buhler. Judgment for defendant, and plaintiff appeals. Affirmed.

Rice & Montgomery, for appellant. Dart & Kernan, for appellee.

Statement of the Case.

NICHOLLS, G. J. The plaintiff alleged in his petition that he was the owner of two promissory notes dated January 10, 1887, payable, respectively, four and five years thereafter, each for the sum of \$5,000, with interest at 8 per cent. per annum from date, made jointly, severally, and in solido by Joseph Buhler (since deceased), Frederick G. Ernst, and Felix Ernst, Jr., to their own order, and by them indorsed, on which notes the interest was paid by the makers up to the 10th of January, 1898; that by act of January 10, 1889, before Wharton Collens, notary, punctual payment of said notes, principal and interest, and attorney's fees in case of suit, was secured by special mortgage on certain property mentioned therein; that said notes not having been paid in whole or part, or interest thereon, except up to January 10, 1898, he caused executory process to issue upon said mortgage notes, and the property mortgaged to be seized and sold to satisfy the amount, in principal and interest, owing and unpaid upon said notes, together with the unpaid and long-past due principal sum of \$10,000 and accrued interest due and owing upon another certain promissory note held by him, dated May 6, 1896, payable two years thereafter, drawn by Frederick G. Ernst and Felix Ernst, Jr., and the commercial firm of Ernst & Co., composed of the said two parties, which note was also in a notarial act of that date, secured, as to payment, principal, interest, and attorney's fees, by special mortgage upon the same identical property mortgaged in the act before Collens; that under the executory process the property was seized, and was sold on the 26th of July, 1900, and after the payment of the costs, attorney's fees, and taxes, there remained out of the proceeds of sale the sum of \$8,358.03, to be applied to, and which sum had been applied to, the extinguishment of said notes of \$5,000 each, and accrued interest; that by said application of said sum in payment the said note described as payable four years after its date, to wit, the 10th of January, 1887, had been satisfied as of July 26, 1900, and that there remained due upon the other of said notes payable five years after its date, the sum of \$3,679.74, together with interest from the 26th of July, 1900; that Joseph Buhler died in the year 1895, and his wife (born Louisa Faessel) died in the year 1896; that they left but one child, Christine Buhler, issue of their marriage; that said Christine, as yet a minor, was fully emancipated in October, 1898, by judgment of court, and was, upon her own petition, recognized as the sole heir of her father and mother, accepted their succession purely and simply, and was sent into possession thereof, and thereby became obligated to pay the

¹ Rehearing denied.

said notes and any amount due thereon. In view of the premises, he prayed for citation and judgment against her for \$3,679.74, with 8 per cent. interest thereon from July 26, 1900, until paid. Defendant answered, and, after pleading the general issue, admitted that she was the child and sole heir of Joseph Buhler and his deceased wife, Louisa Faessel; that she had been emancipated and sent into possession of their estates. She admitted the signature of her father upon the two notes. She averred that her father died the 17th May, 1895, and the firm of Ernst & Co., of which he was a member, was thereby dissolved, and in the same year the interest and share of respondent of her deceased father in the real estate property upon which the said mortgage bears was sold and transferred to the surviving partners, Fred G. Ernst and Felix G. Ernst, Jr., which sale, so far as respondent was concerned, was consummated under proceedings held in the succession of her father, in which accounts were filed, and the liquidation of the firm of Ernst & Co. established, and the said accounts were submitted to a family meeting, of which family meeting the plaintiff was a member; that part of the consideration of said transfer was the assumption by said Fred G. and Felix Ernst, Jr., of the mortgage notes herein held by the plaintiff, and this said sale was made with the knowledge and consent of the plaintiff, who thereafter dealt with Ernst & Co., acknowledging them as his sole debtors, and when he foreclosed upon the notes aforesaid, in the proceedings referred to in his petition, he alleged that the property was the sole property of the defendants in that case, and made no claim against respondent, and respondent therefore averred that said Burbank consented to a change of debtors, and released respondent by his said conduct; that the property mortgaged to secure said notes was worth at the time of the mortgage, and at the time of the death of respondent's father, and at the time of the transfer aforesaid, the sum of \$50,000, or more; that the real estate was improved with a large and valuable mill property and machinery; that the plaintiff's mortgage upon the same was protected by policies of fire insurance for an amount in excess of \$40,000; that after the transfer aforesaid, to wit, on or about the 29th of June, 1892, the real property was destroyed by fire, and the plaintiff collected from the insurance companies the full amount of his outstanding debt, including the two notes herein proceeded upon, and the said debts were extinguished by the said payments by the insurance companies, and said insured property was not rebuilt; that any further transactions between him (the plaintiff) and the said Fred G. Ernst and Felix G. Ernst, Jr., with regard to the insurance money, could not revive the said mortgage, or the obligations of respondent in the premises, and respondent charges that

at the time of the alleged foreclosure herein the said mortgage notes were not valid, existing mortgages, binding upon respondent's deceased parents or upon respondent; that the conduct of the plaintiff in the premises, if maintained in the present case, will result in large and serious loss to respondent, who was during a part of the delay which has elapsed a minor, and who has never been consulted by the plaintiff as to his actions, and who has been injured by his conduct, and she pleads the estoppel of his aforesaid acts as a bar to the recovery of the sum herein sued for; that plaintiff foreclosed upon the said notes in midsummer, and purchased the property in question for a song, and not for a real value; that he had refused to release his debt upon the property for a much larger sum than realized at the sheriff's sale, and the price obtained in midsummer for said property was not its just and fair price; that she never acknowledged the plaintiff's debt, nor had any one with authority to bind her ever acknowledged the same, since the death of her father, and, in so far as she is concerned, the claim is prescribed, and she pleads the prescription of five years. The district court rendered judgment in favor of the defendant, and the plaintiff appealed.

In its reasons for judgment the court declared that the principal facts disclosed by the record were as follows: "On or prior to the 10th day of January, 1887, the plaintiff, Edward W. Burbank, loaned the commercial firm of Ernst & Co., composed of Joseph Buhler, Frederick G. Ernst, and Felix Ernst, Jr., the sum of twenty-five thousand dollars. At that time the firm owned a large rice mill on the corner of Julia and Magazine streets in this city, the title to which stood in the individual names of the members of the firm. To secure this debt the members of Ernst & Co. mortgaged this property by act before Collens, notary, dated January 10, 1887, and executed their five promissory mortgage notes, signed by them individually, each for the sum of \$5,000, and which were delivered to the plaintiff. Joseph Buhler died on the 17th day of May, 1895. At that time the mortgage debt had been reduced by payments from \$25,000 to \$10,000. The succession of Joseph Buhler was duly opened, and the widow, as natural tutrix on behalf of Christine Buhler, the sole heir, and then a minor, on the 9th day of December, 1896, obtained an order of court convening a family meeting to deliberate and advise whether it was to the interest of the minor that the partnership of Ernst & Co. should be liquidated in the usual form or partitioned. The family meeting was composed of the plaintiff, E. W. Burbank, and four others, and was held before Jeff. C. Wenck, notary, on the same day the order was granted. The family meeting advised that a liquidation in the usual form should not take place, that the property and effects of said firm is in such position

that a partition is all that is necessary, and that a partition is needed in order that the interests of the minor may be taken out of the copartnership.' The family meeting was homologated, and in accordance therewith a suit for a partition was brought January 6, 1896. Attached to the petition for a partition was an account showing the condition of the partnership, prepared by the two partners. It was amply solvent. The net interest of the late Joseph Buhler therein, over and above all the debts, was \$38,199.70, of which \$19,693.96 was due him on a deposit account, and \$18,505.74 was his one-third share in the net assets. This account also showed that at the time the plaintiff, E. W. Burbank, was a mortgage creditor of the partnership for \$10,000, and an ordinary creditor holding unsecured notes for \$25,000. A family meeting was then ordered, and held January 10, 1896, to deliberate on the minor's interest, fix the terms of sale, and appraise the minor's share in the assets of the partnership. This family meeting was composed of the plaintiff, E. W. Burbank, and four others, and the undertutor was present. They had before them the account above mentioned, identified with the act as Schedule A, and declared in the act that they had examined and understood the Schedule A, and were thoroughly informed upon the condition of the partnership, and they advised that said schedule be accepted as a fair project for the settlement of the same, and be made the judgment of the court. They also advised a private sale of the minor's interest in assets which they appraised at \$19,099.85. The court thereupon adjudged and decreed that the Schedule A be approved and homologated as the basis upon which the partnership should be settled, and that the partition should be made. A private sale was then made to the new firm of Ernst & Co., composed of the surviving partners of the old firm, and they gave a special mortgage to secure the minor upon other property of the partnership, known as the 'Planters' Rice Mill,' situated on Decatur street, in this city. The new firm of Ernst & Co. by said adjudication became the owners of the Julia street rice mill, the mortgaged property, and assumed the payment of the mortgage of \$10,000 as one of the partnership debts. From that time the members of the firm considered that they alone were bound on the mortgage notes, and that Christine Buhler had no further interest in the property or partnership, and was in no way liable for the debts. On the 5th day of May, 1896, Frederick G. Ernst and Felix Ernst, Jr., individually and as members of the commercial firm of Ernst & Co., by an act of that date passed before Robert P. Upton, notary, acknowledged themselves indebted to the plaintiff in the sum of \$30,000, executed their three promissory notes, each for \$10,000, and, to secure the same, granted a second mortgage upon the said Julia street property. The plaintiff, Burbank, then held two mortgage notes, each for \$5,000, making

\$10,000, dated January 10, 1887, secured by an act before Collens, notary, and three mortgage notes, each for \$10,000, making \$30,000, dated May 5, 1896, secured by act before Upton, notary, or a total of \$40,000 mortgage debt upon said property. In both of said acts it was stipulated that the building upon the property, a valuable rice mill, should be kept insured to the amount of the debt, and the policies transferred to the mortgagee to further secure said debt. Ernst & Co. insured the rice mill (that is, the building and machinery) in various companies for the sum of \$52,000. They transferred to E. W. Burbank policies aggregating \$20,000. Owing to a dispute, or for some other immaterial reason, the other policies were not actually transferred. The building was destroyed by fire on the 29th day of June, 1897. The loss was adjusted by the insurance companies at \$44,513.57. On this sum the insurance companies paid to E. W. Burbank \$19,224.00, the proportion of the loss due under the policies held by him. They paid to Ernst & Co. most of the balance of the insurance. Ernst & Co. they paid out of this insurance to E. W. Burbank the difference between \$19,224 and \$20,000, and \$15,000 additional. Being indebted to E. W. Burbank on mortgage notes and ordinary promissory notes given after the mortgage notes for loans to carry on their business, Ernst & Co. handed or sent their checks, as they collected from the different insurance companies, to Burbank, without giving him any instructions as to what particular notes to impute the payments. The insurance companies made out their checks for \$19,224 to the order of E. W. Burbank. Burbank indorsed this check to Ernst & Co. Ernst & Co. then gave him their check at once for \$20,000. Ernst & Co. then sent him their checks at different times for various amounts, aggregating \$15,000 additional, as they collected the insurance money. On the receipt of the money, E. W. Burbank a day or two after imputed the payment of \$10,000 thereof, first, to a \$10,000 second mortgage note dated May 5, 1896, secured by Upton mortgage; next, \$5,000 thereof to an unsecured promissory note of Ernst & Co. for \$5,000; next, \$10,000 thereof to an unsecured promissory note of Ernst & Co. for \$10,000; next and last \$10,000 thereof to another \$10,000 second mortgage note, dated May 5, 1896. These notes were sent by Burbank to Ernst & Co. at different times. None of this insurance money was imputed to the oldest mortgage notes by the plaintiff. Ernst & Co., not Christine Buhler, paid the interest on the first mortgage notes after their assumption, and the plaintiff held their note until after the trial of this case for the whole of the last year's interests, \$1,687.66, and up to January 10, 1899 E. W. Burbank then foreclosed on the two first mortgage notes, of \$5,000 each, aggregating \$10,000, against Frederick G. Ernst and Felix Ernst, Jr. The property was sold by the sheriff, who applied \$8,358.03 to the

extinguishment of said notes and interest, leaving a balance due on one of the notes of \$3,679.74, for which the defendant is sought in these proceedings to be held liable. No demand was ever made for payment on Christine Buhler, nor was she made a party to the foreclosure suit."

The court reached the conclusion of law, under the evidence, that plaintiff had not expressly consented to a change of debtors, or novated the debt, but that the facts proved established the extinguishment of the debt by payment. It said: "When the building was destroyed by fire the plaintiff held policies of insurance transferred to him amounting to \$20,000, to secure under the mortgage act of 1887 the notes of \$10,000 upon which the defendant, Christine Buhler, was bound. That mortgage debt was the oldest, and ranked all other debts. The evidence is conclusive that the plaintiff alone had the right to collect and did receive \$19,224 of this money from the insurance companies. He alone, not the defendant, Christine Buhler, or her codebtors, imputed the payment. The plaintiff, under the law, should have paid the first mortgage notes, of \$10,000, and interest, out of this money, and not applied it to the extinguishment of the second mortgage and the unsecured notes, debts alone of Ernst & Co. Civ. Code, arts. 2163 to 2166 inclusive. On the ground, therefore, that the notes upon which the defendant is sought to be held liable have been extinguished by payment, judgment is rendered in favor of defendant."

Opinion.

The notes to which the plaintiff refers in his petition are two of the five joint and several notes which Joseph Buhler, Fred G. Ernst, and Felix Ernst, Jr., individually and as members of the commercial partnership of Ernst & Co., of which they were the partners, executed on the 10th January, 1887, before Collens, notary, to secure a loan of \$25,000 made to them by the plaintiff, Burbank, and which they secured, as to payment, by special mortgage on certain property described in the act before Collens, the title of which stood in the names of the three mortgagors. In order more effectually to secure the payment of these notes, the mortgagors bound themselves, in their said capacities, to cause all the buildings and improvements to be insured and kept insured against the risk of fire, up to the full amount, and up to the final payment of the promissory notes, in capital and interest, and to transfer and deliver to the mortgagee until then the policy or policies of such insurance. The evidence shows that five policies were taken out by the mortgagors under the stipulation just mentioned, and were transferred to and held by him. These policies were not only a protection and security in aid of the payment of the plaintiff's debt in its entirety, and the extinction of the mortgage on the property, but

also a protection to the owners of their property rights therein. Each one of these three mortgagors was interested in these policies,—that they should be taken out, and, being taken out, they should be transferred to the plaintiff, and held by him as collateral security for the extinguishment of the notes and mortgage. Joseph Buhler died in 1895, his death carrying with it the dissolution of the partnership of Ernst & Co. The property mortgaged had at that time very valuable improvements upon it, and the value largely exceeded the amount of plaintiff's debt. The mortgage debt had at that time been reduced to \$10,000. Joseph Buhler not only then held his interest in the properties of the firm, but the firm owed him additionally a large amount. Buhler left a minor heir, the defendant in this suit, and those having charge of her affairs thought it to be to her interest to at once disconnect her interests from those of the firm. A settlement between the parties was accordingly made by judicial authority, under and through which Fred G. Ernst and Felix Ernst, Jr., acquired her interest in the firm, and assumed to pay all its outstanding liabilities; one of the liabilities so assumed being this balance of mortgage debts due to Burbank. It is needless to inquire why matters were left in this particular shape as to this debt. There was certainly no apprehension felt on account of it by the friends of the minor assembled in family meeting, who recommended this particular course; the plaintiff himself being one of the members at the meeting. The debt was small, the property securing it was largely in excess of the amount of the debt, and the minor stood additionally secured from danger by the personal assumption of the two Ernsts, and by the stipulation originally agreed upon,—that fire policies should be taken out and transferred to and held by Burbank as collateral. This latter fact minimized any damage resulting from leaving this debt outstanding. Fred G. Ernst and Felix Ernst, Jr., upon acquiring the entire property formed a new firm under the name of Ernst & Co., and continued in the business of millers, keeping up their business relations with the plaintiff, who loaned them large amounts of money, some of which they secured by special mortgage on the Julia street mill property, which they, by reason of their purchase of the Buhler interest, then owned in its entirety, but part of which was left unsecured. From the time of this sale to the two brothers Ernst, up to the institution of the present suit, the defendant seems to have been ignored by all parties; but affairs suddenly, by reason of the destruction by fire of the buildings on the mortgaged property, took such shape as to make her legal position in the premises a matter of very great concern to the plaintiff. By the destruction of the buildings on the mortgaged property by fire, it

became evident to the plaintiff that his interests had become jeopardized. At the time of this fire Burbank held as collateral security policies issued against loss by fire of the buildings on the mortgaged property to an amount of about \$20,000, which Ernst & Co. had taken out; they holding, besides these, additional policies to a large amount on the same buildings. These policies, with one or two exceptions, were collected, and, as collected, the amounts realized were received or turned over to the plaintiff. The particular policies which he held as collateral realized a little over \$19,000. Besides this amount, Burbank received moneys from the other policies. Instead of applying the moneys so received to the extinction of the outstanding balance of the mortgage notes executed on January 10, 1887, Burbank felt himself legally warranted in disposing of them as he thought best. He accordingly, on receipt of the moneys collected from these policies, would return to the Ernsts particular notes which he himself selected as those which had been paid through the moneys received, and in manner such as to leave outstanding and unpaid the mortgage notes of January 10, 1887, which stood secured, as to payment, by the first mortgage on the property. Part of this money was used in paying a second mortgage indebtedness, and part (some \$15,000) in paying unsecured indebtedness. Fred G. Ernst and Felix Ernst received the notes which were so returned, no objection being made, but giving no consent, other than such consent as might be inferred from silence and inaction. They assign as their reason for not objecting that, knowing that they themselves owed all the notes, it was a matter of indifference to them which notes should be extinguished; that it did not occur to them that the defendant had any interest or concern in the matter; that, had they realized that she had, objection would have been made, and the notes would have been returned. What we are called on to consider in this case is not what the situation is as between the plaintiff and the two Ernsts, not what these parties, either separately or together, would have been warranted in doing, were they alone to be affected, but what the situation is as between the plaintiff and the defendant, whose interests have been or will be vitally affected by the course which has been pursued, to which she has given no consent, and about which she has not been consulted. It is very true that there are cases wherein it has been held that an imputation of payment made between a creditor and his debtor is not subject to the control of third persons, or even of parties more or less concerned in the resulting situation; but we have to deal here with special conditions and circumstances, which call for special examination. The defendant cannot be classed as a third party to what has taken place in this mat-

ter. She has been and is so connected legally with the plaintiff and the brothers Ernst as to entitle her to question the validity and the legality of the action by which her interests have been sacrificed. Persons are much more free to act in their dealings with each other when their own interests alone are to be affected than they are when the interests of persons other than themselves will be made to suffer. In *Griffin v. His Creditors*, 6 Rob. 224, this court said: "We are referred to the rules laid down in the Code for the imputation of payments when two debts are of the same nature and equally onerous. Those rules which are to govern in the settlement of accounts between a debtor and his creditor cannot clearly be enforced to the prejudice of third persons." We find it declared in *Daloz* and *Verge*, *Codes Annotés*, under article 1255, C. N. (No. 7), "*Les tiers intéressés ne sauraient être liés par l'imputation que le créancier a fait à leur préjudice.*" J. G. "*Obligations*," 2024, V, art. 1848.

It becomes necessary, therefore, to ascertain what rights the defendant had in this matter, and how far plaintiff was justified in ignoring them. While Buhler, Fred G. Ernst, and Felix Ernst, Jr., were all bound, as was the first partnership of Ernst & Co., for the debt evidenced by the notes executed in the act before Collens, each of these individuals was separately, directly, interested therein, and Burbank, as the creditor holding the notes, was bound to recognize and protect those interests. The collaterals furnished were given to Burbank for the protection of a particular debt, in the payment of which not only Burbank and the two Ernsts were concerned, but also the defendant. Plaintiff neither acting alone, nor in concert with the two Ernsts, could legally divert the collaterals, when once placed in his hands for a specific purpose, to some other object. The Ernsts, in obtaining these policies, and placing them as collaterals in the hands of the plaintiff, were not acting in their interests alone, but for and on behalf, also, of the defendant; and the plaintiff knew this when he accepted the collaterals given for that purpose. Neither he nor the Ernsts were at liberty to change their destination without defendant's consent. Article 3170 of the Civil Code, referring to the duty of a pledgee, says that: "If the credit which has been given in pledge becomes due before it is redeemed by the person passing it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount, and in taking measure to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge." What debt must he apply it to? Evidently, to the debt for which it was given him in pledge to pay. The interest of

the defendant in the Julia street property was transferred to Fred G. Ernst and Felix Ernst, Jr., charged with the obligation assumed by them of paying the plaintiff, and of carrying out the obligation contracted by the mortgagors in the act before Collens,—of taking out fire policies on the property secured by the mortgage. This obligation they carried out, and defendant had a right to suppose that the plaintiff would respect her rights in the premises. Had they not taken out the policies, the defendant would have been entitled to have done so herself (Civ. Code, art. 2134),—to have held the policies not only for plaintiff's, but for her own, protection in the premises. When the Ernsts obtained and gave them as collateral to plaintiff, it was his duty to hold them for defendant's protection, as well as his own. *Baldwin v. Thompson*, 6 La. 479; *Gay v. Blanchard*, 32 La. Ann. 505. Had defendant paid the notes, it was plaintiff's duty to have had control of the collaterals, and to have either turned them over to the defendant, or held them for his security and benefit. He has diverted the collaterals which had been placed in his hands for the security of a specific mortgage debt to the payment of unsecured debts due him by the Ernsts,—an amount larger than was sufficient to have paid the debt for which the policies were given to him as collaterals. Under such circumstances, the debt, as between the plaintiff and the defendant, must be held to have been paid. The diversion of the collaterals carried with it, as its result, the obligation of the plaintiff to credit the debt to the amount diverted. *Bullitt v. Hewitt*, 11 La. Ann. 327.

We think the judgment is correct. It is hereby affirmed.

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(107 La.)

STATE v. MAXEY et al. (No. 14,398.)¹

(Supreme Court of Louisiana. April 28, 1902.)

SHOOTING WITH INTENT TO KILL—EVIDENCE
—DECLARATIONS OF WOUNDED
MAN—NEW TRIAL.

1. The statement was not a mere narrative of the wounded man. Declarations of one wounded, made immediately after the wounding, as to how it was inflicted, or by whom, have been held admissible, where voluntarily or spontaneously made at a time so near the act as reasonably to preclude all idea of design.

2. One may by sign (he being unable to speak), given two minutes after the shooting to one to whom he runs, and meets a short distance from the scene of the shooting, let it be known by whom he has been shot, and the declaration by sign is admissible as part of the *res gestæ*.

3. The trial judge held that the accused should have sooner discovered the evidence upon which they based their motion for a new trial, and that it was cumulative. New trial will not be ordered on appeal until it is manifest that error has been committed. There is no evidence showing that the trial judge

has exceeded the bounds of the discretion with which he is vested.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Sabine; John Bachman Lee, Judge.

Thomas Maxey and another were convicted of shooting with intent to kill, and appeal. Affirmed.

William C. Pegues and Charles C. Egan, for appellants. Walter Guion, Atty. Gen., and Amos L. Ponder, Dist. Atty. (Lewis Guion, of counsel), for the State.

BREAUX, J. The defendants. Maxey and Smith, were charged by information of the district attorney with shooting Barney Grogan with intent to murder. They were tried by jury, and sentenced to three years' imprisonment in the state penitentiary. They appeal from the verdict and sentence. Their grounds are stated in three bills of exceptions.

The first bill of exceptions presents the question whether the evidence admitted was admissible as part of the *res gestæ*. The defendants stoutly deny that the evidence was part of the *res gestæ*. The court inserted in the bill of exceptions, in substance, that the witness Bethany, who was lying in bed at the time, and saw the shooting, testified that he immediately went out and met the wounded man, Grogan, while running from the sawmill, and calling for Manager G. W. Loring, and that he (the wounded man) told him (witness) that accused had shot him. It is in place to state that Grogan, the wounded man, was a night watchman of a sawmill plant. This declaration of the wounded man was made as he was running from the scene of the shooting, and in about one or two minutes afterward he came to the residence of the manager, Loring; and by this time his tongue was so swollen he could not talk, and Loring asked him if Maxey shot him, and he answered in the affirmative by nodding his head. The trial judge added that if the testimony of Loring were taken alone there would be some doubt as to its admissibility, but, taking the same in connection with the statement made to Bethany, the judge *à quo* believed it admissible as part of the *res gestæ*. There was oneness and identicalness between the utterance of the wounded man and the affirmative shake of his head, all within one or two minutes. That which he said to the witness whom he met while running is in substance the same as indicated by the affirmative nod of the head when asked by the manager if Maxey had shot him. Mr. Bradner, in his work on Evidence (page 490), says that it is not easy always to determine when declarations may be received as part of the *res gestæ*, and the cases are not always in harmony. We understand the rule, sustained by many trustworthy decisions, as admitting declarations "made un-

¹ Rehearing denied May 26, 1902.

der the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it." *Abb. Tr. Brief*, p. 628. Declarations connected by circumstances immediately following may be admissible. *Bradner, Ev.* p. 494. "That is to say, a declaration, to be a part of the *res gestæ*, need not be coincident in time with the main fact proved, if the two are so closely connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause." *Bradner, Ev.* (2d Ed.) p. 494. It was an impulsive declaration of the wounded man almost immediately afterward. Very little time elapsed between inflicting the wound and the declaration. One followed the other in rapid succession, and left no time for connected narrative or self-serving account. Beyond question, there are declarations after the act that are admissible. The ruling of the judge *quo finds* support in *State v. Thomas*, 30 La. Ann. 600, and in *State v. Robinson*, 52 La. Ann. 541, 27 South. 129.

The defendants urge in matter of the foregoing bill of exceptions that Loring's evidence should have been excluded because it was not the spontaneous utterance of Grogan, the wounded man; that Loring suggested the names of the accused, and asked, "Did Smith and Maxey shoot you?"—and refer to one of the decisions of the court in which it was decided that the statement must spring from the act, and under circumstances which exclude all idea of design. *State v. Thomas*, 30 La. Ann. 600. In our view, the question falls within the rule laid down in this case, and the utterances to one witness and the sign given afterward to another were made and given under circumstances which preclude the idea of design, and have every appearance of having sprung from the act. But it is said by defendants' counsel that Loring suggested the names of the accused. We have noted that the wounded man could not speak. The manager's inquiry must have been prompted by that fact. His inquiry was taken advantage of by the wounded man to account for his physical condition. He caught the meaning and replied. He availed himself of the words of the manager and made them his own. The truth of this affirmative sign is corroborated by the statement made immediately before to the witness Bethany. If Grogan could have talked, he would doubtless have said to Loring that which he had just said to Bethany.

The second exception reserved during the trial shows that, under the objection of the defendants, Bethany was permitted to testify that (quoting from the bill) "he saw the man who shot Barney Grogan after the shooting coming toward the house where he (Bethany) lived, and asked Grogan who shot him," to which Grogan replied that Smith and Maxey "shot him"; that he "halled him"

("them," we presume, is meant), and they would not answer, whereupon he fired at them, and they returned the fire. The objection was that it was hearsay and that it was self-serving. Having decided that the testimony of Loring had been properly admitted, this virtually decides that the testimony of declarations made to Bethany a few moments before were also admissible, and disposes of this bill of exceptions.

We are brought to bill of exceptions No. 3, reserved to the overruling of the motion for a new trial. The motion was sustained by the affidavit of the parties by whom defendant stated he would prove, in case of a new trial, that Grogan said that he did not know who shot him. The following is the statement of the judge *quo*, made part of the bill of exceptions: "That the alleged newly discovered evidence is cumulative and strictly rebuttal; that both of the witnesses relied upon lived in the town of Many, in call of the court house, and the case had been pending for some time; and that it did appear that this evidence could have been obtained by the use of ordinary diligence. There must be an end of all things. The court is of the opinion that the accused were correctly convicted by an impartial jury, and therefore refused a new trial." About six months elapsed from the time the information was filed to the date of the trial. As to whether or not the defendants expected a different result on the second trial is not stated in their affidavit for a new trial. The asserted newly discovered evidence directly contradicts the evidence against the accused. It can have no other effect than to contradict the testimony admitted. It is well settled by repeated decisions that a verdict will not be set aside and a new trial granted to enable the defendant to impeach the testimony admitted on the trial; and, besides, motions for a new trial are largely left to the discretion of the trial judge. *State v. Venables*, 40 La. Ann. 215, 3 South. 727; *State v. Spooner*, 41 La. Ann. 780, 6 South. 879; *State v. Young*, 34 La. Ann. 346; *State v. Fahey*, 35 La. Ann. 9; *State v. Diskin*, 35 La. Ann. 46; *State v. Burt*, 41 La. Ann. 787, 6 South. 631, 6 L. R. A. 79; *State v. Garig*, 43 La. Ann. 365, 8 South. 934; *State v. Ware*, 43 La. Ann. 400, 8 South. 878; *State v. Chambers*, 43 La. Ann. 1108, 10 South. 247. The refusal to grant a new trial, because the trial judge does not believe the affidavit of defendant is not open to review in the supreme court. *State v. Hunt*, 4 La. Ann. 438; *State v. Rolland*, 14 La. Ann. 40; *State v. Beard*, 34 La. Ann. 104. This was subsequently modified in *State v. Hyland*, 36 La. Ann. 87,—not to the extent, however, of holding that the trial judge is not vested with discretion to finally determine the question. It is subject to review on appeal only in case of manifest error. We have not found manifest error. Here it was not shown or alleged that the newly discovered evidence

would change the result on new trial. Underwood, Cr. Ev. § 519.

It is ordered, adjudged, and decreed that the verdict and sentence be affirmed.

(107 La.)

CAMERON et al. v. ORLEANS & J. RY. CO., Limited. (No. 13,808.)¹

(Supreme Court of Louisiana. March 31, 1902.)

RAILROADS—MATERIAL MAN'S LIEN—NOTICE—INJUNCTION—ILLEGAL SEIZURE—DAMAGES—PARTNERSHIP—WHAT CONSTITUTES—PLEDGE—BILLS OF LADING.

1. One who furnishes ties and lumber to a contractor who is building a railroad, and who has received payment for the same in accordance with the terms of his contract, has no claim against the company for which the road is being built, where he has served no notice and taken no steps to preserve his rights, and his seizure of the material which has been delivered to and paid for by such company is unauthorized.

2. Where a contractor undertakes to build and equip a railroad, the mere fact that he has assembled material suitable, and which he contemplates using, for that purpose, gives to the other contracting party no right to control his disposition of such material, and an injunction will not lie to restrain him from removing it elsewhere. Nor does the fact that the other contracting party has given him information which has led to the obtention of such material make it obligatory upon the contractor to put it into the road, or to sell it to the contractor at cost.

3. Where one has furnished material to a contractor engaged in building a railroad in the honest belief that he will be protected by reason of the fact that the money to be used is to be drawn upon the joint checks of the contractor and the company for which the road is being built, but it turns out that he is not protected, and the material furnished is in the possession of such company, but, legally beyond his reach, and he levies a seizure upon property belonging to the contractor, and also sues the company, and seizes such material, he is liable in damages to the company; but if it appears that the seizure, as against the contractor, is good, and would of itself have stopped the work, no greater damages will be allowed than are clearly proven.

4. Partnership, no doubt, results from intention, but the question in any given case is, what is the intention of the parties? If, by their representations, dealings, and conduct, it appears that they have agreed to everything that, as a matter of law, is necessary to constitute a partnership, and that by reason of the rights which they have secured to, and the obligations which they have imposed upon, themselves, they occupy towards each other the relation of principals, and really share the profits of the business in which they are engaged in that relation, and not as employer and employé, it must follow that the business is theirs, and they are liable for the obligations incurred for its purposes for that reason, and the disclaimer, in their contract, of the intention to enter into the partnership relation, and the assertion, thus contradicted, that they occupy, or intend to occupy, the relation of employer and employé, are not conclusive as to third persons.

5. The status of a partnership and the character of the liability of its members are matters to be determined by the law of the domicile, and, where a partnership created in another state does business in Louisiana, are presumably to be determined by the law merchant, of

which this court takes judicial notice as prevailing in this country, save where it is shown to have been modified by statute.

6. Where money is borrowed upon a promise to furnish, as collateral security, bills of lading for property then in the hands of a carrier, and unpaid for, and the borrower pays for the property, and retains the bills in his possession, with the consent of the lender, until the property itself, still in the hands of the carrier, is seized at the suit of his creditor, the lender has no pledge, and the subsequent delivery of the bills to him does not affect the seizure.

7. Where a contractor agrees to pay for material half in cash and half in bonds secured by mortgage upon the work on which he is engaged, to be delivered at their market value, and, receiving and disposing of the material, he fails to go on with his contract, and thereby give value and entitle himself to the bonds, the furnisher of material has the right to demand the full amount due him in money.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Flora B. Cameron and others against the Orleans & Jefferson Railway Company, Limited. Judgment for defendant and intervener, and plaintiffs and such defendant appeal. Modified.

McCloskey & Benedict, Carroll & Carroll, and Dinkelspiel & Hart, for appellants. George W. Flynn, for appellees Costello & Burke. Rouse & Grant, for appellee Atlas Nat. Bank. Hunter C. Leake and Gustave Lemle (J. M. Dickinson, of counsel), for appellee Illinois Cent. R. Co. E. L. Simonds, for appellee International Const. Co.

MONROE, J. Mrs. Flora B. Cameron and others, as executors of the will of William Cameron, filed suit alleging that the Orleans & Jefferson Railway Company, Limited (which will be called the "Orleans Company"), was incorporated for the purpose of building and operating a railroad in the parishes of Orleans and Jefferson, and that it made a contract with the International Construction Company (which will be called the "Construction Company"), agreeably to which the latter was to build the road; that petitioners sold and delivered to said Construction Company and to said Orleans Company cross-ties, lumber, and other material, for which they were to be paid one-half cash and the balance in the bonds of the Orleans Company at their market value, and that said ties and material had been delivered to and were in the possession of said Orleans Company; that the Construction Company was a commercial firm domiciled at Detroit, Mich., and composed of Charles H. Lawrence, of that city, E. M. Costello and M. D. Burke, of Cincinnati, and other persons, nonresident in this state, and that said company had property within the jurisdiction of the court and under the control of the Orleans Company; and plaintiffs prayed for writs of sequestration and attachment and process of garnishment, and for judgment against the defendants in solido in the sum of \$12,207.38, as the contract price

¹ Rehearing denied May 26, 1902.

of said ties and material, with privilege upon the property to be seized. Agreeably to the prayer of this petition, a writ of sequestration was issued, under which certain ties were seized, and a writ of attachment, under which a quantity of steel rails, loaded on cars in the possession of the Illinois Central Railroad Company, were also seized; and thereafter, by motions, exceptions, answers, interventions, and reconventions, the different parties now before the court set up their various defenses, claims and counterclaims, as follows:

The Orleans Company, by way of defense, denies that it made any contract with the plaintiffs, or that it bound itself to pay for any material which the plaintiffs might deliver to the Construction Company, and alleges that the Construction Company was to build the road, and was to be paid upon estimates to be furnished from time to time for work done and material delivered. It further alleges that the ties in question had been delivered to and paid for by it in accordance with this contract, and without notice of plaintiffs' claim, and it prays that plaintiffs' suit be dismissed, and that it recover damages in reconvention for the seizure of its property. By way of intervention said company alleges that the rails were bought by the Construction Company at the suggestion of one of its (the Orleans Company's) officers for the purposes of the road in question, and that, inasmuch as they could not be replaced without prejudicial delay, intervener, though not required so to do by its contract, offered to pay for them, but that the offer was declined by the Construction Company and also by Costello and Burke; that said Construction Company claims to have paid for said rails; that Costello and Burke claim to have paid for them; that the Atlas National Bank of Cincinnati claims to have advanced part of the purchase money, and to have a privilege and right of pledge on them; and that plaintiffs have seized them under their attachment, but that intervener is entitled to them upon paying the cost price, and it prays judgment accordingly. The Orleans Company also filed a separate suit, entitled "Orleans & Jefferson Railway Company, Limited, vs. International Construction Company" (which appears in this court under No. 13,809, 32 South. 218), after the attachment had been levied, setting up its claim to the rails, and praying that the Construction Company be perpetually enjoined from removing them from beyond the jurisdiction of the court; and as the issues in the two cases are identical up to a certain point, and the transcript in this case is used for the purposes of the other, the cases have been argued together, and will be so dealt with in this opinion.

The Construction Company denies that it is a commercial firm composed of the parties named in the petition. It admits that it made a written contract with the plaintiffs for ties, etc., which were to be paid for when delivered, but it denies that the same have

been delivered, and alleges that this action is premature, and it prays for damages in reconvention, with reservation of its rights against the Orleans Company, which, it alleges, has failed to comply with its contract.

E. M. Costello and M. D. Burke, in answer to the demand made against them individually and as members of the Construction Company, deny that they were members of said company, or were ever connected therewith except as employes, and, assuming the character of plaintiffs in reconvention, they allege that the rails in question were shipped to New Orleans by the Illinois Central Railroad Company, to be delivered to the Construction Company when paid for, but that the Construction Company failed to pay for them, and delivery was refused; that thereafter appearers bought said rails, and that \$5,200 of the money used in paying for them was advanced by the Atlas National Bank, to which bills of lading for all of said rails were delivered as security for the money so advanced. They deny that the failure of the Orleans Company or the Construction Company to build the road is attributable to them, and they pray that the attachment be dissolved, with damages, and that the rails be surrendered to them, subject to the pledge in favor of the Atlas National Bank for its advances. These parties—that is to say, Costello and Burke—also appear as interveners and reiterate generally the statements made in their answer and demand in reconvention, and further allege, in explanation of their connection with the Construction Company, that in 1898 they became acquainted with C. H. Lawrence, of Detroit, "who stated that he was the representative and general manager of the International Construction Company," and that he desired to secure their services in carrying out a contract for the construction of a railroad near Cincinnati, but that said road was not built, and they had nothing more to do with Lawrence or his company "until about March 15, 1899," when they received a letter from him, in consequence of which they went to Detroit, and that he there exhibited to them a contract which had been entered into between the Orleans Company and the Construction Company, and informed them that he desired to secure their services in executing the same; that, as a result of their interview, Costello came to New Orleans about March 19th for the purpose of investigating, and that on his return interveners agreed to give their services in the contemplated work for one-half of the profits, which were to be paid as salary, and a further allowance of \$25 per week, which was to be paid to Costello; that they thereupon came to New Orleans, and began to work for the Construction Company, and that the plaintiffs and the public generally had full knowledge of the fact that they were employes "by the letter heads and stationery of said company"; that about June 22d they received a letter from Lawrence stating that he had bought some rails from the

Illinois Central Railroad Company for which he was unable to pay, and requesting them to pay for the same, and that they thereupon "wired" the Orleans Company, asking if they would be allowed a lien for the amount which they might advance for that purpose; that the Orleans Company gave an affirmative answer, subject to the condition that the assent of the Construction Company, and its surety and a certificate from "Hunt's Inspection Bureau" be obtained, and that they then wired the Orleans Company that they had communicated with Lawrence, and that, if his answer was favorable, they would begin laying the track the following week; that in response to this communication Lawrence met them in Cincinnati, and again requested them to pay for the rails, and that they agreed to buy the rails for their own account, provided Lawrence would transfer to them the contract with the Orleans Company, which they agreed to assume if they found, on returning to New Orleans, that Lawrence had succeeded in raising \$60,000 in New York, which, by the terms of said contract, he had undertaken to borrow for the purposes thereof on the bonds of said company. They further allege that on or about June 26th the Illinois Central Railroad Company agreed to accept them as purchasers of the rails in place of the Construction Company, and that Lawrence, for said company, assigned to them the contract aforesaid, which was to be accepted by them, and presented for approval to the Orleans Company only upon the conditions stated. They further allege that Lawrence did not succeed in borrowing the money necessary to carry out said contract, and that they therefore refused to assume the same, and that they "now tender said rails to said [Orleans] company for the amount paid by them for the same, * * * provided said company will pay for same within a reasonable time,—say August 15, 1899." They allege injury resulting from the seizure, and pray judgment decreeing them to be the owners of the rails, and awarding them damages.

The Illinois Central Railroad Company intervenes, claiming \$638 for the use of 22 cars for 29 days during which they were held loaded with the rails.

The Atlas National Bank intervenes, claiming to be pledgee of the rails for the sum of \$5,200, with interest.

The writ of sequestration was dissolved by the district court in an interlocutory proceeding, and there was judgment on the merits, rejecting the claim of the plaintiffs as against the Orleans Company and as against Costello and Burke, recognizing the latter as owners of the rails, subject to the claim of the Illinois Central Railroad Company and the Atlas National Bank, and dissolving the attachment, with damages; also condemning the plaintiffs in damages upon the reconventional demand of the Orleans Company and condemning the Orleans Company in damages upon the reconventional demand (set up in the injunction

suit) of Costello and Burke, and in favor of the plaintiffs and against the Construction Company on the main and reconventional demands of those parties, respectively.

1. The International Construction Company has no corporate existence, but is merely the name under which C. H. Lawrence transacts business, either alone or in connection with other persons,—one of the issues in the case being whether Costello and Burke were associated with him as partners in the business out of which this suit arises. Lawrence, in the name of the Construction Company, contracted to build and equip for the Orleans Company the road contemplated by its charter, and it was part of his contract that he should borrow the money necessary for that purpose, with the exception of \$7,377, upon the mortgage bonds of the Orleans Company, a certain proportion of which were to be "underwritten" by several of the officers of the Orleans Company acting individually. The \$7,377 mentioned was to be furnished by the Orleans Company in cash, and of that amount \$1,000 was to be paid at once to the Construction Company and \$6,377 was to be deposited in bank, together with the money to be borrowed by Lawrence, subject to the joint order of the contracting parties, and paid to the Construction Company for material delivered and work done upon presentation of bills of lading and engineer's estimates. It may as well be stated here that Lawrence did not succeed in borrowing any money, but that some of the members of the Orleans Company advanced \$10,000 in addition to the cash called for by the original contract, and that the fund so created, together with certain amounts advanced by Costello and Burke, constituted the only fund that was available until the enterprise failed. One Conroy, and T. Gordon Reddy, Jr., representing the plaintiffs, were endeavoring, whilst the negotiations between the Orleans Company and the Construction Company were in progress, to obtain the contract to supply the ties and other lumber needed for the building of the road. Conroy was called off elsewhere, and Reddy, the manager of the Cameron Mills, took charge of the matter, and had some conversations with the president of the Orleans Company, with Zell, director, vice president, and acting treasurer of that company, and who was also the engineer upon whose certificates the money was to be paid, and with Lawrence, representing the Construction Company. He also, before entering into any contract, made the acquaintance of Costello. The evidence justifies the conclusion that it was originally contemplated, as between the Orleans Company and the Construction Company, that when money was drawn upon their joint checks on the presentation of bills of lading showing the delivery of material, or of engineer's estimates showing work done, such money should be used to pay for the particular material rep-

resented by the bills or the particular work represented by the estimates so presented; and it can hardly be doubted that Reddy acted under the impression that the payment of the amount to become due under any contract which he might make would, to some extent at least, be secured, by reason of the fact that all such payments were to be made by the joint authority of both the parties to the main contract. That contract, however, in terms provided that upon presentation of the bills of lading, etc., the money was to be paid, not to the parties furnishing the material, but to the Construction Company, and it was therefore left to that company either to pay for the particular material called for by the bills presented or to use the money so obtained in paying for some other material or work; and the evidence does not make it clear that any assurances for which the Orleans Company could be held bound were given to Reddy that the latter course might not be pursued. The main contract also provided that after the completion of the work, and before receiving the final payment, the Construction Company should present receipted bills for all materials furnished, and it is probable that Reddy relied somewhat upon this stipulation, of which he was informed. As a matter of fact, it does not appear that he ever saw the main contract, or asked to see it; and his contract to supply ties, etc., consists of a written proposition, addressed to the "International Construction Company, Detroit, Michigan," and an acceptance thereof by "C. H. Lawrence, Contracting Agent International Construction Company of Detroit, Mich.," the Orleans Company being in no manner a party thereto. It is true that, after the proposition had been forwarded, and after acceptance had been mailed, Reddy wrote a letter to Zell, in which he speaks of having submitted a proposition to the Construction Company and the Orleans Company; and that Zell replied, saying that Lawrence would return in a few days, that all financial matters had been arranged, that Reddy could go on sawing the lumber and would run no risk in shipping it, and that all parties furnishing material would be protected, as the Construction Company would be required to furnish receipted bills within 10 days after the completion of the work before it could obtain a final settlement. But this letter was written in his private office, was unauthorized by the Orleans Company, and was not brought to the knowledge of any of its officers until just before the institution of this suit. And as Reddy knew the president of the Orleans Company, and ought to have known that a vice president is an officer who usually acts only in case of the absence or disability of the president, there appears to us to have been no good reason for his addressing Zell, or for his relying upon Zell's assurances. Beyond this, it is claimed that the ties and

material were shipped to the Construction Company and the Orleans Company, but this claim is not sustained by the evidence, the fact, as we take it, being that the shipments were made to the Construction Company alone. Under these circumstances we are of opinion that the plaintiffs made no contract with the Orleans Company, and have no claim against it, and that the sequestration of the ties, which had been delivered to and paid for by that company, was properly set aside. We do not think, however, that the Orleans Company is entitled to recover any damages other than so much of its attorney's fees as are fairly attributable to the services rendered in dissolving the sequestration. After the plaintiffs had delivered almost all of the ties and material called for by their contract, they learned from the president of the Orleans Company that the money to pay for the same had been turned over to the Construction Company, and he expressed great surprise that it had not reached the plaintiffs; the fact being that it had been used for some other purpose, and that the Construction Company had no means of replacing it. The plaintiffs then determined to bring suit, and, whilst the officers of the Orleans Company endeavored to dissuade them from so doing, and particularly from suing the Orleans Company, they furnished certain data upon the basis of which the suit against the Construction Company was brought. Even if this were not the case, the Orleans Company would have no right to complain of the suit brought against the Construction Company, and we are satisfied that the joining it as a defendant in that suit inflicted no particular injury that would not have been sustained by the suit against the Construction Company alone, accompanied, as that suit was, by the seizure of the rails, without which no progress could have been made in the building of the road. The ties were never removed from their positions, and were not long under seizure. We are therefore of the opinion that the amount allowed in damages on the reconventional demand of the Orleans Company should be reduced to \$250.

2. There was judgment in the district court in favor of the plaintiffs and against the International Construction Company for the amount claimed in the petition, but it was held that Costello and Burke were not members of the company, and, as Lawrence was not condemned individually, and as the property which was seized was released as belonging either to the Orleans Company or to Costello and Burke, the judgment, as rendered, can be of no great value to the plaintiffs, and the Construction Company took no appeal therefrom.

3. Probably the most serious question presented is whether Costello and Burke were partners of Lawrence for the purposes of the business out of which this litigation has arisen. The evidence shows that prior to

1899 C. H. Lawrence, who lived in Detroit, was operating under the name of the International Construction Company, save when, for the purposes of particular transactions, he associated other persons with him. It also appears that E. M. Costello, of Cincinnati, was operating in the same way under the name of the Queen City Construction Company, and that he at times associated M. D. Burke with him, either under that name or under the firm name of Costello & Burke. During the year 1898 these parties—Lawrence, Costello, and Burke—using the name of their so-called companies or otherwise, entered into an arrangement for the building of a railroad near Cincinnati, known as the "Mill Creek Valley Road," but by reason of the failure to obtain some necessary franchise the scheme was abandoned. A similar arrangement appears to have been made for the building of a road near Erie, Pa., and, as we understand the testimony, they were engaged upon that work whilst operating in Louisiana, the proposition which led to their association for the purposes of the work at Erie and for that at New Orleans having been made at the same time. Thus, on February 21, 1899, Lawrence wrote, from Detroit, to Costello, at Cincinnati: "I have some work which I believe we could take together and make some money. * * * I think both contracts which I have would prove enticing to both yourself and Major Burke." And he invited Costello to visit Detroit, in order that they might discuss the matter. After writing this letter, he appears to have come to New Orleans, and on his return to Detroit to have found a letter from Costello awaiting him. He accordingly wrote Costello again on March 4th stating what work he had on hand, and repeating the invitation contained in the previous letter. And on March 6th Costello and Burke went to Detroit, and had an interview with him, as the result of which, on March 7th, he offered them a partnership interest in the New Orleans work, and, as we infer, also made them a similar offer with regard to the work at Erie, Pa. The proposition as to the New Orleans work was made dependent upon their approval of his contract with the Orleans Company, which had not then been signed, and it contained the following stipulation, to wit: "If the foregoing proposition is satisfactory to the Queen City Construction Company, a copy of this communication shall be made by the Queen City Construction Company, and indorsed across its face, 'Accepted and approved. Queen City Construction Company, by E. M. Costello and M. D. Burke,' and this shall constitute the contract for the Orleans and Jefferson Railway job between the International Construction Company and the Queen City Construction Company." Judging from this language, and from the subsequent conduct of the parties, we understand the idea to have been that the contract with the Or-

leans Company should be submitted to Costello and Burke as soon as it was signed, and, if it met with their approval, they would close the contract of partnership with Lawrence by writing the words "Accepted and approved" across the face of the written proposition which the latter had submitted, or a copy thereof, and affixing their signatures. The contract with the Orleans Company, having been signed upon March 11th, was forwarded to Costello on March 13th, and was, presumably, found satisfactory, since there appears in evidence Lawrence's proposition, in which some slight changes had been made in the meanwhile, with the words "Accepted and approved" written across its face, and duly signed, in literal compliance with the stipulation above quoted, the instrument still bearing the date March 7th. By the 15th of March, therefore, the three parties named had entered into partnership by written agreement for the carrying out of the contract for the construction and equipment of the Orleans & Jefferson Railway. Thereafter, about March 19th, Lawrence and Costello came to New Orleans, and the latter was introduced to Castleman, the president of the Orleans Company; to Grunewald, a director of that company; to Reddy, who shortly afterwards, as the representative of the plaintiffs, made the contract here sued on; and to a number of other persons,—as Lawrence's partner, and as a member of the International Construction Company, in the matter of building and equipping the Orleans & Jefferson Railway. The evidence leaves no room for doubt that when Costello came to New Orleans on or about March 19th the question whether he and Burke and Lawrence would form a partnership had been settled by a written contract, signed after they had made all the inquiries that they thought proper to make; and the position which Costello and Burke now assume—that Costello came here to make an investigation in order to enable them to determine whether they would form such a partnership or not—does not accord with the facts, nor, as we shall see, does it accord with their subsequent representations and conduct. They claim that when Costello returned to Cincinnati they had an interview with Lawrence upon the evening of March 23d, and entered into a new contract, whereby it was stipulated that all former agreements as to the New Orleans work should be considered void, but that they would advance \$750, so as to enable Lawrence to go to New York and borrow the money called for by the contract with the Orleans Company, and, if he succeeded in doing so, that they would procure for him the bond of \$15,000 in favor of the Orleans Company required by that contract, and would render their services in the capacity of employees in carrying out said contract, and that in consideration thereof there were to be deliv-

ered to them one-half of the cash and securities that Lawrence might receive, after paying expenses, but that said contract should be executed by and in the name of the International Construction Company, and that neither Costello nor Burke, nor the firm of Costello & Burke, nor the Queen City Construction Company, should be authorized or required to sign any paper obligating them, or either of them, in any amount, or for any purpose connected therewith; and there is in the record an instrument purporting to witness such a contract, and to have been signed March 23, 1899, by the International Construction Company, the Queen City Construction Company, Lawrence, Costello, and Burke. This instrument also contains the stipulation that "a bookkeeper or accountant, satisfactory to Costello and Burke, shall be placed in charge of the New Orleans office of the International Construction Company, and the payment and accounts of the entire venture shall be under the supervision of said accountant, and at all times accessible to Costello and Burke." Both Costello and Burke were examined at great length, and they testified, without qualification, that this contract was entered into at the Stag Hotel, in Cincinnati, upon the evening of March 23, 1899. The impression conveyed by them in their examination in chief, and, for the most part, in their cross-examination, is that the agreement was completed and signed at the Stag Hotel, as it now appears in evidence, upon March 23d. Towards the close of the cross-examination, however, Burke was asked the direct question, "When was the instrument signed?" and he replied that it was signed at his office on the 1st of April. We think this circumstance is worthy of some attention, because, whilst it may have happened just as the witness states, this is not the only instance in which papers presumably having an important bearing on the rights of the parties have been found to bear dates long anterior to their execution.

Proceeding to the consideration of subsequent events, notwithstanding that Lawrence did not succeed in borrowing the money required by and for the contract with the Orleans Company, Costello and Burke procured for him the bond of \$15,000 to secure the Orleans Company with respect to the execution of that contract, and in order to do so gave to the security company furnishing it a bond of indemnity, signed by themselves, for a like amount; thus placing themselves in a position to bear the losses resulting from the enterprise, even though it was not so stipulated in the Stag Hotel contract. About April 4th Burke came to New Orleans, and Castleman, calling upon Lawrence at his hotel, found him in Lawrence's room, and was introduced to him by Lawrence in the following terms: "Mr. Castleman, let me introduce you to Major Burke, a member of our company, and our chief engineer," to which Burke respond-

ed by saying, "Yes," and by further saying: "Now you have seen the entire firm, or the principal members, and it is a good one. Mr. Lawrence is the financier, Mr. Costello is the contractor, and myself the engineer. * * * It is a good firm, and we are going to build you a splendid piece of work." Burke remained in New Orleans some ten days or two weeks, and was joined, about April 14th, by Costello. During that time he occupied himself with such engineering work as the situation demanded, and, having supplied himself with the necessary data, returned to Cincinnati to place orders for certain of the material needed. Lawrence also went North, and Costello remained here, in charge of the business, until about June 20th. During his stay he represented the International Construction Company in all respects, and by his language and conduct at all times held himself out to be a member of that company. The letter headings, specifically referred to in the pleadings as informing the public that he and Burke were not members of the firm, when considered in connection with the other representations and the conduct of the parties, appear to us to convey the opposite meaning. They read as follows: "Home Office: Detroit, Mich. New Orleans: 508 Hennen Building. E. M. Costello, Manager. C. H. Lawrence, General Contracting Agt. M. D. Burke, Chief Engineer. International Construction Company, Contracting Engineers." It is true that Costello and Burke deny in their testimony that they made the representations attributed to them, or that they were introduced and held out as has been stated; but their denials are absolutely unsupported by that of any other witness, and are overwhelmed by evidence from every direction. One circumstance, among many, which has attracted our attention, is the following: Burke was charged with the ordering of some two car loads of "special work," consisting, as we understand it, of iron or steel for switches, curves, frogs, etc., and he placed the order with the Weir Frog Company, a Cincinnati concern, with which he seems to have been friendly. He testifies that he dealt directly with Mr. Abby, the engineer of the company, and that he gave the order merely as an employé of the International Construction Company, and not as a member, and that he in no way guaranteed the bill, or made himself or the firm of Costello & Burke liable for it. He also testifies that he is aware of the fact that Abby had testified to the contrary. The testimony of Castleman, Zell, and Clark is to the effect that both Costello and Burke stated that they had made themselves responsible for the special work, and had actually paid \$1,000 on account of it from their individual funds. But a further refutation of Burke's testimony appears over his own signature. It became necessary to raise some \$12,000 to pay for the rails, and the money was obtained by Costello and Burke. In connection with their action in that behalf, they obtained an

assignment from Lawrence of the contract with the Orleans Company, upon the face of which assignment it appeared that Lawrence was entirely eliminated. There was, however, an understanding, which was reduced to writing by Burke in the form of a letter addressed to Lawrence, reading in part as follows: "404 Pike Building, Cincinnati, Ohio. C. H. Lawrence, the International Construction Company, Chamber of Commerce Building, Detroit, Michigan—Dear Sir: Costello left for New Orleans yesterday afternoon, and, allowing for a stopover in Birmingham, he will reach New Orleans on Friday morning. A little money was wired to Hall yesterday, to pay laborers and other pressing demands, and to signify something more than a mere promise that he was coming. The draft for rails is here paid. It was a close call for us, but we made it. * * * Regarding the agreement between us, there was so much to do before Costello left that it was thought best that I should write you a letter stating the general terms, and that you should keep the letter in place of the formal agreement until that should be executed. It is this: That E. M. Costello and M. D. Burke having advanced their money and pledged their credit to secure the rails, special work, car barn, and other property necessary for the building of the Orleans and Jefferson Railway Company, * * * that, in consideration of such advances, C. H. Lawrence, for himself and for the International Construction Company, does, on June 24th, 1890, assign all his or its interests in said contract to said Costello and Burke, yet, notwithstanding said assignment, said three individuals agree to act unitedly in carrying to completion the original agreement with the Orleans and Jefferson Railway Company; said Costello and Burke agreeing to relieve said Lawrence of so much of the work at New Orleans as they can; and neither individual being empowered, after said date, to pledge any of the securities to be received for the said work or to obligate either of the persons, but all to work for the best interests of the three, and at the completion of the work the net profit, if any, arising from said contract, to be divided equally between E. M. Costello, M. D. Burke, and C. H. Lawrence. This agreement between said three individuals to be kept strictly private, each agreeing with the other two not to use it in any business way without the knowledge and consent of the other two parties to this agreement," etc. Of course, Lawrence must have known whether Costello and Burke had advanced "their money and pledged their credit to secure the rails, special work, car barn, and other property necessary for the building" of the road. And the statement that they had done so would hardly have been made to him as a reason why he should ostensibly assign the contract to them, and really reduce his interest in the prospective profits from one-half to one-third, unless that statement was true. We must assume, therefore, that it was true,

and that the testimony of the witnesses who swear that the same statement, in substance, was made to them, or in their presence, was equally true.

There is a great deal more testimony and there are a great many more circumstances disclosed by the record bearing upon the point at issue, and leading to the same conclusion, but which it would unnecessarily lengthen this opinion to consider, or even to recapitulate. No one doubts that partnership is a matter of intention, or that a share of profits may be given in lieu of salary or wages without making the recipient a partner, or liable as a partner. This latter doctrine was recognized, not only before the decision in *Cox v. Hickman* (in 1860) 8 H. L. Cas. 268, but before and after the decisions in *Grace v. Smith*, 2 W. Bl. 998, and *Waugh v. Carver*, 2 H. Bl. 235, which had been rendered nearly a century before, and which were overruled by *Cox v. Hickman*. The question in any given case is, what is the intention of the parties? If, by their representations, dealings, and conduct, it appears that they have agreed to everything that, as a matter of law, is necessary to constitute a partnership, and that by reason of the rights which they have secured to, and the obligations which they have imposed upon, themselves, they occupy towards each other the relation of principals, and really share the profits of the business in which they are engaged in that relation, and not as employers and employes, it must follow that the business is theirs, and that they are liable for the obligations incurred for its purposes for that reason; and the disclaimer in their contract of their intention to enter into partnership, and the bald assertion, thus contradicted, that they occupy or intend to occupy the relation of employers and employes, is not conclusive as to third persons. Upon the facts as presented, we may properly apply to the particular litigants here concerned the following language from the opinion of Sir George Jessel, M. R., in a case in which *Cox v. Hickman* and other leading English cases involving the law of partnership were exhaustively reviewed, to wit: "It was said, and said with considerable force, by Mr. Chitty and Mr. Mathew, that they never intended to be partners. What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they intended to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners. Then they did intend to be partners. * * *

It is an elaborate device—an ingenious contrivance—for giving these contributors the whole of the advantages of partnership with-

out subjecting them, as they thought, to any liabilities. I think the device fails, and that, looking at the law as it stands, I must hold that they are partners, and liable for the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts." *Pooley v. Driver*, 5 Ch. Div. 458.

4. The contract upon which the plaintiffs sue resulted from a written proposition addressed by Reddy, the manager of the Cameron Mills, to the International Construction Company, dated March 24, 1890, and accepted in writing upon the 29th of the same month. The proposition contained the following stipulation: "Settlement to be made as soon as shipment is completed, on terms as follows: One-half of the entire amount in cash, and balance (less freight as per expense bills) to be paid in first mortgage bonds of said railroad at market value or price of said bonds at time of settlement." The contract called for 100,000 feet of "pecky" cypress, 25,000 ties, and a number of pieces of timber for bridges and other work; and the evidence shows that the whole of it has been delivered, with the exception of 605 ties, the price of which is not claimed. It is shown, however, that six car loads of ties had been shipped prior to the bringing of this suit, that the defendants had failed to take them, and that Costello had notified Reddy to temporarily discontinue shipments. And it was at this juncture that Reddy, upon making inquiries at the office of the Orleans Company, learned that the ties previously shipped had been estimated for, and that the money to pay for them had been turned over to the Construction Company, and used for some other purpose. The efforts of Lawrence to borrow money upon the bonds of the Orleans Company, as he had undertaken to do, had, in the meanwhile, proved unsuccessful; the work of building the road had been suspended; and the evidence justifies the conclusion that the scheme was a failure. Whether it would have been successful under any circumstance is a question. But its chances of success appear to have been effectually destroyed by a blunder, for which, though Lawrence was perhaps mainly responsible, the Orleans Company was not altogether blameless. It appears that there had been a previous issue of bonds secured by first mortgage, and, although most of them were under the control or within reach of the company, they had not been called in when the attempt was made by Lawrence to float the second issue upon the New York market as first mortgage bonds. The president of the Orleans Company went to New York as soon as he was informed of it, and explained the situation as best he could; but it was a mistake that ought not to have occurred, and it had the effect of shaking the confidence of the capitalists from whom it was hoped that the money might be obtained to such an extent that, considering the character of the security offered, we are not persuaded by the evidence

before us that anything more could have been done. This being the case, and the material which had been delivered having been placed beyond their reach, and, though wholly unpaid for, so far as plaintiffs were concerned, the price received by the Construction Company for the same having been diverted to other uses, we think that plaintiffs' suit and attachment against the Construction Company and its members was fully authorized, and that there was error in the judgment of the court a quo dismissing the same as to Costello and Burke and awarding them damages against the plaintiffs. Plaintiffs' contract contemplated that they should be paid half cash and half in the bonds of the Orleans Company at their market value, and that from the proportion due in bonds there should be deducted the bills for freight, which were to be paid by the Construction Company. This arrangement was predicated upon the assumption that the Construction Company would do the work necessary to entitle it to the bonds, and to give those bonds a market value; and as the Construction Company has failed in that respect through no fault of the plaintiffs, the latter, we think, are entitled to a judgment in money based upon the contract price of the goods actually delivered by them, less the freight charges paid by the Construction Company. The amount of those charges we are unable to ascertain from the record, and we think that justice requires that the rights of the members of the Construction Company with respect thereto should be reserved. For the purposes of the plaintiffs' claim it is, perhaps, unimportant whether the rails which have been seized belong to the Construction Company or to Costello and Burke, since, although a contracting firm is an ordinary partnership under the law of this state, the construction company is a juridical personage, the character of whose liability is to be determined, in the absence of proof of a special law in the state of its origin, by the law merchant; and by that law the partners are liable in *solido*. Nevertheless, as the question has some bearing in another direction it will be considered.

5. It appears that the president of the Orleans Company informed Lawrence that the Illinois Central Railroad Company had the rails in question for sale; but, if the Orleans Company had any contract or option giving it a preference in the matter of the purchase of the rails, it has not been established. Lawrence bought the rails, at \$17.50 per ton, for the Construction Company, and the Illinois Central Railroad Company shipped them to New Orleans for delivery when paid for, retaining the bills of lading in its possession. Upon June 21, 1890, Lawrence wrote, from Detroit, to Costello, at Cincinnati, in part as follows: "I am very fearful of the Ill. Cent. R. R. Co. pulling the rails away * * * unless we can meet this draft of \$12,100 which I had Cliff to draw on us here in order to hold the rails there as long as possible.

What I want to know is whether there is not some way that you can arrange in Cincinnati to borrow this sum of money for a short time, and to take the rails as security. We could sell the rails to-day in New Orleans for two or three dollars more a ton than we paid for them. If these rails get away, we cannot replace them short of \$22.00 or \$23.00 per ton, and then it will take quite a time to get them down there. The idea is simply this: The security is worth a great deal more than the loan which we have to have, and everything can be smoothed out if you can arrange the matter. * * * I wish you would telegraph me upon receipt of this, and after conference with Major Burke, and see if there is not some way we can whip the devil around the stump, and save these rails. We accepted the draft, and it lays at the American Express Co.'s office here awaiting payment next Monday. Kindly consider this letter addressed to Major Burke as well as yourself, and let me hear from you." In response to this appeal, made to him not as an employé but as a member of the Construction Company, Costello raised \$7,000, which was deposited in the Atlas National Bank, and he and Burke borrowed from that bank, upon a note signed by them and by Mrs. Costello, the further sum of \$5,200, which was needed to make up the amount necessary to pay for the rails, and which was similarly deposited. The draft for the price of the rails, amounting, with interest and charges, to \$12,180.44, was then paid by the bank, and the bills of lading for the rails, which, with the rails themselves, were in New Orleans, were turned over to Costello and Burke, who retained possession of them until September 13th following,—more than two months after the rails had been seized in this suit,—and then delivered them to the bank in connection with a written act of pledge, which was then executed. There were various transactions between Lawrence and Costello and Burke at that time, which we consider it unnecessary to go into in detail. Among others, an assignment from the former to the latter, dated June 24th, of the contract with the Orleans Company, which the assignees now repudiate as having been inoperative. Later on, in September or October, there was another such assignment, which specially included the rails, and which was given the date June 27th, and is also repudiated. Before the rails were paid for, Costello and Burke inquired, by wire, of the Orleans Company, whether, if they made the payment, they would be allowed a lien on the rails. After they were paid for, and had been seized in this case, Costello and Burke executed the act of pledge to the bank, in which it is recited, as showing the character of their interest in the rails, "that the said Costello and Burke having agreed to pay for the same on the pledge or security of said rails and splices and the indorsement and delivery of the bills of lading for the same," etc. Upon the whole, the evi-

dence convinces us that the money to pay for the rails was advanced, so far as Costello and Burke were concerned, for account of the Construction Company, and that when the payment was made the title to the property vested in that company, and it does not show that it has ever been divested.

6. The Atlas National Bank alleges in its intervention that the rails had been sold by the Illinois Central Railroad Company to the Construction Company, and, the latter having failed to pay for them, that they were sold to Costello and Burke, and that at their request it (the bank) paid the price, to wit, \$12,180.44, on condition that the bills of lading should be delivered to it, "to be held as security for the repayment of that sum"; and that the said bills were, as signed, transferred and delivered to it by Costello and Burke to secure the repayment of said advances, "whereof there is still due and owing" the sum of \$5,200 and interest. The allegations that the Illinois Central Railroad Company sold the rails to Costello and Burke, and that the bank paid for them on condition that the bills of lading should be delivered to it to secure the whole of the purchase price, must have been made in error. The president of the bank testifies that the \$5,200 was advanced to Costello and Burke on condition that it should be used for the payment of the rails, and on the further condition that the Illinois Central Railroad Company should turn over to it, or hold subject to its order, the bills of lading for said rails, which bills of lading were pledged to it by Costello and Burke to secure the repayment of the money so advanced. He further testifies that "Costello and Burke were authorized to go to New Orleans, and receive, for the Atlas National Bank, the bills of lading covering the rails paid for by the advance of \$5,200, and under no circumstances to surrender the bills of lading unless cash in hand was paid for the rails." He further testifies that the original agreement of June 27th, when the \$5,200 was advanced, was oral, and that it was reduced to writing in September, 1899, when Costello and Burke returned from New Orleans, and delivered to the bank the bills of lading for 27 cars of rails, which they had previously received from the Illinois Central Railroad Company. There is annexed to this testimony the act of pledge in favor of the bank, executed by Costello and Burke, and dated September 13, 1899, which apparently includes not only bills of lading for the rails, but also bills of lading for two cars of special work shipped by the Weir Frog Company to the International Construction Company; and it may be remarked in this connection that, although Costello and Burke claim and testify that they had no concern with the special work save as employes of the Construction Company, to which it was consigned, and although they and the bank claim that the rails were pledged to the latter, nevertheless it was by their order alone that six

car loads of rails and the two car loads of special work, which had not been attached, were removed from here to Mississippi, after the other rails had been seized, and the Weir Frog Company obtained judgment against them in that state predicated upon a seizure of the property so removed. From the facts as presented, we are entirely unable to evolve any pledge in favor of the Atlas National Bank which will affect the rights of the plaintiffs under their attachment. When the \$5,200 was advanced, neither the Construction Company nor Costello and Burke were the owners of the rails, nor did they have the rails or the bills of lading in their possession. The rails belonged to the Illinois Central Railroad Company, and it held possession of them, subject to what may be called a past-due option in favor of the Construction Company to take them on paying the price. Assuming that Costello and Burke represented the Construction Company, the most that they could do was to promise that the rails should be pledged to the bank. But a promise to pledge gives no privilege on the thing promised. Succession of D'Meza, 26 La. Ann. 35. When the price was paid, the rails belonged to the Construction Company, of which Costello and Burke were members; and the delivery to them and their retention of the bills of lading was not such a delivery as to constitute a pledge in favor of the bank, for they were the debtors, and not third persons. Succession of Lanau, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577; Civ. Code, art. 3162. Nor did the delivery of the bills to the bank in September,—two months after the rails had been attached,—or the written instrument which was then executed, constitute such a pledge, in so far as the attaching creditors were concerned, since the bank cannot be said at that time to have acquired the bills as an innocent third holder without notice. We think, however, that, inasmuch as the claim of the bank is not contested by the Construction Company or by Costello and Burke, there is no reason as to them why it should not be recognized; and, as Costello testifies that the rails are now worth about \$30 a ton, it may be that the bank will get its money.

7. The Illinois Central Railroad Company claims for demurrage or storage by reason of the fact that the rails remained on its cars for 29 days after notice to remove them. This claim does not appear to be seriously disputed, and is shown to be reasonable. The company is, however, charging for 22 cars, when, from the return on the writ of attachment, it seems that only 21 cars were included in the seizure. The amount allowed by the district court should therefore be reduced from \$638 to \$609.

8. We are unable to find any sufficient legal foundation for the claim of the Orleans & Jefferson Railway Company to the rails. They constituted part of the material that the Construction Company attempted to as-

semble for the purposes of its contract, but the Orleans Company never acquired any rights in or to them, and can no more control the disposition which the Construction Company may choose to make of them than it could have controlled the disposition of the working force of that company. The injunction which was issued at the instance of the Orleans Company to restrain the Construction Company from removing the rails was therefore unauthorized, and was properly dissolved by the district court. Upon the other hand, holding, as we do, that Costello and Burke were not the owners of the rails, they cannot be allowed to recover damages in the matter. Such damages, if any are due, are recoverable only by the Construction Company.

For these reasons it is ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it rejects the demand of the plaintiffs as against the Orleans & Jefferson Railway Company, Limited, and in so far as it rejects the demands in reconvention and by way of intervention of said Orleans & Jefferson Railway Company, Limited, save as to the damages allowed, which are reduced to \$250, and that it be affirmed in so far as it condemns the International Construction Company and rejects its demand in reconvention; that it be amended by reducing the amount allowed to the Illinois Central Railroad Company to \$609, and by holding and decreeing that the Atlas National Bank of Cincinnati be paid the amount of its claim, if the fund proves sufficient, from the proceeds of the property attached, after payment of the amounts herein allowed in favor of the Illinois Central Railroad Company and the plaintiffs, respectively; and that said judgment be annulled, avoided, and reversed in all other respects. And, proceeding to render such further judgment as should be rendered in the case, it is ordered, adjudged, and decreed that there now be judgment in favor of the plaintiffs, Flora B. Cameron, W. W. Cameron, R. H. Downman, and F. A. McDonald, testamentary executors of William Cameron, deceased, and against the defendants Charles H. Lawrence, E. M. Costello, and M. D. Burke, in solido, in the full sum of \$12,207.38, with legal interest from judicial demand until paid. It is further ordered and adjudged that the writ of attachment herein issued be maintained, and that the amount of this judgment in favor of the plaintiffs be paid from the proceeds of the property attached in preference to any other claims save that of the Illinois Central Railroad Company as herein recognized and allowed, subject, however, to the condition that the right is reserved to the defendants, or either of them, to have the amount for which this judgment is rendered reduced by the amount that they or the International Construction Company may have paid as freight upon the ties and other material shipped by the plaintiffs to said company under the contract sued on. It is fur-

ther ordered, adjudged, and decreed that the demands set up by said E. M. Costello and M. D. Burke and by Costello & Burke by way of reconvention and intervention be rejected. It is further ordered and adjudged that for all the purposes of this suit the property attached be held to belong to the International Construction Company, composed of Charles H. Lawrence, E. M. Costello, and M. D. Burke, but that the rights of the said parties inter sese with respect to the same and as members of said company be reserved. It is further ordered and adjudged that the costs of the lower court be paid by the International Construction Company and by Costello & Burke, save those incurred by reason of the intervention of the Orleans & Jefferson Railway Company, which shall be paid by that company, and that the costs of the appeal be paid by Costello & Burke, the Orleans & Jefferson Railway Company, the Atlas National Bank of Cincinnati, and the Illinois Central Railroad Company.

(107 La.)

ORLEANS & J. RY. CO., Limited, et al. v.
INTERNATIONAL CONST. CO. et
al. (No. 13,809.)¹

(Supreme Court of Louisiana. March 31, 1902.)
INJUNCTION—WHEN GRANTED—RIGHTS
INVOLVED.

The mere fact that a contractor who has undertaken to build and equip a street railroad has assembled certain material with the intention of using it for the purposes of the contract gives the contractee no proprietary interest in such material, nor does it give him the right to control the disposition of it. Hence an injunction will not lie at the suit of the contractee to prohibit the contractor from removing such material or otherwise disposing of it.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by the Orleans & Jefferson Railway Company, Limited, and another, against the International Construction Company and others. Judgment for defendants, and plaintiffs appeals. Affirmed.

Carroll & Carroll and Dinkelspiel & Hart, for appellants. George W. Flynn, for appellees.

MONROE, J. This case was argued with the case of Cameron v. Railway Co. (this day decided) 32 South. 208, and is so intimately connected with that case that it has been found convenient to deal with both in one opinion. For the reasons there given it is ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it dissolves the injunction and rejects the plaintiff's demand, and that it be annulled, avoided, and reversed in so far as it sustains the reconventional demand of E. M. Costello and M. D. Burke and Cos-

tello & Burke and awards them damages; the costs of the main demand to be paid by the plaintiffs, and those of the reconventional demand, as also those of the appeal, by said Costello & Burke and E. M. Costello and M. D. Burke.

(107 La.)

HUGHES v. BOARD OF COM'RS OF
CADDO LEVEE DIST.
(No. 14,280.)¹

(Supreme Court of Louisiana. May 12, 1902.)
LEVEE DISTRICTS—CONTRACTS—VALIDITY—
POWERS.

1. In section 2448 of the Revised Statutes the General Assembly has thought proper to place a limitation upon the powers of police juries and city authorities, which it has not deemed necessary or proper to extend to levee boards. The limitation must be imposed by the legislature, not the courts.

2. A levee district is a state local benefit tax or assessment district, which the general assembly has authority to confer rights and powers upon, and to charge with duties which it has not itself. State v. City of New Orleans, 24 South. 666, 50 La. Ann. 886.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by W. J. Hughes against the board of commissioners of the Caddo levee district. Judgment for plaintiff. Defendant appeals. Affirmed.

David Thompson Land and Thomas Fletcher Bell, for appellant. Holbert & Barret, for appellee.

Statement of the Case.

NICHOLLS, C. J. The plaintiff alleged that in August, 1895, the defendant board entered into a contract for the building and construction of a levee known as the "Wilderness Levee," within the limit of their levee district, on terms and conditions shown by the contract, a copy of which he annexed to his petition; that the contract was complied with by Ivey; that the contract was executed under the supervision of one of the state board of engineers and the special commissioner of the Caddo levee district, and when finished it was inspected and accepted by the board; that on estimates made of the work by the said state engineer furnished the board by him it had issued to Ivey certain warrants or certificates, evidence of indebtedness under the contract issued by the board on account of said contract; and that plaintiff was the holder and owner of a number of these warrants or certificates amounting to \$10,538.20, which he described, which had been transferred to him by Ivey, who, by written act, subrogated him to the extent of the amount of the warrants to his rights, the warrants bearing interest at 8 per cent., as stipulated in the contract. He prayed for judgment for the amount of the certificates, with interest.

¹ Rehearing denied May 26, 1902.¹ Rehearing denied May 26, 1902.

Defendant, reserving the right to contest the validity and legality of the contract, excepted to plaintiff's petition on the ground that it could not be sued for portions of a debt which might be due by it; that no partial assignee can bring suit against it for a portion of a debt which might be due by it. Under reservation it answered, pleading first the general issue. Further answering, it admitted the making of the contract referred to, but averred that the same was null and void for the reason that the board had no power or authority to make the same; that it was ultra vires, and not binding on the board; that, if it had the lawful right to make it, it was null and void, for the reason that the means of paying the principal and interest of the debt contracted were not provided for either by resolution of the board or by the contract as required by law, and that the means of paying said indebtedness stated in the resolution of the board, viz., payments to be made in certificates of indebtedness "payable out of the first surplus of resources of the Caddo levee district board after the liquidation of the indebtedness of the board to date (August 6, 1895), said certificates to bear eight per cent. per annum interest," was illegal, null, and void, for the reason that all the resources and revenues of said board had been previously appropriated and set apart by section 13 and other sections of Act No. 74 of 1892, creating said levee district, for the purpose of paying the principal and interest on bonds to the amount of \$200,000, issued by said district under section 10 of said act, which said bonds were issued for said amount prior to the making of said contract with Ivey, and which said bonds were not yet due and payable, and that said provision for the payment of said indebtedness was uncertain, vague, general, and indefinite; that prior to the said contract with Ivey defendant had pledged the revenues for 1895 and 1896 to pay an indebtedness to John Scott & Sons for \$22,964, and had pledged the revenues of 1897 and all subsequent years to pay an indebtedness to Bobbet, Lanan & Co. for \$31,402, but defendant did not admit that said mentioned contracts were binding on the board; that at the date of the Ivey contract the board did not possess resources and revenues that had not already been pledged, and that Ivey knew or could easily have ascertained said fact; and that the amount of said contract was excessive, exorbitant, and largely in excess of the just value of the work done; and that defendant had offered to pay plaintiff what was justly due on a quantum meruit, with interest thereon, which was refused; that the board had no legal right to issue the warrants. The district court rendered judgment in favor of the plaintiff according to his prayer, and the defendant appealed.

The Caddo levee district was created by Act No. 74 of 1892, and a board of commissioners authorized to be appointed to take charge of its affairs. By section 4 of the act

the board was authorized "to make and execute contracts and to do and perform any and all acts necessary to carry out the objects of this act, viz., the thorough and perfect protection of the lands of this district from damage by flood." It was made the duty of the board to devise and carry into effect a comprehensive levee system, having for its object perfect protection of the entire district from overflow, to determine in what manner work shall be undertaken, and to provide means to carry out the recommendations of the board of engineers; provided that all work be advertised to be let out to the lowest responsible bidder, save in cases of emergency. Section 5. For the purpose of providing means to carry out the objects of the act, the board was empowered to levy 10-mill district levee tax, a local assessment not exceeding 5 cents for every acre of land in the district, and a local assessment, not exceeding 50 cents per bale, on all cotton raised in the district. Sections 6-8. As an "additional means" to carry out the purpose of the act, the state made provision for the granting to the board all lands belonging to or that might thereafter belong to the state, "and embraced within the limits of the district." Section 10. And for the purpose of raising "further additional funds" for the said district the board was empowered to issue and negotiate bonds to the amount of \$2,000,000. Section 10. The interest on these bonds was made payable out of the 10-mill tax. After 20 years the excess of this tax was to go into the sinking fund. The board had until 1912 at its disposal the proceeds of the acreage and cotton taxes, and the sales of lands, and any excess of the 10-mill tax over and above interest on the bonds. The work contracted for is admitted to form part of the levee district of the district, and the contract between the board and Ivey was entered into in good faith by all parties under the belief and conviction that it was authorized by the law. It is not pretended that the contract was not fully and properly performed by the contractor. The contract was made pursuant to the resolution of the defendant board providing that payment be made "in certificates of indebtedness payable out of the first surplus of revenues of the Caddo levee board after the liquidation of the indebtedness of the board to date," said certificates to bear 8 per cent. interest per annum. At the date of the Ivey contract in August, 1895, the board owed John Scott & Sons \$22,964 for levee work, payable out of the revenues of 1895 and 1896, and Bobbet & Lanan \$31,402, payable out of the revenues of 1897 and subsequent years. The board had issued \$200,000 of bonds under Act No. 74 of 1892 maturing in 1922. In 1900 the general assembly, by Act No. 142 of that year, authorized the defendant board to issue and negotiate bonds to the extent of \$100,000 for the purpose of raising additional funds to carry out the objects contemplated by Act No. 74 of 1892, and to fund the unbonded in-

debtedness of Caddo levee district. Section 2 of said act reads as follows: "That the board shall have the right to negotiate said bonds at a rate of discount, including commissions not to exceed ten per cent., and to exchange said bonds for the interest-bearing 'warrants' heretofore issued by the said board on the best terms possible at the discretion of the board." These bonds were issued and sold above par. At the date of the judgment in the case at bar all the outstanding warrants except those sued upon had been paid by compromise settlements. The plaintiff claims, therefore, that his warrants have become due, and prays judgment for their full value and interest. The president of the board testified that the sale of lands amounts to between \$50,000 and \$75,000. The current expenses for 1895 and 1896 show a surplus after payment of interest on the bonds. The revenues for 1897 and subsequent years are not shown. The plaintiff sues not only upon the certificates or warrants, but upon the contract made with Ivey under a partial transfer, with subrogation, using the certificates as evidence. The contract itself contemplated and provided for a breaking or dividing up of the indebtedness to be created thereunder in installments. The district judge has considered and disposed of the various objections raised by the defendant in an able opinion, and from his concise statement of facts we have quoted freely.

Referring to the claim made by the defendant that the words of the contract to the effect that "the certificates were to be payable out of the first surplus revenues of the board after the liquidation of the indebtedness of the board to date" (August, 1895) postponed payment of the certificates until not only all outstanding warrants, but also all outstanding bonds which had been issued, should have been paid, he very correctly declared that "It was not to be presumed that the parties contemplated the bonds as a part of this indebtedness, but referred simply to the outstanding levee warrants issued to the contractors already named, and for which the revenues of 1895, 1896, and 1897 and subsequent years had been pledged." In disposing of the contention of the defendant that the contract was null and void because the bond did not legally provide for and had no means wherewith to pay the debt arising from the contract in accordance with section 2448 of the Revised Statutes, and did not comply with Act No. 30 of 1877, the court said: "A mere perusal of the section [section 2448] shows that it only applies to the police juries and constituted authorities of cities and towns. Act No. 30 of 1877 only applies to municipal corporations and police juries. A levee district is a mere functionary of the state (Peart v. Levee Dist., 45 La. Ann. 425, 12 South. 490), one of the instrumentalities which the general assembly may use in performing its duty of maintaining a levee system in the state (Egan v. Hart, 45 La. Ann.

1362, 14 South. 244). The board of state engineers acts in conjunction with the district levee commissioners, surveys and locates all levees, determines what repairs and changes shall be made, what streams shall be opened or closed, and how the state engineer's fund (provided by the state) apportioned to the district shall be expended." Section 5 of Act No. 74 of 1892 makes it the duty of the board "to provide the means to carry out the recommendation of the board of engineers." In the nature of things, the general assembly could not anticipate the cost of the original construction of the levee system in Caddo levee district; hence no limit of expenditures was fixed. The bond issue was authorized "for the purpose of raising additional funds." The amount to be expended was left to the discretion of the board, subject to the recommendation of the state engineers. We find in the act no provision for annual appropriations and annual benefits, and no restrictions on annual expenditures. The board was not required to pass ordinances pending the means of paying the principal and interest of debts contracted for levee construction and repair. Its duty was simply to provide means to carry out the recommendations of the state engineer. For this purpose the board was vested with power of taxation, and was granted lands, and also the authority to issue bonds. The act of 1900 authorized the board to issue \$100,000 in bonds to carry out the objects of Act No. 74 of 1892, and to fund its unsecured indebtedness and its interest-bearing warrants. It cannot be questioned but that the warrants sued on were among those contemplated by the act of the legislature. The main purpose of the act was to provide the means of paying the warrants issued by the board for the levee construction and repair, amounting to some \$75,000. The board has recently sold lands to an amount from \$50,000 to \$75,000, and has also sold the bonds for some \$112,000. Hence the legislature itself has provided the means of paying the warrants sued on as all other outstanding warrants issued by the board. The board had until 1912 at its disposal the proceeds of the acreage and cotton taxes and the sale of land and any excess of the 10-mill tax over and above interest on the bonds. Therefore the contention that the board had no power to contract because all of the revenues had been pledged to the payment of the bonds is without force. The case comes squarely within the doctrine announced in *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, and *Cole v. City of Shreveport*, 41 La. Ann. 839, 6 South. 688.

"It is argued that, as the state itself is prohibited from contracting debts, the legislature was without power to authorize the contracting of debts by state levee boards. If this argument is sound, it strikes at the constitutionality of all the acts of the legislature authorizing such boards to issue bonds and contract debts. As the board has not pleaded

the unconstitutionality of Act No. 74 of 1892, it is unnecessary for the court to notice the contention further. *State v. St. Romes*, 26 La. Ann. 754.

"The only difference between plaintiff and defendant in this case is that the former demands payment according to the contract, while the latter offers to pay on a quantum meruit. The contract price was unquestionably much higher than the cash value of the work; but the work was not let out on a cash basis, but on a long term of credit, and conditional on the prior payment of the other creditors out of the resources of the board. Plaintiff sues on a contract and cannot recover on a quantum meruit. That the contract price agreed upon was higher than what it would have been on a cash basis or on a quantum meruit is irrelevant, and is no defense to the action. There is no lesion in personal contracts. There is no middle ground between the allowance or the rejection of plaintiff's demand. The contract was made and executed in good faith, and, if it be a lawful contract, it should be enforced according to its tenor. The work was authorized by law, and, the defendant having received it, and it standing to-day as part of the levee system of the district, the district should pay in accordance with the terms of the contract."

We are of the opinion that the conclusion reached by the district court is correct. Section 2448 of the Revised Statutes, upon which defendant relies, is in these words: "The police juries of the several parishes and the constituted authorities of incorporated towns and cities in this state shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so created." The general assembly has thought proper to place a limitation upon the powers of police juries and city authorities which it has not deemed necessary or proper to extend to levee boards. The limitation must be imposed by the legislature, not the courts. A levee district is a state local benefit tax or assessment district, upon which the general assembly has authority to confer rights and powers and to charge with duties which it may not be authorized sometimes to itself perform. In *State v. City of New Orleans*, 50 La. Ann. 886, 24 South. 669, this court said: "The position taken that there is manifest inconsistency between prohibiting the legislature from taking action upon some particular matter and yet authorizing it either to permit subordinate corporations to do so, or to authorize it to charge them with the duty of doing so, is not logically correct. For instance, there may be certain duties, the performance of which, from their character, could and should be executed in certain localities for the public good, the expenses of which should be made to be contributed to by the people of that special locality. While the people of the state at large might have

an interest in seeing these duties performed, and they should, through the legislature, have control over them to some extent, it might be very unfair and improper to cast a general burden upon the state in respect to the same upon the whole people." "Different localities should be made to bear exclusively the burden to the extent that they were specially and directly concerned in the subject matter. * * * In doing this the constitution would have simply shifted the burden of the duty from the state at large to the people of particular places." In this matter of expenses incurred for levee purposes the state contributes a part by general taxation, the balance being made up by the people specially concerned therein. It is not pretended that the building of this particular levee was not called for at the time by the exigencies of the situation, nor that the contract for the same was not awarded after due observance of all legal formalities. It is simply urged that the bid made and accepted was too high. The proper time to have raised and acted on that objection was when the bid was accepted, and before the work was done. As matters stand, the defendant board has under its control, utterly untrammelled as to demands upon it, moneys sufficient to pay plaintiff's claim. We see no reason in law, and certainly none in equity, why the plaintiff should not be paid.

The judgment appealed from is correct, and it is hereby affirmed.

(107 La.)

STANDARD COTTON SEED OIL CO. v.
EXCELSIOR REFINING CO.
(No. 13,889.)¹

(Supreme Court of Louisiana. April 28, 1902.)

RECEIVER—COMPENSATION—INSOLVENT
ESTATE—STOCKHOLDER AS
CREDITOR.

1. A receiver, or legal representative of a succession, instead of placing on his account a certain sum as reserved for future costs, should ask for an order that all costs incurred, as well as the costs of the then proceeding, and those to be incurred thereafter, up to the date of final settlement, be taxed and paid by privilege from the fund stated in the account.

2. The receiver's commission being allowed at 5 per cent. of the fund to be distributed, a greater percentage than 10 per cent. upon the same fund is refused the attorneys of the receiver. It is held, on the showing made, that on those accounts—receivers and attorneys—15 per cent. is all that should be allowed on a distributive amount of but little more than \$9,000.

3. In insolvent estates, there must be taken into consideration, in estimating fees, the practical results achieved in the way of moneys realized for creditors, and care is always to be had not too greatly to deplete by charges the small store of funds constituting the common stock out of which all are to be paid.

4. A stockholder, who was also director, made advances of money which were used for the purpose of the corporation, to meet its debts and tide over its difficulties. Held—it being shown that this was done legitimately and in good faith—no fraud, no deception, no

¹ Rehearing denied May 26, 1902.

preference, no wrong doing of any kind—his rank and standing as an ordinary creditor is the same as that of any other ordinary creditor.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Standard Cotton Seed Oil Company against the Excelsior Refining Company. From an order sustaining the receiver's accounts Charles H. Adams, an opponent, appeals. Modified.

Cage, Baldwin & Crabites, for appellant. Gustave A. Breau and Fenner, Henderson & Fenner, for appellee.

BLANCHARD, J. This is a contest over a receiver's account and tableau of distribution. The only asset is the sum of \$9,219.80. On the debit side of the account appeared a list of seven claims allowed as privileged, aggregating \$2,240.85. This left a balance for ordinary creditors of \$6,978.45. Then appears a list of ordinary debts, seven in number, aggregating \$7,978.27, among whom, ratably, it is proposed to distribute the \$6,978.45. At the foot of the account appears the following:—"O. H. Adams claims to be a large creditor of the company, but, inasmuch as this alleged indebtedness arose out of a transaction with the company at the time when the said Adams was a director and the active manager of the company, accountant is advised that the said Adams is not entitled to participate as a creditor in the distribution of the assets of the company unless and until the other creditors have been paid, or at least until full and satisfactory proof of the amount, nature and bona fides of the debt alleged to be due to the said Adams has been made to the court." Adams appeared and filed an opposition, averring he is a creditor of the defendant company, as per judgment duly rendered in his favor by the civil district court of the parish of Orleans for amounts aggregating, principal and interest, over \$32,000. He demanded to be included on the account as an ordinary creditor for said indebtedness, to take rank equally with the other ordinary creditors and share ratably with them in the amount left over after payment of the privileged debts. He opposed every item on the privileged list as being either not due, or excessive in amount, and especially did he oppose the amount reserved for further costs \$100, and the allowance of \$1,250 to the attorneys of the receiver. And he opposed all of the debts classed as "ordinary" on the receiver's account save that due the Standard Cotton Seed Oil Company under a judgment it had recovered against defendant corporation. The court a quo sustained his opposition to the item of \$100 reserved for future costs found among the privileged claims, and, in lieu, ordered that all costs incurred, as well

as the costs of this proceeding and those to be incurred hereafter, up to date of final settlement, be taxed and paid by privilege from the fund stated on the account. We approve this ruling. His opposition as to the other items on the privileged list was rejected. As to the six ordinary claims he objected to, his opposition was sustained as to five of them, leaving as due, of the ordinary debts placed on the account, the one to the Standard Cotton Seed Oil Company for \$6,254.74 and the one to Gilmore & Baldwin for \$419.80. His opposition to the exclusion by the account of his own claim from the list of ordinary debts was maintained and he was recognized as an ordinary creditor for \$32,000, less \$1,095.93 paid to him June 7, 1895, but it was decreed that he is not entitled to participate in the distribution of any funds borne on the account until all the privileged and ordinary creditors listed on the account as amended by the judgment, together with costs, be first fully paid. As thus amended, the receiver's account was homologated and distribution ordered. Adams appeals.

Among the privileged debts there is an allowance of \$461 to the receiver as commissions. This is 5 per cent. upon the funds in hand for distribution and is not excessive and is not objected to. It is objected, however, that \$1,250 is, taken in connection with the receiver's commissions, too great a sum as attorney's fees where the net result of the services rendered is the realization of the sum of \$9,219.30 only, as the fund to be distributed to creditors. It is pointed out that the attorney's fees claimed and the receiver's commissions aggregate \$1,711—too great a charge upon a fund of but little more than \$9,000. It is urged that allowing the receiver 5 per cent. of the fund collected for distribution, and his attorneys 10 per cent. upon the same fund, which is \$461 to the receiver and \$921.93 to the attorneys, or \$1,382.93 in all, is quite sufficient, being 15 per cent. of the sum in hand for distribution. We agree with this view. While the evidence shows that valuable services were rendered by eminent counsel, involving much labor and time, there must, in insolvent estates, be taken into consideration, in estimating fees, the practical results achieved in the way of moneys realized for creditors, and care is always to be had not too greatly to deplete by charges the small store of funds constituting the common stock out of which all are to be paid.

The first item on the list of ordinary debts allowed by the judgment is that relating to the claim of the Standard Cotton Seed Oil Company. The principal of the debt is stated to be..... \$1,042.14
And 6 years interest at 5 per cent. 1,212.60

Making a total, as per the account,
of \$6,254.74

But this total is erroneous—a wrong calculation. The figures foot up \$5,254.74 and not \$6,254.74. The account and judgment thereon must be amended in this particular.

There is also error in the judgment in stating the amount of the Adams' claim at \$32,000. This is too much. The receiver properly allowed the ordinary debt of the Standard Cotton Seed Oil Company to bear 5 per cent. interest up to the filing of the account, May 21, 1900. The judgment which Adams had recovered in the suit he had brought against the receiver fixed the interest on the several items going to make up his claim, and this interest should have been calculated, as was done in the case of the Standard Cotton Seed Oil Company, up to May 21, 1900, the day of the filing of the receiver's account. Figuring the claim on this basis, and allowing the credit, heretofore referred to, of \$1,095.93, the total of the Adams claim is \$31,775.14 and not \$32,000 as was allowed by the judgment herein.

The evidence establishes that this debt due Adams was for cash loaned the company in good faith for the purpose of carrying on its business and serving the best interests of all parties, creditors, stockholders and directors. In the absence of fraud, or deception, or preference, or wrongdoing of any kind, his rank and standing as an ordinary creditor is the same as that of any other ordinary creditor. There is no charge of fraud or mismanagement. Indeed, the record discloses a disclaimer by counsel of the receiver of anything of this kind. This being so, and the funds having been advanced by Adams legitimately and used for the purpose of the company, the law does not exclude him from participating pro rata with other ordinary creditors. The authorities relied on by counsel for the receiver as establishing the reverse of this, do not do so. Some of them have no applicability; others go only to the extent of holding that stockholders, directors and officers of a corporation cannot make use of their positions to prefer their claims to those of other creditors, nor to take any unfair or inequitable advantage of them—a proposition of universal acceptance. The case of *Morgan Co. v. Allen*, 103 U. S. 515, 26 L. Ed. 583, cited by counsel for the receiver, has no bearing on the question here raised. The same is true of *Belknap v. Adams*, 49 La. Ann. 1351, 22 South. 382, another of their cited cases. In *Brashear v. Cooperage Co.*, 50 La. Ann. 587, 23 South. 540, another of their authorities, the court held that a director, claiming under a mortgage executed in his favor by the corporation, could not compete in the distribution of the proceeds of the mortgaged property with a creditor to whom, on the same day the mortgage note was delivered to the director, the board of directors authorized the mortgage (presumably on the same property) on which the creditor advanced his money to the corporation—a situation, or state of facts, so different from that here present-

ed that the case is not an authority in point. In the case referred to there was deception, if not fraud, practiced upon the creditor. In *Cockran v. Dry Dock Co.*, 30 La. Ann. 1365, also invoked by counsel for the receiver, the point decided was that the debts of the company must be satisfied before the salaries of the officers of the company, who were stockholders, could be paid—a proposition altogether sound and altogether dissimilar from the question here raised. In *Cahill v. Refrigerating Co.*, 47 La. Ann. 1484, 17 South. 784, mainly relied on by the receiver's counsel, the contract was between directors, who were the holders of bonds secured by mortgage (having loaned the company the funds represented by the bonds), and creditors who claimed privileges upon the proceeds of sale of the mortgaged property. The property had been sold in foreclosure of the mortgage. It did not bring enough to satisfy the mortgage resting upon it, much less that and the privileged debts combined. The privileges asserted by the competing creditors, if they existed, outranked the mortgage. The privileges did exist unless lost because of failure to seasonably register the same as against third persons. Right there was the crucial point of the case. To have effect against third persons claiming a mortgage, it was necessary to record the evidence of the privilege within a certain time. This had not been done and as to the mortgage creditors claiming the proceeds of the property sold, the privilege was lost if they were third persons. But being directors of the corporation the court properly held they could not be considered "third persons," and the privileges took effect as against them even though not seasonably recorded. The inapplicability of that case as an authority in the instant case is patent. On the other hand, the contention advanced on behalf of Adams, of his right to stand on a footing with the other ordinary creditors of this insolvent estate, is supported by authority of the greatest weight, as the following will show:—

"A stockholder may lend money to a corporation and take a mortgage to secure the loan, and in the absence of fraud, he has the same rights under such contract as a stranger would have." 2 Clark & M. Priv. Corp. § 534.

"The strict rule that directors cannot enter into contracts with the corporation does not seem practicable. It would operate to disable those who have already embarked their funds in a corporate enterprise and given to it their personal attention, from assisting it in time of difficulty, except at the risk of doing so without security. A corporation might be in a sorry plight indeed, if one who had already embarked his funds in it, and who, from the fact of his being one of its managers, is best acquainted with its needs and difficulties, should not be able to make a present advance of money to it to help it out of those difficulties. That it is necessary for the law to throw around such transactions the

strongest safeguards in order to prevent fraud, need not be argued. Nor should it be forgotten that the right of directors of an insolvent corporation to take security for past advances, thereby preferring themselves over other creditors, stands on quite a different footing. We, therefore, find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith." 3 *Thomp. Corp. p. 2968, § 4068.*

"Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit. It is to be observed, however, that a person who is a creditor of an insolvent corporation is not deprived of any of his rights as a creditor by the fact that he also occupies the position of director of the company. He is merely incapacitated, as director, from using any of the powers of his position for his own benefit or the benefit of his codirectors." 2 *Mor. Priv. Corp. § 787, p. 757.*

"After proceedings have been instituted to obtain a general distribution of the assets of an insolvent corporation among its creditors, the shareholders cannot when sued for the amounts unpaid upon their shares, set off debts due to them by the corporation. Under these circumstances they must pay up their shares in full and are entitled only to a ratable distribution of all the company's assets, and to receive dividends upon their claims in common with other creditors." 2 *Mor. Priv. Corp. § 861, pp. 833, 834.*

"Directors and other officers, however, who are also creditors, are, of course, not excluded, because officers, from sharing ratably with other creditors of their corporation." *Taylor, Priv. Corp. § 760.* See, also, sections 729, 730, and 731. *Beach, Priv. Corp. § 245; Hopson v. Spring Co., 50 Conn. 507; Bank v. Whittle, 78 Va. 737.*

"It is not claimed that the debt of the appellant corporation to the appellee, as a stockholder and director, was invalid and void as between them, but that the appellee's claim against the company should not stand upon the same footing and share ratably with the claims of other creditors, who were not stockholders and directors of the corporation. We know of no legal reason for any such discrimination against the stockholder or direct-

or, who has become a bona fide creditor of his corporation for money loaned thereto in aid of its business. In this case the appellants do not question the good faith of the appellee's loan to the appellant corporation, nor its power to borrow the money in furtherance of its business, nor was any fraud or improper dealing imputed either to the company or to the appellee; but upon the ground, solely, that he was a stockholder and director of the company, as alleged in the second paragraph of the answer, it is insisted that the appellee's claim should be postponed until all the creditors, who were not stockholders of the company, had been fully paid. We cannot approve of this position." *Manufacturing Co. v. Probasco, 64 Ind. 412.*

See, also, *Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Sawyer v. Hoag, 84 U. S. 610, 21 L. Ed. 731; Scovel v. Thayer, 105 U. S. 152, 26 L. Ed. 968; Merrick v. Coal Co., 61 Ill. 472; Foster v. Refining Co., 118 Mo. 264, 24 S. W. 63; McKittrick v. Railroad Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518.*

For the reasons assigned, it is ordered, adjudged and decreed that the account and tableau of distribution filed herein by the receiver be recast as follows:—

Assets.	
Proceeds of judgment against Chas. H. Adams in suit No. 47,877, C. D. Ct., principal of judgment.....	\$ 7,500 00
Interest at 5 per cent. to May 4, 1900, four years and five months.....	1,656 25
One-half of costs incurred by receiver in suits No. 47,877 and 47,878, consolidated..	63 05
Total assets	\$ 9,219 30
Privileged Debts.	
1. Costs of suits Nos. 47,877 and 8..	\$ 126 10
2. Costs of suit already incurred in this proceeding	15 00
3. Receiver's commission.....	461 00
4. G. A. Breaux and Fenner, Henderson & Fenner, attys. for receiver	921 93
5. Standard Cotton Seed Oil Co. court cost in suit 42,462.....	188 93
	1,712 78
Balance for ordinary creditors.....	\$ 7,506 52
Ordinary Debts.	
1. Standard Cotton Seed Oil Co., amount due under judgment in suit No. 42,462—principal....	\$4,042 75
Interest 6 years 5 per cent.....	1,212 60
	5,254 75
2. Gilmore & Baldwin.....	419 80
3. Chas. H. Adams.....	31,775 14
Total ordinary debts.....	\$37,449 69

—To be paid pro rata from balance of \$7,506.52.

And as thus amended it is approved and homologated and distribution ordered to be made accordingly.

It is further ordered, etc., that the judgment appealed from be so amended as to conform to the account thus recast, and as thus amended the same be and is hereby affirmed, costs of this appeal to be paid out of the funds in the hands of the receiver.

MOTES v. ROBERSON et al.

(Supreme Court of Alabama. June 10, 1902.)
**SUBROGATION—PAYMENT OF MORTGAGE DEBT
 —VOLUNTEER.**

A bill for subrogation to a mortgage lien which alleged that complainant, at the request of defendants, had paid or advanced money to defendants to be used in satisfying certain mortgages, and that the money had been so used, is not demurrable for want of equity; plaintiff, having advanced the money at defendant's request, not being a mere stranger or volunteer.

Appeal from chancery court, Pike county; William L. Parks, Chancellor.

Suit by M. E. Motes against Dick Roberson and another. From a decree in favor of the defendants, the complainant appeals. Reversed.

The bill in this case was filed for the purpose of having a mortgage executed by the defendants to the Edinburgh American Land Mortgage Company, and another mortgage executed by the defendants to the Land Company of Alabama, equitably assigned to the complainant, and at the same time praying that the complainant be subrogated to the lien of said mortgages. It is alleged in the bill that she, "at the request" of defendant, "paid for him, or advanced to him to be paid on, his past-due payments on said mortgage debts, and which were so paid." The bill further alleges that "said sums paid, or advanced to be paid, on said mortgages, have never been repaid or returned to complainant, and that they are justly due, with the interest thereon; that on the 31st day of August, 1897, complainant recovered a judgment against defendant Dick Roberson on a promissory note bearing date January 28, 1891, given for the aforesaid amounts or sums paid or advanced on said mortgage debts, and for other and different uses, all amounting to \$600." It is further alleged that at the time complainant made the payments for Dick Roberson, or advanced to him the money for that purpose, he was indebted to complainant in a large amount for advances and plantation supplies to enable him to make his crops, and had been since the year 1888 to 1892, and a foreclosure of said mortgages would have taken from Dick Roberson the means of meeting his obligations to complainant, and added greatly to the peril of complainant as to all debts due her. The defendants demurred to the bill, and made a motion to dismiss it for the want of equity.

J. R. Motes, for appellant. A. C. Worthy, for appellee.

McCLELLAN, C. J. It is laid down by Mr. Pomeroy that: "The doctrine [of equitable assignment] is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party, and for his benefit. Such a person is in no true

sense a mere stranger and volunteer." The doctrine thus stated has recently been approved and applied by this court (Faulk v. Calloway, 123 Ala. 825, 26 South. 504), and it is believed not to be inconsistent with any of our previous adjudications. Applying it to the facts averred in the present bill, the conclusion must be that the bill presents a case for equitable relief by way of subrogation to the lien of the mortgage given by Dick Roberson to the mortgage company for the reimbursement of complainant in respect of the sums she paid, directly or indirectly, at his instance and request, on the mortgage debt. Our conclusion is, therefore, that the chancellor erred in dismissing the bill for want of equity.

Reversed and remanded.

**ALABAMA MUT. FIRE INS. CO. v.
 MINCHENER.**

(Supreme Court of Alabama. June 10, 1902.)
INSURANCE—DESCRIPTION OF PROPERTY—FAROL EVIDENCE.

Where, in an action on a fire insurance policy, it appeared that the defendant's agent wrote the application himself, and that there was a misdescription of the property intended to be insured, it was not error to permit plaintiff to testify as to the property to be insured, and that a contract of insurance had been entered into.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by Joseph Minchener, Sr., against the Alabama Mutual Fire Insurance Company, of Troy, Ala. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

This was an action brought by the appellee against the appellant, and counted upon a fire insurance policy. The defendant pleaded the general issue.

The policy of insurance described the property insured as "the one-story, shingle-roof, frame building, and adjoining communicating additions thereto, including foundations, which is occupied as a dwelling house, and situated on the east side of Minchener street in Troy, Alabama."

It was shown, that the duly constituted general agent of the defendant company, with authority to make contracts for the company and issue policies of insurance at Troy, Ala., duly executed and delivered to plaintiff the policy sued on, on the day of its date, for which he was paid the premium; that on the date of the issuance of the policy, the plaintiff was the owner of the property insured, which was known as the C. W. Williams place; that no written application was made by plaintiff for insurance thereon, but it was described by the plaintiff to the agent by pointing it out and showing it to him.

The plaintiff testified that the house was on a street in the city of Troy, on the east side of his, the plaintiff's, mill in said city, which street he had heard called by the name

of Lake street and also by the name of Minchener street, and was most commonly called Lake street; that plaintiff had nothing to do with the description of the property further than to point it out to the agent, who was present and saw it and who wrote out the description of the property as it appears in the policy and handed it to plaintiff, who retained it, not knowing the particular description employed, until the fire occurred. It was further shown, that plaintiff had, theretofore, had his lands in Troy surveyed and a map made of them, which he filed and had recorded in the probate office of said county of Pike, in all respects according to the statute; and according to said map, the lot on which the C. W. Williams house is located,—said house being the one insured and destroyed by fire,—is located on Lake street; that according to said map, there is a Minchener street in said city which lies east of Lake street, and plaintiff owned a house on the east side of that street of the value of about \$250, while the value of the one destroyed by fire was shown to be \$600, etc.

There was no controversy, as the bill of exceptions states, of the right of plaintiff to recover, if he is allowed to show that the Williams lot was the one insured and intended to be insured by plaintiff and defendant's agent.

The court at the request of the plaintiff gave the general affirmative charge in its behalf. To the giving of this charge the defendant duly excepted, and also excepted to the court's refusal to give the general affirmative charge requested by it.

There were verdict and judgment for the plaintiff. Defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved, and the rulings of the court upon the charges asked.

Foster, Samford & Carroll, for appellant.
M. R. Brannen, for appellee.

HARALSON, J. A policy of insurance, should designate the property, so that the subject insured and the risk may be determined. In case of doubt as to what property is covered, the construction will be against the insurer. 2 Joyce, Ins. § 1090.

Touching mistakes in the description of property insured, Mr. May observes, that "knowledge of the company or its agents of the untruthfulness of the statements as to the distance of neighboring buildings, or of inaccuracy or incompleteness in the description of the property, at the time when the insurance is effected, by the general concurrence of the more recent decisions, will estop the insurers from setting up such untruthfulness in defense." 1 May, Ins. § 262. Again, the same author states the rule of modern decisions to be, that "a party who deals with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him, are known to the principal, and when

policies are issued with a full knowledge of such facts, the insured is to suffer no prejudice, nor are the insurers to gain any advantage by insisting upon conditions which it would be dishonest to enforce." Section 493.

In case of the insurance of a ship, which is as applicable to a house, it is said: "If both parties have in view the same vessel, and the underwriter when the policy is issued, knows its true name, and it is intended to insure that particular ship, a mistake in the name of the vessel will not prevent a recovery for its loss, there being no fraud or concealment, and the contract being otherwise valid and complete." 2 Joyce, Ins. § 1445; Hughes v. Insurance Co., 55 N. Y. 265, 14 Am. Rep. 254.

In Insurance Co. v. Merritt, 47 Ala. 387, the plaintiffs stated verbally to defendant's agent, that they desired insurance on their sawmill and machinery, and told him where it was. The agent visited it for the purpose of examination and inspected it to his satisfaction, and afterwards wrote the application which the plaintiffs made. A loss occurred, and on suit for its recovery, the company defended on the ground, that the insurance was obtained on the written application of plaintiffs, and there was a misrepresentation or concealment of the presence of a planing machine in the building insured, which was not included in the property insured. The court said that the agent visited the sawmill for the purpose of examination, and inspected it to his satisfaction. He saw the planing machine, and made inquiries about it. Afterwards, he wrote the application which the plaintiffs made. He insured other planing mills at the same rate. Upon this evidence the court held, that there was no error in a charge which instructed the jury, that if defendant's agent wrote the application and did so in such form as to include the planing mill, and such was the intention of the plaintiff, Robertson, and the agent, then the defendant was liable for the insurance on the machinery including the planing mill.

On the examination of the insured, he was asked to "state, whether or not this house known as the Williams place, on the east side of said street mentioned by you (most commonly called Lake street, and which was called, also, Minchener street), was the house which you pointed out to the agent of defendant company, and told him this was the property you wanted him to insure." This question was objected to for that it called for illegal, irrelevant and immaterial evidence, and more especially, because the policy itself was the best evidence of what house was intended to be insured, and because the evidence called for, tended to prove the intention of the parties. The court allowed the witness to answer, that he pointed out said Williams house to the agent, and told him he wanted a policy of insurance on that house. There was no error in the admission of this evidence. It tended to show, which

It was competent to do, that this particular house and no other, was the one the agent insured. If there was any indefiniteness or uncertainty in the description, it was the act of the defendant's agent, and this evidence made the matter plain. *Gulmartin v. Wood*, 76 Ala. 209; *Insurance Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Pope v. Insurance Co. (Ala.)* 30 South. 496.

For the same reason, there was no error in allowing the witness, against the objection of defendant, to answer in the affirmative, the question, "Whether or not you and the said Joseph Minchener, Jr., as the agent of defendant, then and there agreed upon and contracted for a \$400 policy on said building and appurtenances, which policy was to run and be in force for three years from that date, and which was to be issued to you in said company, and which was subsequently issued to you, and which is the policy sued on in this case."

There was no conflict in the evidence and it was conceded, that there was no controversy as to the right of the plaintiff to recover, if he was allowed to show that the Williams lot was the one intended by him and defendant's agent to be insured.

The judgment below must be affirmed.
Affirmed.

CAWLEY v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

HOMICIDE—INSANITY—SELF-DEFENSE—SPECIAL VENIRE—QUASHAL—CHALLENGE TO JURORS—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. A minute entry showing that at the trial accused moved to quash the special venire summoned in the case, and excepted to the overruling of the motion, sufficiently shows his presence when the motion was ruled on.

2. Where certain names on the special venire were drawn from the jury box by the court at a previous term as special jurors for the trial of another murder case, and after the drawing the court restored them to the jury box, and the same names have been drawn as special jurors in the pending trial, the venire is quashable.

3. Where certain persons drawn on a venire have been drawn and summoned to serve as regular petit jurors for the week in which accused is to be tried, and such persons appear both on the special venire and on the list of those served and summoned for the week, the venire is quashable.

4. Under Cr. Code, § 5007, directing that a mistake in a juror's name is not sufficient cause for quashing a venire, but the court may direct the name of such person to be discarded, and another to be forthwith summoned, where a mistake is made in transcribing the name of a special juror on the list served on accused it is no ground for quashing the venire that the court directed such juror to be discarded, and another summoned.

5. Under Cr. Code, §§ 5004, 5273, relating to the drawing of a special venire, and requiring the list of jurors to be served on accused in capital cases, the venire cannot be quashed because the list of jurors served on accused fails to show what persons had been drawn as petit jurors for the week accused was to be tried; the name of all being on the list served on him.

6. Where, in a prosecution for murder, a witness designates the location of accused's house, and the road where deceased was killed, and it is not disclosed affirmatively that deceased, on leaving his house, did not go into the road, and along it to where his body was found, it is competent to question witness as to obstructions preventing a person leaving deceased's house being seen, as showing that accused saw deceased, as he went along the road, from his house, and pursued him.

7. Where insanity is pleaded as a defense on a trial for murder, the subsequent as well as previous acts and declarations of accused are admissible to show his true mental condition at the time of the homicide.

8. On a prosecution for a homicide resulting from deceased's illicit relations with a daughter of accused's sister, a witness testifying to a conversation with accused before the homicide may state that accused stated that deceased had it in for him, and, if he could get accused "out of the way, he could do" his sister "as he pleased."

9. Where, in a prosecution for murder, the testimony on self-defense shows that deceased put his hand in his pocket, and moved as if to draw it out, when advancing towards accused, it is error to exclude testimony by accused that deceased was in the habit of carrying a pistol.

10. On a prosecution for murder, an instruction that if accused was free from fault in bringing on the difficulty, and deceased advanced towards him, drawing his hand from his pocket, indicating to a reasonable mind that his purpose was to draw his pistol, and accused was in such close proximity as to render flight hazardous, he was not required to endanger his life by attempted flight, is erroneous, as assuming that the facts postulated created imminent peril, and so invading the province of the jury.

11. A charge that reasonable doubt is a doubt for which a reason can be given is properly refused as confusing.

12. Where, on a prosecution for murder, insanity is relied on, it is proper to refuse an instruction that accused was not guilty if the killing was the product of mental disease, and accused committed the act under circumstances which would be unlawful if he was sane.

13. On a prosecution for murder, the court cannot properly instruct that if accused did not provoke the difficulty, and deceased advanced on him, drawing his hand from his pocket, indicating to a reasonable mind that his purpose was to fire, accused was authorized to anticipate him and fire first.

14. Where insanity is relied on as a defense to murder, the court cannot properly instruct that, though accused could distinguish between right and wrong, he was not guilty if he was moved to action by an insane impulse controlling his will, as emotional insanity is no defense.

Appeal from circuit court, Lee county; A. A. Evans, Judge.

John P. Cawley was convicted of manslaughter in the first degree, and he appeals. Reversed.

The appellant, John P. Cawley, was indicted and tried for the murder of Brady Jones by shooting him with a gun, and was convicted of manslaughter in the first degree, and sentenced to the penitentiary for 10 years. The defendant was arraigned on October 21, 1901. The judgment entry of said date recites as follows: "The defendant, being in open court, attended by his counsel, and being duly arraigned according to law, pleads 'Not guilty,' and also 'Not guilty by reason of

insanity.'" The minute entry then recites that October 28, 1901, was set as the day for the trial of the defendant. It then contains the order of the court for the drawing of 50 names to serve on the special venire. The minute entry then proceeds to recite that the state, through its solicitor, moved the court to quash the special venire upon the grounds that certain names were drawn from the jury box by the court at the spring term, 1901, of said circuit court, as special jurors for the trial of another murder case, and that after so drawing said special jurors the court restored said names to the jury box, and the same names had been drawn from said box as special jurors in the present case, and that, proof of the facts alleged in the motion being made, the court sustained the motion, and the special venire was quashed. The minute entry then shows the following proceedings: The court ordered the box containing the names of the jurors to be brought into the court room, and drew therefrom 50 names to serve as special jurors for the trial of the defendant. The state moved to quash the special venire so drawn upon the ground that certain persons drawn upon said venire had been drawn and summoned to serve as regular petit jurors for the week in which the trial of the defendant had been set, and that the names of such persons appear both upon the special venire and upon the list of those persons served and summoned as jurors for the week of the court. The facts alleged in this motion being shown to the court, the court sustained the motion, and the special venire was quashed. Thereupon the court proceeded to draw from the jury box another list of 50 names to serve on the special venire, and ordered the same served upon the defendant. When the cause was called for trial on October 28th, the day set for the trial of such case, the defendant moved the court to quash the special venire drawn and summoned in said case, and assigned eight grounds for said motion. The first and second grounds were the ruling of the court in quashing the special venire drawn on October 21st. The third, fourth, and fifth grounds were that the list of jurors served on the defendant did not contain the name of W. D. Graves, nor of the jurors drawn and summoned to serve on the regular petit jury for the week the trial of the defendant was to be had, but that said list of jurors served upon the defendant did contain the name of one W. D. Garves, who was not drawn and summoned upon either the special venire or the regular petit jury for said week. The sixth and seventh grounds of the motion were not supported by the evidence, and it is unnecessary to set them out. The eighth ground of the motion was that the list of jurors served on the defendant fails to show what persons had been drawn and summoned to serve as petit jurors for the week the defendant was to be tried. The allegations contained in the first and second

grounds of the motion were admitted to be true. In support of the third, fourth, and fifth grounds of the motion, it was shown that a mistake had been made in transcribing the name of W. D. Graves, who was drawn as a special juror upon the list served upon the defendant, and his name was written "W. D. Garves." Thereupon the court directed the name of such person to be discarded, and the name of another person forthwith summoned to serve on the same case, and the person so summoned was disposed of in the same manner as if he had been drawn in the first instance. In support of the eighth ground it was shown that the list of jurors served on the defendant did not show who were the jurors drawn and summoned for the week of the court in which the defendant was to be tried, or who were the special jurors drawn for the trial of the case, but that the list of jurors served on the defendant contained the names of the jurors drawn and summoned for the third week of the court, together with the names of the special jurors drawn for the trial of the case. The defendant's motion to quash was overruled, and to this motion the defendant duly excepted.

The evidence for the state tended to show that as the deceased, Brady Jones, was walking along what is called a "plantation road," he met the defendant, Cawley; that, as Jones saw said Cawley, he stooped and started to run; that thereupon Cawley shot and killed him. It was shown that the plantation road ran between the house of the defendant and one Sylla Griggs; that the distance from Cawley's house to where the shooting occurred was about 200 yards. It was further shown that the killing occurred about 6 o'clock in the morning; that the deceased had been to the house of Sylla Griggs, to see her about picking some cotton for him, and was returning from her house when he was shot. One H. G. Adams, a witness for the state, testified to the location of the road, and how it was situated in regard to Cawley's house and that of Sylla Griggs' house; and he showed to the jury, by a drawing on paper, the relative location and distances of the several places about which he had testified. The state then asked the witness Adams the following question: "A person leaving Jones' house, and going into the plantation road, and thence along said road to where the body of Jones was found,—is there any obstruction to prevent such person from being seen from said house?" The defendant objected to this question because it called for illegal, incompetent, and immaterial evidence, and called for the conclusions of the witness. The court overruled the objection, and the defendant duly excepted. The witness answered that there was not. The defendant duly excepted to the court's overruling his motion to exclude this answer of the witness. The evidence for the defendant tended to show that, as he and his son were

walking along the plantation road, they met Jones, the deceased; that, as Jones came towards the defendant, the latter told him to stop, but that Jones kept advancing, and put his hand in his pocket, and moved as if to draw it out; and that thereupon the defendant fired upon him. The sister of the defendant was introduced as a witness, and testified that she was a widow, and that Brady Jones had had illicit relations with her daughter, who was unmarried; that the defendant, who was her brother, was her protector, and she had asked him to keep Jones away from her daughter; and that after this request the defendant seemed very much depressed. There was also evidence introduced for the defendant tending to show that, after the request was made by the sister of the defendant, he seemed to be unable to talk about anything else except the relations existing between his niece and said Jones, and that he seemed to be brooding over it all the time. There was also evidence introduced for the defendant that the deceased had made threats against the defendant. Upon the introduction of one Huguley as a witness, he was asked the following question: "Did you have a conversation with defendant about the deceased several months ago?" Upon the witness answering that he did, he was then asked by the defendant to state the conversation. The witness answered, "Defendant said that Brady Jones had it in for him, and if he the said Brady Jones, could get defendant out of the way, he could do Sister Sallie as he pleased." The state moved to exclude this answer upon the ground that it was irrelevant, incompetent, and immaterial. The court sustained the motion, and the defendant duly excepted. During the examination of the defendant as a witness in his own behalf, he was asked the following question: "If the deceased was not in the habit of carrying a pistol?" The state objected to this question upon the ground that it was illegal, irrelevant, and incompetent. The court overruled the objection. The defendant then answered: "Yes; I saw him with one on several occasions since February, 1901, sticking out of his pocket." The state moved to exclude the answer of the witness upon the ground that it was illegal, irrelevant, and incompetent, and because the deceased had a right to carry a pistol not concealed. This motion was sustained by the court, and the evidence was excluded, and to this ruling the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(b) If the defendant was free from fault in bringing on the difficulty, and the deceased advanced towards him, at the same time drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw his pistol and fire upon

the defendant, and if the accused was in such close proximity to the deceased as to render it hazardous to attempt flight, then the law would not require the defendant to endanger his safety by attempted flight. (c) A reasonable doubt, gentlemen, is a doubt for which a reason can be given. (d) If the jury believe from the evidence that defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be, 'Not guilty,' if the killing was an offspring or product of mental disease in the defendant. (e) If the defendant did not provoke or bring on the difficulty, and the deceased advanced upon him, drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first. (f) If from previous threats made by deceased and communicated to defendant, and from deceased carrying a gun, the defendant was reasonably led to believe that, on first meeting, one of them would be killed, and if, at the time of the meeting when deceased was shot, the deceased advanced upon the defendant, and placed his hand in his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw a pistol and fire, then the defendant would be authorized to fire upon the deceased first, if his danger would have been increased by retreat. (g) If the defendant was not at fault in bringing on the difficulty, and if the defendant, from previous acts and threats of the deceased, was reasonably led to believe that, on first meeting, the deceased would attempt to kill him, and if at the time of the fatal meeting, the deceased advanced upon the defendant, and placed his hand in his pocket, and attempted to draw it in such a manner as to indicate to a reasonable mind that his purpose was to draw a pistol and fire, and if he was in such proximity to the deceased as that a retreat would have increased his danger, then the defendant would have been authorized, under the law, to anticipate him and fire first. (h) Even if the jury should believe from the evidence that the defendant, at the time of the alleged killing of Brady Jones, had the capacity to distinguish between right and wrong, yet, if the jury should believe from the evidence that defendant was moved to action by an insane impulse controlling his will or judgment, then he is not guilty of the offense charged."

Barnes & Duke, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The recitals in the minute entry sufficiently show the presence of the defendant when the several motions to quash the several venirees were ruled upon by the court. No exception is shown to have been reserved by defendant to the action of the court in quashing the venirees on motion of the solicitor. As sustaining the correctness

of the ruling of the court in this respect, see *Wilkins v. State*, 112 Ala. 55, 21 South. 56.

In respect to the refusal of the court to quash the venire on defendant's motion, only those grounds of the motion are insisted upon which go to the right of the court to discard the name of one W. D. Graves, who was drawn as a special juror, and to order another to be forthwith summoned to supply his place. It was made to appear to the trial court, as shown by the record, that the name of W. D. Graves was drawn from the box as a special juror, and that in the list of jurors delivered to defendant the name was written "W. D. Garves." For the correction of this mistake the court had ample authority under the provisions of section 5007 of the Criminal Code, which it followed.

The other grounds of the motion, except the eighth, were not supported by the evidence, and therefore there was no error in overruling them. While the facts alleged in the eighth ground were proven, it can avail the defendant nothing, since there is no requirement that the list of jurors served on defendant shall designate the names of those jurors specially drawn, and those drawn and summoned for the third week of the court; the names of all being upon the list served upon him. Cr. Code, §§ 5004, 5273.

The record does not contain a copy of the drawing made by witness Adams, which was before the court, showing the relative location and distances of the places named by him. Nor does the evidence in the record disclose affirmatively that Jones, upon leaving his home, did not go into the plantation road, and thence along it to the point where his body was found. We cannot, therefore, know, as insisted by appellant's counsel, that he came to the place where he was killed by a different route, and from an opposite direction. Since error must be affirmatively shown, to overcome the presumption which must be indulged in favor of the correctness of the rulings of the trial court, and as the question to which an objection was interposed was doubtless propounded by the solicitor for the purpose of showing that the defendant saw Jones, the deceased, as he went along the plantation road, from his own house, and pursued him, it was entirely competent and relevant.

Two defenses were relied upon by defendant,—one, self-defense; and the other, insanity. There was testimony offered by the defendant tending to show (the weight of which was for the jury) that he had been previously to, and was at, the time of the killing of the deceased, afflicted with a mental disease produced solely by the information imparted to him of a supposed illicit relation between his niece and the deceased. When insanity is pleaded, the subsequent as well as previous acts and declarations of the defendant are admissible in evidence to show his true mental condition at the moment of the homicide.

McLean v. State, 16 Ala. 672; 1 *Mayfield*, Dig. p. 460, § 48.

The declarations of defendant to witness Huguley should not have been excluded.

In view of the testimony tending to establish the defense of self-defense, the court committed an error in excluding the statement of defendant, as a witness, that deceased was in the habit of carrying a pistol. *Wiley v. State*, 99 Ala. 146, 13 South. 424; *Naugher v. Same*, 116 Ala. 463, 23 South. 28.

Written charges "b," "f," and "g," refused to defendant, were bad. They assumed, as matter of law, that the facts postulated created imminent peril to life or limb; thus invading the province of the jury, whose duty it was to determine whether the defendant was in imminent peril, actual or apparent. *Gilmore v. State*, 126 Ala. 21, 28 South. 595.

Charge "c" was condemned in *Avery v. State*, 124 Ala. 20, 27 South. 503.

Charge "d" was properly refused upon the authority of *Maxwell v. State*, 89 Ala. 150, 7 South. 824.

Charge "e" is so obviously defective, no comment is necessary.

Charge "h" is in conflict with the principle, often declared by this court, that emotional insanity as a defense "finds no justification or support in our jurisprudence." *Walker v. State*, 91 Ala. 76, 9 South. 87; *Parsons v. Same*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 198; *Boswell v. Same*, 63 Ala. 807, 35 Am. Rep. 20.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

HAMPTON v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

CRIMINAL LAW—CONCEALED WEAPONS—COMPLAINT—MOTION IN ARREST OF JUDGMENT—BILL OF EXCEPTIONS.

1. A complaint charging that defendant carried concealed about his "person" a "pestol," against the peace of the state, etc., is not insufficient; there being no room for doubt as to the meaning of the quoted words.

2. A motion in arrest of judgment, the ruling thereon, and the reservation of a question as to such ruling, cannot be presented on appeal by bill of exceptions, but must be shown by the record proper.

3. A motion in arrest of judgment in a criminal case should be made and denied after verdict and before sentence.

4. The overruling of a motion for a new trial in a criminal case is not reviewable on appeal.

5. Where, on a prosecution for carrying concealed weapons, the fact that defendant had the weapon on his person was not in dispute, but it was disputed whether it was concealed, it was error to give the general affirmative charge, with hypothesis, for the state.

Appeal from Morgan county court; Wm. E. Skeggs, Judge.

Calvin Hampton was convicted of carrying concealed weapons, and he appeals. Reversed.

The complaint under which defendant was convicted charged "that within twelve months before the filing of this complaint, Calvin Hampton carried concealed about his person a pistol which said offense has been committed in said county against the peace and dignity of the State of Alabama." To this complaint or affidavit the defendant demurred upon the ground that it did not charge the commission of any offense, but avers that the defendant "carried concealed about his person a pistol," and that the averments of said affidavit were uncertain and insufficient. This demurrer was overruled. Under the opinion on the present appeal, it is unnecessary to set out the facts in detail. The court, at the request of the state, gave to the jury the following charge: "If the jury believe the evidence beyond a reasonable doubt, they will find the defendant guilty as charged in the complaint." The defendant duly excepted to the court's refusal to give this charge, and also separately excepted to the court's refusal to give the following written charges requested by him: "(1) If you do not believe the evidence beyond a reasonable doubt, you are not required to find the defendant guilty. (2) If you are satisfied from the evidence that the defendant was carrying the pistol in such a manner that it was observable by ordinary observation, you should find the defendant not guilty." After the judgment of conviction rendered upon the verdict of the jury, the defendant made a motion in arrest of judgment. This motion does not appear as part of the record, and it does not appear to have been made until after the sentence of the court had been passed upon the defendant.

Russell & Lynne, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The complaint upon which defendant was tried is not before us. The copy of it in the transcript does not show clearly how the word "person" was spelled,—whether "pearson" or "purson." But it is of no consequence whether the one or the other, since it is simply a clerical or grammatical error. It is impossible to read the complaint and be in doubt as to the word intended, or its import. The same may be said of the word pistol, if we concede that it was written "pestol." Grant v. State, 55 Ala. 207; Ward v. State, 50 Ala. 120.

A motion in arrest of judgment, the ruling thereon, and the reservation of a question as to such ruling, cannot be presented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions the ruling of the trial court thereon will not be reviewed. Taylor v. State, 112 Ala. 60, 20 South. 848. Furthermore, such motion should be made and denied after verdict and before sentence. It comes properly between the verdict and judg-

ment pronouncing the sentence. Sanders v. State, 129 Ala. 69, 29 South. 841.

The overruling of the motion for a new trial is not revisable. Bondurant v. State, 125 Ala. 31, 27 South. 775.

There was no dispute as to the defendant's having the pistol on his person. The matter of controversy was as to whether it was concealed. On this point the evidence was in conflict. It was error, therefore, to give the general affirmative charge, with hypothesis, for the state. If the pistol was not concealed the prisoner was not guilty, and the fact of its concealment was a question for the jury.

There was no error committed in the exclusion of evidence, nor in the refusal of the two written charges requested by defendant. Koch v. State, 115 Ala. 99, 22 South. 471; Driggers v. State, 123 Ala. 46, 26 South. 512.

Reversed and remanded.

CARTER v. STATE.

(Supreme Court of Alabama. June 5, 1902.)
CRIMINAL LAW—WITNESSES—IMPEACHMENT—IMMATERIAL EVIDENCE.

A witness in a criminal prosecution whose evidence tends to establish an alibi, and who denies on cross-examination that he stated at a certain time and place that he had been told by defendant that the latter had committed the crime, cannot be impeached as to such denial; the statement so denied being hearsay.

Appeal from circuit court, Jackson county; J. A. Bilbro, Judge.

Ed Carter was convicted of assault with intent to murder, and he appeals. Reversed.

Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. The defendant, Ed Carter, was indicted for an assault on James Galloway, with intent to murder him. On the trial, he was found guilty of an assault, and fined \$50.

James Galloway, the party assaulted, testified that the defendant cut him with a knife, and to facts tending to show that the assault was felonious. Other evidence was introduced by the state, corroborative of this witness' evidence, and tending to establish the guilt of the accused.

The defendant introduced one George Cananiss as a witness, whose evidence tended to show, that the defendant was not present at the time the state's witness, Galloway, testified that the defendant cut him, and that he was not guilty of the alleged assault.

On the cross-examination of this witness, after testifying that "he was pretty full that afternoon," the solicitor for the state asked him: "Did you not tell Reuben Brown, about two weeks after the difficulty, on the roadside, near Thomas' sawmill, that Ed Carter (the defendant) told you he cut Jim Galloway, and showed you the knife with which he did it?" The witness answered, "No."

After the defendant closed his evidence,

the solicitor, in rebuttal, called Reuben Brown as a witness, and asked him to "state whether or not George Cabaniss on the roadside, near Thomas' mill, two or three weeks after the difficulty, told him that Ed Carter, the next morning after the difficulty, told him (Cabaniss) that he (Ed Carter) cut Jim Galloway, and showed him a knife saying, 'Here is the knife that did the work.'" Defendant objected to this question on the ground that it called for illegal, irrelevant and hearsay evidence. The court overruled the objection, "and instructed the jury that the evidence would be received, not as evidence of the fact of the cutting, but as going only to the credibility of the testimony of the witness, Cabaniss, if the jury should believe he made such statements," and to this ruling, the only one presented for review, the defendant excepted.

The attempt to impeach the credibility of the witness, Cabaniss, in the manner proposed on his cross-examination by the state, was as to matter wholly immaterial to the issue in the case, and purely hearsay as against the defendant, and was improperly allowed. If the witness had been asked, if defendant had not made such a statement to him, such an inquiry would have been relevant and material, and, if he had denied it, the witness, Brown, might have been called to contradict him, by showing that he had made such a statement to him at the time and place laid in the predicate. In such case, the impeachment would have been based on a matter relevant and material, and not on one which was immaterial. The rule is well settled, that if a witness on his cross-examination is interrogated as to a matter wholly immaterial to the issue, the party calling for the evidence is concluded by the answer, and cannot impeach the witness by contradicting it. *Ortez v. Jewett*, 23 Ala. 662; *Seale v. Chambliss*, 35 Ala. 20; *Beall v. James Folmar, Sons & Co.*, 122 Ala. 420, 26 South. 1.

Reversed and remanded.

COOSA MFG. CO. v. WILLIAMS.

(Supreme Court of Alabama. June 4, 1902.)

SERVANT-INJURIES-NEGLIGENCE-CONTRIBUTORY NEGLIGENCE-SERVANT'S KNOWLEDGE OF DANGER-EVIDENCE-PLEADING.

1. Where plaintiff, an experienced mill hand, and foreman of the department in which he was injured, was directed by the superintendent to climb on a ladder leaning against a rapidly revolving shaft, for the purpose of putting a belt on a pulley, he was as familiar with the danger as was the superintendent, so that, if the latter's order was negligent, plaintiff's action in obeying it was contributory negligence, defeating any recovery.

2. Plaintiff climbed a ladder leaning against a rapidly revolving shaft in a mill in order to put a belt on a pulley attached to the shaft. The superintendent ordered another person to place a pole against the belt and raise it, to assist plaintiff in getting out on the pulley. The belt, when so raised, lapped, and doubled around the shaft so as to catch plaintiff's arm

and break it. *Held*, that there being no evidence that the lapping and doubling of the belt was the necessary or probable effect of raising the belt with the pole, and there being nothing inherently dangerous in the act directed, plaintiff could not recover on the ground of negligence on the superintendent's part in giving the order to raise the belt.

3. In an action for personal injuries, a so-called count in the complaint merely stating that plaintiff further claims a certain sum because of his liability for medical attention made necessary by his injuries is not really a count which would support recovery, but a mere averment of special damage.

Appeal from circuit court, Calhoun county; John Pelham, Judge.

Action by Lon Williams against the Coosa Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action brought by the appellee, Lon Williams, against the appellant, the Coosa Manufacturing Company, to recover damages for personal injuries. The complaint contained nine counts. The court sustained the defendant's demurrers to the first, second, third, fourth, fifth, and eighth counts of the complaint, and the record recites that issue was joined on the pleas filed to the sixth, seventh, and ninth counts. The seventh count was in words and figures as follows: "(7) The plaintiff claims of the defendant the further sum of twenty-five thousand dollars damages, for that whereas, to wit: On the night of the 11th of December, 1900, while defendant was engaged in operating its cotton mill at Piedmont, in Calhoun county, Alabama, manufacturing cotton, the machinery in said cotton mill was driven and propelled by an engine, shafting, pulleys, and belts. Said shafting and pulleys were situated several feet above the floor and machinery in said cotton mill, and the only means or way to reach said shafts and pulleys to put belts on said pulleys was by the use of a ladder with one end resting on the floor of said cotton mill, and the other end leaning against the revolving shaft. At the time that plaintiff received the injury hereinafter complained of, it became necessary for a belt to be put on one of the pulleys on the revolving shaft, against which the upper end of the ladder leaned, which shaft was running from 300 to 400 revolutions per minute; and plaintiff at the time he received the injury was in the employ of the defendant in the twisting and spooling department in said cotton mill, and a part of plaintiff's duties as such employé was to put the belts on these pulleys when necessary, and while running from 300 to 400 revolutions per minute at the time when said belt had to be put on; and while the plaintiff was engaged in his employment in defendant's said cotton mill, and it became necessary for one of the pulleys to have the belt put on it, plaintiff ascended said ladder to the shaft, against which said ladder was leaning, which was the only way of reaching the said shaft and pulleys provided by de-

defendant for the purpose of putting on belts on said pulleys, and it was necessary at the time of the injury to plaintiff to put a belt on said pulley, and was a part of plaintiff's duty, under his employment, to put on said belt. That on reaching the shaft and pulley to be belted at the upper end of said ladder, plaintiff took hold of a pipe with his left hand to steady and support himself, and with his right hand raised said belt to put it on said pulley,—there being no way or means provided for standing while putting on said belt, except a round or step of said ladder; and, while plaintiff was so situated in said position, defendant's superintendent, J. H. Barlow, being present, directed one Howard Busby, an employé in defendant's said cotton mill, whose duty it was to obey said superintendent, J. H. Barlow, who was present, standing on the floor, to raise the belt with a pole, which belt plaintiff was putting on. The said Howard Busby obeyed said superintendent, J. H. Barlow, and jabbed the pole he had in his hand up against said belt, which caused said belt to lap and double around said revolving shaft, carrying plaintiff's right hand and arm with the belt around said shaft, breaking plaintiff's right arm in four places, and crushing the bone in his arm, and breaking his right hand, also, which caused great and permanent injury to plaintiff. Plaintiff avers that by reason of defendant's superintendent's (J. H. Barlow's) gross negligence in giving to said Howard Busby directions to raise said belt with the end of the pole he had in his hand while plaintiff was putting on the belt, and the said Busby obeying said superintendent's directions, which was his duty to do, and did obey said superintendent, J. H. Barlow, by raising said belt with said pole, which caused said belt to lap and catch plaintiff's right hand and arm, and carry it around the shaft, breaking and crushing plaintiff's right hand and arm, and caused plaintiff's said injuries, to the damage of plaintiff in the sum of twenty-five thousand dollars, as aforesaid; hence this suit." The ninth count, after the prefatory averments as to the operation by the defendant of a cotton mill, and the employment therein of the plaintiff, and the injury sustained by the plaintiff in trying to put a belt upon a pulley, as substantially averred in the seventh count, then continued as follows: "Plaintiff avers that by reason of the gross negligence of J. H. Barlow, who was intrusted with the superintendence of defendant's said cotton mill, in directing plaintiff to put said belt on said pulley at a time when said shaft and pulley was revolving from 300 to 400 revolutions per minute, and said cotton mill was in operation, without stopping said shaft and pulley while plaintiff was putting on said belt. Plaintiff avers that if the said J. H. Barlow had stopped said shaft and pulley while putting on said belt, he being then and there present, the injury would not have occurred. Plaintiff further avers that the said J. H. Barlow,

superintendent as aforesaid, was superior to plaintiff, and to whose orders and directions plaintiff was bound to obey and did obey, and such injury resulted from his having obeyed said directions, and the failure of said J. H. Barlow to stop said shaft and pulley while plaintiff was putting on said belt, all of which gross negligence in the said J. H. Barlow caused said injuries, to the damage of the plaintiff in the sum of twenty-five thousand dollars; hence this suit." The sixth count was as follows: "(6) The plaintiff claims of the defendant the further sum of two hundred dollars as special damages because by reason of the injuries received, as set out in seventh and ninth counts of the complaint hereinabove, he had to employ physicians to attend to his injuries and wounds, and had to become liable to his physicians for the sum of two hundred dollars for medical attention and treatment of his said wounds." The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The first, second, and third charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, were as follows: "(1) If the jury believe the evidence, they must find for the defendant. (2) If the jury believe the evidence, they must find for the defendant under the ninth count of the complaint. (3) If the jury believe the evidence, they must find for the defendant under the seventh count of the complaint." There were verdict and judgment for the plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Jno. F. Martin and J. J. Willett, for appellant. Matthews & Whiteside, for appellee.

McCLELLAN, C. J. The plaintiff was an experienced mill man. He had worked for a long time in the mill in which his injuries were received, and at the time of receiving them he was, and had for months been, the foreman of that section of the mill in which he was hurt. He knew all about belting pulleys in motion. If there was danger in attempting to belt the pulley he was engaged in belting at the time of his injury, while it was in motion, he knew of that danger, its character and extent, fully as well as Barlow, defendant's superintendent; and that danger, certainly to a man of his acknowledged experience and familiarity with the matter in hand and the environment, was an obvious danger. So that, on the assumption upon which we are now proceeding, the plaintiff was under no duty to subject himself to this danger at the command of Barlow, the superintendent, and his doing so was such want of due care and prudence—such negligence contributing to his own hurt—as to constitute a full defense against the alleged negligence

of Barlow in directing him to belt the revolving pulley. On the other hand, if the belting of the revolving pulley was not a dangerous thing for Williams to undertake, it was not negligence in Barlow to direct him to do it, and plaintiff can take nothing on account of Barlow's said order. In any view of the case, therefore, the defendant was entitled to the affirmative charge on the ninth count of the complaint.

The seventh count, upon which, with the ninth, the trial was had, charges that Barlow negligently ordered Busby to raise the belt with a pole while plaintiff was engaged in and about putting it on the pulley, and that, in carrying out this order, Busby so raised the belt as to cause it to lap and double around the revolving shaft, on which was the pulley over which the belt was to be placed, and that this lapping and doubling of the belt around the shaft operated to catch plaintiff's arm, and inflict the injury complained of. There is some evidence tending to show that Barlow directed Busby to raise the belt with the pole; but there is a total absence of evidence going to show the lapping and doubling of the belt around the shaft was a necessary, probable, or likely result of raising the belt by means of the pole as directed by Barlow, or that the result should or could have been within the reasonable apprehension of an ordinarily careful and prudent man in Barlow's place; nor was there anything inherent in the act of so raising the belt to stamp it as a thing at all dangerous, to the comprehension of a careful man. The belt had to be raised in order to get it over the pulley. For Busby to raise it with a pole would seem, in all reason, to lessen whatever danger there may have been in Williams' effort to get it on the pulley. It would seem, too, to all reasonable observation, that it could be safely raised without lapping or doubling it on the shafting by placing the end of the pole on the under or inner side of it, and that such lapping or doubling would not ensue at all unless the pole were applied obviously improperly to the end in view to the outside of the belt, thereby shoving the two parts below the pulley against each other, and jamming and doubling the one side up under the other, and between it and the shafting. We are therefore of the opinion that the evidence does not at all support the charge that Barlow was guilty of negligence in the order given to Busby to raise the belt with the pole; that the only negligence in the premises of which there was any evidence was that of Busby, in the manner of attempting to execute a proper order, which negligence is not counted on, and for which defendant could not be held responsible to this plaintiff; and that the defendant was entitled to the affirmative charge on this seventh count, also.

What is called the sixth count is no count at all, but a mere averment of special damage under counts 7 and 9.

For the errors committed by the court in refusing charges 1, 2, and 3 requested by the defendant,—affirmative charges, with hypotheses on the complaint and on counts 7 and 9, respectively,—the judgment must be reversed. The cause is remanded. Reversed and remanded.

DURRETT v. STATE

(Supreme Court of Alabama. June 5, 1902.)

CRIMINAL LAW—HOMICIDE—APPEAL—BILL OF EXCEPTIONS — VERDICT — SUFFICIENCY — AGREEMENT BETWEEN ATTORNEYS AS TO PUNISHMENT—MOTION FOR NEW TRIAL.

1. The action of the trial court in regard to a motion in arrest of judgment will not be reviewed where the motion in arrest of judgment and the ruling thereon were not in the record, but only in the bill of exceptions, since the bill of exceptions cannot assume the office of the record.

2. A verdict that "We the juror find the defendant guilty of murder in the first degree, and shall suffer death," while not in the proper form, is sufficient to support the judgment.

3. An agreement by the solicitor for the state, on a prosecution for murder, with the defendant's attorney, after defendant had pleaded "Not guilty," and all the evidence had been taken, that defendant would withdraw his plea and plead guilty, whereupon the solicitor for the state would tell the jury that the state would be satisfied with a sentence to life imprisonment, is not binding on the jury, and a verdict of the death penalty was valid.

4. The ruling on a motion for a new trial in a criminal case is not revisable on appeal.

Appeal from Tuscaloosa county court; J. J. Mayfield, Judge.

Ben Durrett was convicted of murder in the first degree, and he appeals. Affirmed.

Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. In this case, as in the case of *Diggs v. State*, 77 Ala. 68, the motion in arrest of judgment, and the ruling of the court thereon, do not appear otherwise than from the bill of exceptions. A motion in arrest of judgment is based on error of law apparent on the face of the record. The error or defect is one shown in the record proper,—the record which the law requires to be preserved in permanent form; as, for instance, the judgments of the court. In *Diggs v. State*, supra, it was said: "It has been repeatedly held by this court that it is not the appropriate office of a bill of exceptions to present for revision any matter which otherwise would appear of record. It will not be permitted to assume the office of the record, which the law requires the court to keep, where no bill of exceptions is resorted to, and on which it cannot trench. Any matter apparent on the record, as a defect in the indictment, sustaining a demurrer to any plea of the defendant, or overruling a motion in arrest of judgment, must be presented for revision by the record, without the aid of a bill of exceptions."—citing *Ex parte Knight*, 61 Ala. 482; *Petty v. Dill*, 53 Ala. 641. See, also, *Thomas v. State*, 94 Ala. 75, 10 South. 432.

The verdict of the jury reads as follows: "We the juror find the defendant guilty of murder in the first degree, and shall suffer death." While the verdict was not in proper form, yet it was sufficient to support the judgment of the court. *Noles v. State*, 24 Ala. 672; *Id.*, 26 Ala. 31, 62 Am. Dec. 711; *Harrall v. State*, 26 Ala. 52; *Robinson v. State*, 54 Ala. 86.

After issue joined on the plea of not guilty, and the evidence for the state and defendant had closed, the defendant entered into an agreement with the solicitor for the state to withdraw his plea of not guilty and enter a plea of guilty, and for the solicitor to state to the jury that the state would be satisfied with a sentence to life imprisonment as a punishment. This agreement was carried out by the solicitor, but the jury declined to carry it out, and by their verdict imposed the death penalty. It was the province and duty of the jury, under the law, to fix the punishment, and the agreement of the solicitor could be nothing more than a recommendation to the jury. In no sense, under the law, was it binding on them.

Ruling on motion for new trial in a criminal case is not revisable on appeal.

We find no error in the record, and the judgment must be affirmed.

SOUTHERN CAR & FOUNDRY CO. v. STATE.

(Supreme Court of Alabama. June 4, 1902.)
CORPORATIONS—LICENSE TAX—SUFFICIENCY OF PLEA—STATUTE OF LIMITATIONS—ASSIGNMENT OF LICENSE—CAPITAL STOCK—POWER TO TAX—INTEREST RECOVERABLE.

1. In an action to recover a license tax from a corporation, a plea that a proper license had been procured was bad, for failure to aver that it had been paid for.

2. Under Acts 1898-99, p. 202, § 16, providing that suit for the recovery of a license tax may be brought at any time within five years, the statute of limitations of one and two years does not apply to a suit by the state to recover a license tax from a foreign corporation.

3. The purchase of the business of a domestic corporation did not authorize a foreign corporation to do business under a license tax issued to the former company.

4. A foreign corporation was not entitled to a credit for the amount of a license tax paid by a domestic corporation whose business it had purchased.

5. Under Code, § 4122, subd. 55, providing that a corporation shall pay a license in proportion to its paid-up capital stock, the amount of the license is regulated by the amount of the entire paid-up capital stock, and not by the amount actually employed in the business.

6. The extent of a license tax upon corporations is entirely within the discretion of the taxing power.

7. Under Code, § 4008, providing that all delinquent taxes shall bear interest at 8 per cent., interest on an unpaid license tax is recoverable.

Appeal from city court of Anniston; Thos. W. Coleman, Jr., Judge.

Action by the state against the Southern Car & Foundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee against the appellant to recover a license privilege tax for the years 1899, 1900, 1901, and tax commissioner's fees thereon; the amount of said taxes being \$500 for one year, and the fees \$50 on each amount. The defendant pleaded the general issue and several special pleas. The third plea was as follows: "Third. That it had procured license from the proper authorities to do business in Alabama for the time mentioned in the complaint." The other special pleas referred to in the opinion are sufficiently shown therein. The plaintiff demurred to the third plea upon the ground that it fails to aver that the defendant had paid for and taken out a license, under which the suit was brought, and that it does not aver that the license was taken out before suit was brought. This demurrer was sustained. The demurrers interposed to pleas 4 and 4½ and 5 were upon the ground that said pleas presented no defense to the action, and that the statute of limitations of one and two years was no bar to the recovery of the license tax. These demurrers were sustained. The cause was tried by the court, without a jury, upon an agreed statement of facts, which was in words and figures as follows: "That the defendant, Southern Car & Foundry Company, is a corporation organized under the laws of the state of New Jersey; that said corporation was organized some time before June 1, 1899, and that on June 1, 1899, it had, and that it has had continuously since that date, a paid-up capital stock exceeding one million dollars; that the defendant engaged in business in Calhoun county, Alabama, viz., in the business of building cars, etc., on the 1st day of June, 1899, and that it has continued in business in said county during the years 1899, 1900, and 1901, to the present, having been engaged during all of said time at Anniston, in said county, in the building of cars, etc.; that the defendant had not taken out any license from the judge of probate of Calhoun county to do business in the state of Alabama for any one of said years, and that before the bringing of this suit the tax commissioner of Calhoun county reported to the judge of probate of said county the failure of the defendant to take out such license for each of said years, and that the defendant failed or refused to take out such license, and that thereupon this suit was brought; that while the defendant had during the said years 1899, 1900, and 1901 a paid-up capital stock exceeding one million dollars, only two hundred thousand dollars of its said capital stock was invested in property or business in the state of Alabama, the balance of its capital being invested in other states, or used in business in other states; that the Southern Car & Foundry Company had prior to the 1st day of June, 1899, purchased the stock, property, and business of the Elliott Car Company, a corporation existing under the laws of Alabama, located at Gadsden, Alabama, having

a capital stock of one hundred and fifty thousand dollars, and that said Elliott Car Company had taken out a license to do business in the county of Etowah for the year 1890, having paid therefor the sum of \$75 to the state, and \$37.50 to the county of Etowah; that for the year 1900 the Southern Car & Foundry Company paid to the judge of probate of Etowah county the sum of \$75 for the state and \$37.50 for the county, and like sums for the year 1901, and for this sum the judge of probate of Etowah county issued to it a license to do business as a corporation for each of said years; that, except as above stated, the Southern Car & Foundry Company did not pay any license taxes to the state or to any county for the years 1899, 1900, or 1901, and that no license was issued in the name of the Southern Car & Foundry Company for 1899, and that it paid only \$75 to the state for 1900, and a like sum of \$75 for 1901; that the Southern Car & Foundry Company is authorized and empowered, under its charter, to engage in the manufacture of cars, to operate rolling mills, machine shops, and to do a general manufacturing business; that on June 1, 1899, the Southern Car & Foundry Company took a lease from the Illinois Car & Equipment Company of its property in Calhoun county, Alabama, and operated the plant of the latter company in said county for the remainder of the year 1899; and that said Illinois Car & Equipment Company was a corporation organized under laws of New Jersey, having a paid-up capital stock of over one million dollars, and had paid a license tax of five hundred dollars to the state of Alabama, and two hundred and fifty dollars to the county of Calhoun, for the year 1899, and a license had been duly issued to it (I. C. & E. Co.) for that year." The court rendered judgment for the plaintiff, taxing the amount of his recovery at \$1,701.33. To the rendition of this judgment, defendant duly excepted. The defendant appeals, and assigns as error the rulings of the court in sustaining the demurrers to the pleadings, and the rendition of judgment in favor of the plaintiff.

J. J. Willett, for appellant. Chas. G. Brown, Atty. Gen., and W. P. Acker, for the State.

DOWDELL, J. This is a suit by the state to recover of the defendant, Southern Car & Foundry Company, a corporation, a license tax for the years 1899, 1900, and 1901, and the tax commissioner's fees thereon. The cause was tried by the court without a jury, on an agreed statement of the facts, and a judgment was rendered in favor of the state, from which the defendant appeals.

The first assignment of error challenges the court's ruling in sustaining the plaintiff's demurrer to the third plea. This plea was bad, if for no other reason, in not averring

that the license alleged to have been procured was paid for, and was open to that ground of demurrer.

Demurrers were also sustained to pleas 4, 4½, and 5,—assignments of error 2, 3, and 4. These pleas set up in answer to the complaint the statute of limitations of one and two years. The statute expressly authorizes suit for recovery of a license tax at any time within five years. Acts 1898-99, p. 202, § 16. The court properly sustained the demurrers to these pleas.

The purchase of the stock, property, and business of the Elliott Car Company by the defendant company did not authorize the latter company to do business under a license issued to the former company for the year 1899; nor was it entitled to a credit, to the amount of the license tax paid by the Elliott Car Company, on the amount of the license tax required of the defendant company for that year. A license is personal, and cannot be assigned. But it is not even pretended here that there had been any assignment of its license by the Elliott Car Company to the defendant. *Long v. State*, 27 Ala. 32; 2 Am. & Eng. Enc. Law (2d Ed.) p. 1049, and notes.

The defendant company is a foreign corporation, and its paid-up capital stock exceeds \$1,000,000. Section 4122, subd. 55, of the Code, provides: "All corporations doing business in this state, whether organized in this state or in another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes: * * * Corporations whose paid up capital stock exceeds one million dollars, five hundred dollars." This provision of the statute is too plain to call for construction. There is nothing here upon which to base an argument that the legislature intended the amount of the license tax to be regulated by the amount of the capital stock actually employed in the business. The amount of the license tax is expressly based upon the entire capital stock paid up, and this the legislature had the power and authority to do. The statute makes no distinction between foreign and domestic corporations, and it is well settled that a foreign corporation cannot complain that it is subject to the same law applicable to and governing domestic corporations. The extent of the tax imposed is entirely within the discretion of the taxing power. The following authorities seem to be conclusive on the above propositions: *Phoenix Carpet Co. v. State*, 118 Ala. 43, 22 South. 627, 72 Am. St. Rep. 143; *Horn Silver Min. Co. v. People*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; *Home Ins. Co. v. State of New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025. On the unpaid license tax, interest was recoverable. Code, § 4008.

The court, in rendering judgment, allowed the defendant credit for the \$75 paid by the defendant for each of the years 1900 and

1901. The facts, therefore, do not sustain the assignment of error as to a failure to give this credit.

We find no error in the record, and the judgment must be affirmed. Affirmed.

JAMES v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

GAMING—PLACES WHERE PROHIBITED—EVIDENCE—ADMISSIBILITY.

1. Where, in a prosecution for gaming, a state's witness testified that defendant played dice on a certain day, and that a certain other person was present in such game, which lasted all the day, it was error to refuse to allow the employer of such other person, in testifying for defendant, to state whether such person was ever absent from his work during the month in which the game occurred.

2. Evidence by the state that a third party, said to have been in a game of dice, for participating in which defendant was being prosecuted, was summoned as a witness, but was absent from the county, was irrelevant.

3. The back yard of a house where intoxicating liquor is sold, and entrance to which is through the back door of the house, is within the prohibition of gaming contained in Code, §§ 4792, 4797, prohibiting gaming "at" stores where liquor is retailed.

Appeal from city court of Montgomery; Wm. H. Thomas, Judge.

Frank James was convicted of gaming, and appeals. Reversed.

The appellant, Frank James, was tried and convicted under an indictment which charged under two counts that he bet at a game played with cards or dice, or some device or substitute for cards or dice, at a tavern, inn, or storehouse for retailing spirituous liquors, or storehouse or place where spirituous liquors were at the time sold, etc., and that he played at a game of cards or dice at a storehouse where spirituous liquors were sold or given away, etc. The testimony of the witness Lee, introduced by the state, is sufficiently shown in the opinion. Upon this witness testifying on cross-examination that he was a witness in several gaming cases, he was asked by the solicitor on his redirect examination the following question: "Were you subpoenaed, or did you go before the grand jury voluntarily?" The defendant objected to this question, because it called for wholly illegal and irrelevant evidence. The court overruled the objection, and the defendant duly excepted. The witness testified that he did not go before the grand jury voluntarily, but was subpoenaed. The defendant moved the court to exclude this answer from the jury upon the same ground, and duly excepted to the court's overruling his objection. Another witness for the state testified to the defendant having played and bet at a game played with dice in the back yard referred to in Lee's testimony, and stated that among others who were present was one Ed Gettings; that Gettings had been summoned as a

state's witness, but was absent at that time. The solicitor for the state asked the witness the following question: "Do you know where Ed Gettings is now?" The defendant objected to this question on the ground that it called for illegal, irrelevant, and incompetent evidence, and duly excepted to the court's overruling his objection. In answer to another question against the objection and exception of the defendant the said witness answered that Gettings was not in the county at that time. The defendant, as a witness in his own behalf, testified that he did not bet or play at a game played with dice at the place designated by the state's witness. The defendant also introduced witnesses who testified that the character of the state's witnesses was bad, and that they would not believe them on oath. The other facts of the case are sufficiently stated in the opinion. The court, at the request of the state, gave to the jury the following written charge: "The back yard of a house where spirituous, vinous, or malt liquors are sold and ingress and egress to and from which are through the back door of the house, comes within the prohibition of the statute against gaming." The defendant duly excepted to the giving of this charge, and also excepted to the court's refusal to give the following charge requested by him: "If the jury believe the evidence, they must find the defendant not guilty."

Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. In behalf of the state one Lee testified to the effect that in May, 1901, defendant played and bet at dice in an inclosed back yard, to which the only opening was through the back door of a store where spirituous liquors were sold; that this game began in the morning, and continued until late in the day; and that among others who were in the game was Dick Laws. In defendant's behalf Bray testified that Laws worked with him during the month of May, 1901, and defendant then asked him, "Did Dick Laws ever get off from his work during the month of May, 1901?" An objection made by the solicitor to this question was sustained. In this ruling there was error, for which the judgment must be reversed. An affirmative answer to the question would have contradicted Lee as to Laws' participation in the game, and would have been relevant, as going to the credibility of Lee's testimony as a whole. The evidence introduced by the state to the effect that Gettings, who was said to have been in the game, was not in the county when the case was tried, was irrelevant. Cross-examination of Lee having been directed to showing he had been officious in the prosecution of gaming cases, it was proper to permit the state to prove he attended the grand jury in obedience to a subpoena, and not of his own volition. In application to the evidence of this case, the charge given for the state was not erroneous, the yard being at the retailing liquor store, within the mean-

ing of sections 4792 and 4797 of the Code. The charge requested by defendant was properly refused.

Reversed and remanded.

(107 La.)

GUILLEBERT v. GRENIER. (No. 14,213.)

(Supreme Court of Louisiana. April 14, 1902.)

MARRIAGE OF MINOR—EMANCIPATION—CONSENT OF TUTRIX—ACCOUNTING.

1. The minor's marriage without the consent of her tutrix, although in every respect legal, did not have the effect of emancipating her from the disabilities of minority. The mother's kindness to her daughter and her son-in-law after the marriage, which has no appearance of any intention to condone the fact that her consent had not been sought or obtained, does not have the effect of supplying the want of consent of the mother and tutrix.

2. Jurisprudence of this state and of other states of this country as well as foreign has always attached importance to the consent which minors should obtain before their marriage.

3. The court deals only with the question growing out of the failure of the minor to obtain the tutrix's consent before marriage. Other issues are not brought before the court by the record so as to justify it to pass upon them.

4. The minor had not been emancipated, and could not compel an accounting as asked by her.

Nicholls, C. J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Avoyelles; G. H. Couvillon, Judge.

Action by Mrs. Adele C. Guillebert against Mrs. Marie J. Grenier. Judgment for defendant, and plaintiff appeals. Affirmed.

Adolph Vallery Coco, for appellant. A. J. Lafargue, H. C. Edwards, and William Hall, for appellee.

BREAUX, J. Plaintiff, a minor, averring that she is emancipated by marriage, sued her mother and tutrix for an account of tutorship. Plaintiff was one of the pupils of a female college at West Point, Miss., and at the closing exercises of the session in May, 1901, plaintiff says that she informed her mother,—her mother being with her,—that she and Dr. Barbin were engaged to be married, and that her intention was to marry during the summer following. A few months afterward they (plaintiff and Dr. Barbin) went to Port Gibson, where they were married without her mother's consent. We gather from the testimony that the only objection of the mother to the marriage was that her daughter was too young. Plaintiff returned the day after her marriage, and was shortly after met by her mother, who treated her daughter kindly, and showed no ill feeling to her son-in-law. Plaintiff's contention is that she is emancipated by her marriage, and, further, that her mother has condoned her asserted disobedience in marrying without her consent, and that, besides, her mother has lost the right of tutorship by contracting a second marriage in 1885, by reason of the fact that her

second husband, the stepfather of plaintiff, did not comply with the provisions of article 255 of the Civil Code in so far as that article requires the inscription of the minor's mortgage. To this action, defendant presented an exception of no cause of action, in which she alleged that plaintiff had eloped with Dr. Barbin, and was married, as before stated; that, plaintiff being a minor under the age of 18, her marriage without the consent of her tutrix did not have the effect of emancipating her, nor of releasing her from any of the disabilities which attend minority. The evidence substantially proves the foregoing statement of facts. The judge of the district court sustained the exception, and dismissed the plaintiff's action. Defendant filed an answer to the appeal, and asks that damages be allowed her against the plaintiff for having uselessly appealed upon grounds that are frivolous.

The question is whether by marriage solemnized in another state, without the consent of the tutrix, plaintiff has all the rights to which an emancipated minor is entitled. While the marriage is entirely good and valid, a negative answer none the less suggests itself as relates to emancipation. By the clear and concise provisions of the text of the law the minor does not, by the marriage without consent of her tutrix, acquire the right of compelling her to account before majority for the property in her possession for the minor. In an early case, a minor aged 19, having failed to obtain a decree of emancipation from the court, sought to be relieved from the disability attending minority by going to Mobile, and there marrying, without the knowledge or consent of his tutor. Upon his return to this state he sued his tutor for his property. He was met by the answer that his marriage, under the circumstances just mentioned, did not emancipate him, and that he would have no right to an accounting by the tutor until his majority. The district court gave him judgment. On appeal it was reversed, and this court held that his marriage in violation of law did not have the effect of emancipating him. *Malliefer v. Sailiot*, 4 La. Ann. 375. Another minor, who had lost both father and mother, repaired to another state with the one to whom she was afterward married, and they were married. On their return to Louisiana they sought by suit to get property held jointly with her coheirs. The court affirmed the decision cited supra, and said: "We are satisfied with the decision in the case of *Malliefer v. Sailiot*, and, as the marriage in Mississippi did not have the effect of emancipating the minor, it is clear that she was not authorized to bring this suit." and they dismissed her suit. *Babin v. Le Blanc*, 12 La. Ann. 367. The question afterward came up incidentally in another decision in which this court availed itself of the opportunity to say that the minor, although legally married, was not duly emancipated, for the reason that the marriage had

been contracted in another state, without the tutor's consent, and in evasion of the state laws. *Clement v. Wafer*, 12 La. Ann. 602. It is not the intention to discriminate against marriages solemnized in other states. If it had been solemnized in this state, the disability, as relates to emancipation, would have been the same. No greater effect can be given to the marriages certified to by authorities in another state. In nearly all the states of the Union the law requires the consent of the parents or other legal representative before the license is issued. 19 Am. & Eng. Enc. Law (2d Ed.) p. 1191. To sustain the defense of emancipation by marriage not preceded by consent would hold out encouragement to minors indifferent to parental influence and control to go counter to their proper authority. It would offer inducements to youths to enter into improvident and ill-advised marriages which maturer years would cause them to regret or deplore. In foreign jurisdictions, under the civil law, the restraint is even greater. "There are decisive reasons in the interest of the children opposed to their contracting marriage without the consent of their parents. While they are minors, the law should have forbidden their marriages, as they are incapable of performing ordinary acts: They are without authority to dispose of the least portion of their property; how can they properly see to their liberty, to their future? If the law permits the marriage of minors, it can only be in the interest of morality; but while the law may declare that marriage may be contracted at the age of fifteen or eighteen years, it is none the less true that children of that age are incapable of understanding the gravity of the engagements they contract. It has, however, become necessary to find something toward avoiding the incapacity. This is the purpose of the 'consent' they are ordered to obtain from their parents until they have reached the age of majority." The foregoing is translated from 2 Laurent, p. 418. We have dealt exclusively with the subject of consent which should precede the marriage in order that the marriage may emancipate the minor. We have naught to do with questions that might arise if there was danger that the minor's property will be squandered by those upon whom it devolves to take care of it and deliver it to their ward. That question is not before us. Nor is the obligation of the tutor to apply the income, and, so far as is necessary, the capital, under legal restrictions, to the maintenance of his ward before us for consideration. A duty then arises regarding which there is no necessity of expressing an opinion at this time. In the condition of the record as made up, we do not consider that the issue regarding the asserted failure of the co-tutor to qualify is before us for decision. We do not think that defendant has given her approval to the marriage to the extent that it must now be held that the minor is emancipated. On the return of the

daughter, the mother, we take it, acted as if not recalling that there had been any trouble or any failure on the part of the daughter to obtain her consent. There was no sensational scene. We understand that the daughter was kindly received, and the son-in-law properly treated. This is to the credit of all parties, but it does not supply the lack of consent which should have been obtained prior to the marriage as a condition of emancipation. Moreover, the inference is that the defendant did not intend to ratify. "In cases of doubt in matter of ratification the one to whom the act is opposed must have the benefit of it." *Succession of Easum*, 49 La. Ann. 1348, 22 South. 364.

We have noted in our statement of the pleadings that defendant seeks damages for a frivolous appeal. This appeal presents none of the features which would warrant damages.

For reasons assigned, the law and the evidence being with the defendant, the judgment in her favor is affirmed.

NICHOLLS, C. J. (dissenting). The district judge, though sustaining defendant's exception, did so only in obedience to the rule *stare decisis*. In his reasons for judgment he says: "I am controlled by the interpretation of the supreme court. It has twice decided that the marriage of a minor without the consent of his parents or tutor did not emancipate. I shall have to sustain the exception, and dismiss plaintiff's action." The decisions of this court which the district judge refers to are those of *Mallefer v. Sailliot*, 4 La. Ann. 375, and *Babin v. Le Blanc*, 12 La. Ann. 367. The first case mentioned was that of a minor over 19 years of age, who applied to the court to be dispensed with the age required by law for attaining majority under the act of 1829. A family meeting, convoked to take his application into consideration, advised the judge to grant it, but the tutor opposed it, and, after hearing evidence, the judge rejected the application, stating that the testimony showed that applicant was unable to manage his own affairs, and that he was unwilling to work. After the rendition of this judgment the plaintiff went to the city of Mobile, and there married, without the knowledge or consent of the tutor. He immediately returned, and instituted an action, in which he called upon the tutor to account, and pay over to him the funds which he held as tutor, on the ground that he had been emancipated by marriage. Two defenses were set up. The first was that, having married without the consent of the tutor, he had no right to call for an account until he had reached the age of majority; the second that the judgment which refused the application to emancipate on the ground that the applicant was unable to manage his own affairs had not been appealed from, and was *res judicata*. The district court ordered the tutor to account, and he

appealed. The supreme court reversed the judgment, and dismissed the suit. In so doing it said that the disposition of the Code which provided that minors are emancipated by marriage means the marriage which the law authorizes, not those which are made in fraud of its provisions. The plaintiff's marriage in the state of Alabama can no more affect the judgment rejecting his application for emancipation than any other form of emancipation obtained in that state would affect it. Through motives of public policy the law does not pronounce the nullity of marriages thus contracted, but it is equally against public policy that they should be held to confer upon the parties all the rights which result from the marriages legally authorized. The facts in *Babin v. Le Blanc*, 12 La. Ann. 367, were that, pending an application for tutorship to the plaintiff, who had lost both her father and her mother, she went with Lafayette Caldwell to Mississippi, and they were there married. On their return to Louisiana, she, joined and assisted by her husband, brought a suit for a partition of the property held in common with her coheirs. The defendant excepted to plaintiff's right to institute the action. The exception was overruled, but on appeal the exception was sustained, and the suit dismissed. The court said: "It is evident that the parties were married in Natchez in order to evade laws which required the consent of a tutor to the minor. In the case of *Mallefer v. Saillet* it was held, in substance, that emancipation is a consequence of the marriage which the law authorizes, and not of that made in fraud of our laws; that the courts of another state cannot emancipate minors whose domicile is in Louisiana; and that a marriage there in opposition to our laws cannot produce any greater effect towards the emancipation of the minor. We are satisfied with the decision in the case of *Mallefer v. Saillet*, and, as the marriage in Mississippi did not have the effect of emancipating the minor, it is clear she was not authorized to bring this suit." The case of *Clement v. Wafer*, 12 La. Ann. 602, was one brought by plaintiff, who had married in Arkansas a young girl under 17 years of age, against the consent of the defendant, who was her tutor in Louisiana, for damages in having, as he alleged, abducted her by fraud. The defendant defended upon the ground that at the time of the marriage he was the tutor of the young girl, who was under his personal care and protection; that by false representations and devices plaintiff had clandestinely procured her to go with him to Arkansas, against his consent and without his knowledge, where, in fraud and evasion of the laws of Louisiana, he endeavored to contract marriage with her, and immediately returned to Louisiana; that she was induced to live with him a short time under the impression that the attempted marriage was valid, when in fact it was not so. He prayed for rejection for plaintiff's de-

mand, and also, should the pretended marriage be established, it be decreed null and void ab initio. The case was tried by a jury, which brought in a verdict for defendant, and plaintiff appealed. The judgment below was affirmed. In the course of its opinion the court incidentally said that defendant was not authorized to demand a dissolution of the marriage, but the matters set up had an important bearing upon the merits of the case, if they were not a complete justification to a portion of plaintiff's action; that, as a marriage of a minor domiciled in Louisiana contracted in another state in fraud of our laws does not emancipate such minor (*Mallefer v. Saillet*, 4 La. Ann. 375; *Babin v. Le Blanc*, 12 La. Ann. 367), the tutor of such minor cannot be held responsible for affording shelter and protection to his ward, and even counseling her in her difficulties. The person who, without the consent of the tutor, persuades a minor to elope with him and marry him in fraud of our laws, acquires no right over her person and to her society except so far as voluntarily yielded to him. In *Boyd v. Tranton*, 14 La. Ann. 691, this question was submitted to the court in a different phase, and from a different standpoint. Reuben Tranton, a minor, ran away and contracted marriage without the consent of his tutor. While married, but under 21 years of age, he executed a promissory note for \$300. His annual revenues were between \$3,000 and \$4,000. Tranton died, and suit was brought upon the note against his succession. The administrator pleaded minority; that the right given to him by article 371 of the Civil Code by reason of emancipation of contracting debts for an amount not exceeding the amount of one year of his revenue did not vest in him because of the circumstances under which he was married. The authorities hereinbefore recited were relied upon to support this position, but the court said: "The authorities cited do not go to the extent contended for, nor do we perceive any reason why they should. Besides, the evidence does not show affirmatively that the marriage was without the consent or against the will of his tutor, but is left to inference from the act of running away, which may or may not be correct, as opposition on the part of the wife's family may have been the cause of it as well as opposition on the part of the tutor." Our attention is called by the defendant to *Succession of Colwell*, 34 La. Ann. 272, in which Chief Justice Bermudez, though dealing with another subject, refers to the decisions in *Mallefer* and that of *Babin* and the principles there announced, as follows: "The doctrine is wholesome. Had it [the law] not been declared and applied as it was, the consequence would have been an encouragement to ill-inclined and unbridled minors to disregard the will of those in charge of them. It would have proved an authority to them to override and evade the law, and by so doing to reap indirectly advantages which they could

not reap directly." Appellant's counsel cite the chief justice as repudiating in the same opinion "a doctrine which, while recognizing the validity of marriages, would deny to them all and any effect," saying that "this would be subversive of the teaching that the law favored marriage, and such a doctrine should be repelled." The following statutes and articles have a bearing upon the matter at issue: Article 97, Civ. Code: "The minor of either sex who has reached the competent age to marry must have received the consent of his father and mother or of the survivor of them, and if they are both dead the consent of his tutor. He must furnish proof of this consent to the officer to whom he applies for permission to marry." Article 112, Id.: "The marriage of minors contracted without the consent of the father and mother cannot for that cause be annulled if it is otherwise contracted with the formalities prescribed by law, but such want of consent shall be a good cause for the father and mother to disinherit their children thus married if they think proper." Article 1621, Id.: "The just causes for which parents may disinherit their children are ten in number. * * * No. 10. If the son or daughter marries without the consent of his or her parents." Article 246, Id.: "The minor not emancipated is placed under the authority of a tutor after the dissolution of the marriage of his father and mother." Section 2348, Rev. St.: "There shall be hereafter no curator ad bona or curator ad litem appointed in any case. The persons and estates of minors shall in all cases be placed under the power of tutors and under tutors and their powers, duties and responsibilities as well as their liability to be removed from office shall continue until the minors attain the age of majority or otherwise emancipated." Article 379, Civ. Code: "The minor whether male or female is emancipated of right of marriage." Article 357, Id.: "The tutor is bound to give an account of his administration at the expiration of the tutorship and whenever he is ordered to do so by the judge." Article 356, Id.: "The tutor is bound to render an annual account of his administration reckoning from the day of his appointment. The account shall be rendered contradictorily with the under tutor." Article 119: "The husband and wife owe to each other mutually fidelity, support and assistance." Article 120: "The wife is bound to live with her husband and to follow him wherever he chooses to reside, the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life in proportion to his means and condition." Article 121: "The wife can not appear in court without the authority of her husband." Article 106, Code Prac.: "A married woman whether she be of age or a minor can not appear in court without the authority of her husband." Article 107, Id.: "Husbands have under their control the personal and possessory action to which their

wives are entitled." Article 381, Civ. Code (new article): "The minor emancipated by marriage may demand an account from his tutor and a settlement of the tutorship. The tutor is bound to pay him the balance ascertained to be due and to deliver the property in his hands belonging to such minor." There was in the Code prior to the placing therein of this last article (and which article is still retained therein) article 370, which is as follows: "Art. 370. The minor who is emancipated has the full administration of his estate and may pass all acts which are confined to such administration, grant leaves, receive his revenues and moneys which may be due to him and give receipts for the same."

The evidence establishes beyond controversy that Miss Adele C. Guillebert, the plaintiff herein, being then a minor, left her mother's house in the parish of Avoyelles without her knowledge and consent, and, accompanied by her present husband, A. Tillou Barbin, went into the state of Mississippi, where, without the knowledge and consent of her mother, she married him. That the married couple returned immediately to Louisiana, where it was then and still is their intention to reside. The daughter (a witness) testified that on her return to Marksville, on meeting her mother the latter kissed her, and told her she forgave her, as she loved her, reproached her for having done as she did, as she, the mother, would have given her consent had she been asked to do so; that both the daughter and her husband have visited the mother since, and no absolute estrangement between the parties has resulted from the marriage. The young lady's conduct was occasioned by the fact that she had been led to believe from conversations with her mother that the latter, had she been asked to give her consent, would have objected to her marriage on the ground that she was then too young to marry. The evidence further shows that the mother caused an account of her administration to be prepared by an attorney, which she placed in the hands of the plaintiff and her husband, and which they themselves placed in the hands of counsel. The account was not a satisfactory one, and it was returned. It was never acted upon nor filed. The present action was then brought. There can be no doubt that citizens of Louisiana cannot, by passing over into Mississippi, and doing there an act which they were without authorization to do under the laws of this state, acquire rights in Louisiana which they would not have had had the act been done in Louisiana. The courts would accord no such results to acts done in evasion of and fraud of our laws. A Louisiana minor not in position to claim emancipation by judicial proceedings here could not, by leaving the state, and having recourse to a Mississippi court, be emancipated, and on his return successfully claim the benefit of the judgment. The Mississippi court would have been without jurisdiction in the

premises. And so, if by the Mississippi law a marriage there of minors would carry with it and vest in favor of the parties to the marriage all the rights of majority, while such would not be the effect of a marriage celebrated in Louisiana between Louisiana minors, minors domiciled in Louisiana could not, by leaving this state and marrying in Mississippi, return with rights acquired under the Mississippi law which would not have been accorded them had they married here. In so far as the court in the decisions in 4 and 12 La. Ann., cited by the defendant, announce this proposition, it was undoubtedly correct; but that is not the precise question before us. The questions propounded to us are: First. What are the legal rights conferred by the present laws of the state, so far as the disabilities attendant upon minority are concerned, upon a Louisiana minor who marries in this state with the consent of his father and mother? Second. What are his rights on the same subject if he marries in this state, but without the consent of his father and mother? Third. If, instead of marrying in Louisiana without the consent of his father and mother, he passes over into Mississippi, and is married there without that consent, has his legal situation been made worse in any way by the fact that he had married in Mississippi instead of in Louisiana? If it has been made worse, to what extent has it been made so? We have not had our attention directed to any case where this court was called upon to differentiate between the marriage of a minor contracted in Louisiana with the consent of his parents and one contracted in Louisiana by the same minor but without such consent, so far as resulting right of emancipation would be concerned, and the extent of the rights which the emancipation would confer in each of the two cases upon the minor. In each of these two cases the marriage contracted would be a valid marriage. In the one the minor would have incurred the possible penalty of disinheritance, in the other he would not. In both cases the minor would, by express provision of law, be emancipated. Would there be any difference in the character and extent of the emancipation? If so, upon what provisions of law would the court base the difference? The most important article of the Civil Code to examine in this connection is article 112, which is not prohibitory in its terms. It unquestionably affirmatively calls for the consent of the minor's parents, but there are no negative expressions used. The lawmaker does not say in terms that minors shall not contract marriage without the consent of their parents, and, so far from declaring that a marriage contracted without such consent would be null and void, it has declared expressly to the contrary. The lawmaker not only does not in recognizing the validity of the marriage attempt to vary or modify in any way the effects of a marriage so contracted from those contracted in any other

way, but passes at once to attach a specific penalty to the act of marrying without consent, and that penalty bears upon the minor's future inheritance, and not the marriage, nor the effect of the marriage. It is a recognized rule governing the construction of penal laws that their provisions are not to be extended, and that, when a particular penalty is affixed as a consequence of doing some act, that penalty, and no other, follows.

We are of the opinion, therefore, that the emancipation and the rights springing from emancipation resulting from the marriage of a minor in Louisiana are precisely the same whether the minor married with or married without the consent of the parents. It is certainly desirable that methods should be designed and carried into effect by which adventurers should be held in check in seeking to marry wealthy minors in order to obtain possession of their property, and to deter minors themselves from having recourse to ill-advised marriages to take control and management of their own property; but those methods must be enacted by the general assembly and not permitted to be supplied by the courts by construction no matter how judiciously or wisely. Reaching this conclusion, the next question is affected to the prejudice of the minor's rights and extent of emancipation by the fact that the marriage without the consent of the minor's parents was celebrated in Louisiana. I think not. Such marriage in Mississippi would be in violation of our laws; such a marriage in Louisiana would be equally in violation of them. The violation in Mississippi would be neither greater nor less than in Louisiana. The effect of the violation is no greater when it occurs outside of the state than when it occurs within it. The utmost complication and confusion would result from permitting the authority and power of control over a wife to be divided between a wife's mother and her husband. *Wilcox v. Henderson*, 7 Rob. 347. I am of the opinion that under the provisions of article 379 of the Civil Code, which declares unqualifiedly that the minor is emancipated by right of marriage; those of section 2348 of the Revised Statutes, which bring tutorship to an end by emancipation; and those of the new article of the Civil Code (article 381) that "the minor emancipated by marriage may demand an account from his tutor and a settlement of the tutorship, that the tutor is bound to pay him the balance ascertained to be due and to deliver the property in his hands belonging to such minor,"—entitled the plaintiff to call upon her mother for an account, and that the judge was authorized himself under article 357 of the Civil Code to have ordered an account to be filed. What would be the extent of the further power of the wife or the husband or both over the property by reason of emancipation by marriage is not a matter before us.

For the reasons assigned, I think the judg-

ment of the district court should be reversed, and the cause remanded to the district court; reinstated on the docket, and proceeded with further according to law.

(107 La.)

JOPLING v. CHACHERÉ et al. (No. 14,216.)¹

(Supreme Court of Louisiana. March 31, 1902.)

PUBLIC LANDS — TITLE FROM TERRITORY — CONFIRMATION BY CONGRESS — PATENT — TAXATION — TAX DEED — PRESCRIPTION.

1. The confirmation by the old board of commissioners for the Western district of the territory of Orleans, under the act of congress of 1807, of a claim to land based upon occupancy and settlement, followed by the confirmation by congress of the claim so confirmed, operated as effectually as a grant or quitclaim from the government. The ownership of the confirmee to the land was not held in abeyance until a patent issued. The patent was simply documentary recognitive evidence of the existence of the confirmed title. Property so confirmed became from the date of the confirmation subject to state taxation.

2. The mere failure of a tax collector to make in his deed recitals of fact which it would have been proper for him to have made does not render the tax sale to which it refers, ipso facto, an absolute nullity, and open, as such, to a collateral attack; nor does such fact destroy the good faith of the purchaser in taking possession of and holding the property as owner under it.

3. The existence of a defect in a tax sale, resulting from a defect in the assessment of the property, does not deprive the sale from being made the basis of the prescription of 10 years, where defect is a latent one, which purchaser was not called upon to ascertain or know.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Acadia; Conrad De Baillon, Judge.

Action by F. M. Jopling against T. C. Chacheré and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward L. Wells (Boatner, Dodds & Boatner, of counsel), for appellant. Gilbert L. Dupré, W. C. Perrault, and W. J. Sandoz, for appellees.

Statement of the Case.

NICHOLLS, C. J. The plaintiff's prayer in this action is that he be decreed to be the owner of the property which he describes in his petition. The defendants are Theodore C. Chacheré and John P. Boagni, who are alleged to be "trespassing upon said land, and claiming to own and be in possession of same by pretended titles, originating prior to the issuance of the patent from the United States, but not from Bennet Jopling, in whose name the patent issued, nor from his heirs or heir." He alleges that he is the owner of the land by purchase from James H. Houston, Jr., who purchased from the only surviving heir of Bennet Jopling, de-

ceased; that the United States on July 16, 1900, issued its patent confirming to Bennet Jopling and his heirs title to said land; that said land was acquired under and by virtue of an act of congress approved March 3, 1807, and predicated upon the treaties of the United States of America. He introduced in support of his title: First. An act dated the 22d day of June, 1900, executed by James H. Houston, declaring himself to be the agent and attorney in fact of James H. Houston, Jr., by which the latter, through said agent, sold to the plaintiff, for the price of \$500, without warranty (the purchaser taking the title as it was, with a tax title against it), all his rights, claims, title, and ownership in and to the land which plaintiff claims in this litigation. In this act it is recited that the land was the same land acquired by the vendor from J. W. Jopling by act passed before William J. Sandoz, notary public, on June 15, 1895, and duly recorded. Second. An act sous seing prive dated 18th of June, 1895, between James W. Jopling and James H. Houston, Jr., acknowledged on the same day before John H. Wells, clerk of the court of Hardin county, state of Kentucky, which act was declared on the 24th of June, 1895, by W. J. Sandoz, notary public, to have been produced before him, and the signature of James H. Houston, Jr., to said act, duly acknowledged to be his signature in the presence of the witnesses thereto. In this act James W. Jopling declares that he sells and conveys, with full warranty, to James H. Houston, Jr., all his rights and titles, interest and demands, in and to a certain tract of land situated in the parish of Acadia, state of Louisiana, containing 898.46 acres, more or less, Spanish grant No. 41, township 7 S., range 1 E. (see parish map, and a list of private land claims, where above-described property is well defined as belonging to Bennet Jopling). The price of the sale was \$50. Third. A patent from the United States, dated July 16, 1900, in favor of Bennet Jopling, his heirs and assigns. The patent recites that it was granted in accordance with the provisions of the act of congress of the 3d of March, 1807. It declares that there had been deposited in the general land office of the United States a patent certificate, numbered 1,490, issued by the register and receiver of the United States land office on the 25th of May, 1900, whereby it appeared that the private land claim of Bennet Jopling (being number 1,927, class B, in the report of the old board of commissioners for the Western district of the territory of Orleans) was confirmed by the said commissioners under the authority conferred upon them by the act of congress approved on the 3d of March, 1807, entitled "An act respecting claims to land in the territories of Orleans and Louisiana;" that the claim had been regularly surveyed and designated as section 49 in township 7 S., of range 1 W., and section 41 in township 7 S., of range 1 E. of the Louisiana

¹ Removed by writ of error to the United States supreme court.

meridian, in the Southwestern district of Louisiana, containing 870.06 acres, as appeared by a plat and descriptive notes on file in the general land office thereof, duly examined and approved by James Lewis, surveyor general for Louisiana, on the 9th day of May, 1900; that this plat and descriptive notes were inserted and made of the patent. The plat and descriptive notes referred to were signed, as recited, by James Lewis, surveyor general of Louisiana, on the 9th of May, 1900. Immediately following the plat the surveyor general recites that it represents the survey of the private land claim of Bennet Jopling, confirmed by the old board of commissioners for the Western district of Louisiana in pursuance of authority conferred upon them by the fourth section of the act of congress approved March 3, 1807, entitled "An act respecting claims to lands in the territories of Orleans and Louisiana," as appeared by their confirmation certificate, No. B1,927, dated March 11, 1812. After making this recital, the surveyor general says: "The following being a description of the survey, taken from the approved field notes of N. B. Phelps, deputy surveyor." He then gives the field notes of the survey. At the end of the document, under date of May 9, 1900, are the words "Examined and approved," followed by the signature of the surveyor general. Boagni answered, pleading first the general issue. He then averred that he had, by authentic act, recorded in the parish of Acadia on July 24, 1900, purchased from Victor C. Sitting, in good faith and for a valuable consideration, a tract of woodland situated in the parish of Acadia containing 500 acres, more or less, being part of section 41, township 7 S., range 1, confirmed to Bennet Jopling by certificate No. 1,927, bounded north by T. C. Chacheré, south by heirs of J. C. Brooks, east by Bayou Mallet, and west by E. Veltin and Wm. Johnson Spanish grant, acquired by his vendor at tax sale made September 30, 1871, recorded in St. Landry parish, and duly confirmed by the auditor of public accounts on the 19th of May, 1874; that since the purchase of this land, in 1871, his vendor had been in uninterrupted and continuous possession, and in good faith, of said tract, peaceably possessing the same; that he pleaded in bar of plaintiff's action the prescription of 3, 4, 5, 10, 20, and 30 years; that the sale to him was made with full warranty of title, and he was entitled to have his vendor cited in warranty to defend the title and he so prayed. In the event of eviction, he prayed for a judgment for the restitution of the price, and for the fruits and revenues he might be obliged to return to plaintiff, for costs, and for all damages which he might suffer by reason of plaintiff's action. Chacheré answered, pleading first the general issue. Further answering, he averred that on the 29th of May, 1882, he purchased in good faith, and for a valuable consideration, from Vic-

tor C. Sitting, by authentic act duly recorded in the parish of St. Landry, the property which he described, containing 435 acres, more or less (being part of the land purchased at tax sale made by D. C. Sitting, tax collector, in 1871; said land being in section 41, township 7 S., range 1 E.); that he had, in good faith, uninterrupted, peaceable, and actual possession of the same since the date of his purchase; that since the date of his purchase he had paid the taxes thereon, at the rate of \$30 per year; that he had inclosed the same by a fence worth \$750, and made improvements, which he recited; that he pleaded in bar of plaintiff's action the prescription of 3, 4, 5, 10, and 20 years. In the event he be not sustained in his defense, he prayed that, if there should be a decree divesting him of his property, before he be made to surrender the property plaintiff reimburse him the amount of taxes he had paid, and the full value of the improvements he had placed upon the property. Victor Sitting, called in warranty, answered the call in warranty on the 20th September, 1901. He pleaded the general issue. Further answering, he averred that he had on the 30th of September, 1871, at a tax sale made in accordance with law, bought certain property, which he described, at that time in the parish of St. Landry; that he took possession of the land immediately after purchasing the same, and continued in good faith and uninterruptedly and peaceably until May 29, 1882, when he sold one half of said land, for a valuable consideration, to Theodore C. Chacheré; that from that date he continued in possession of the other half in good faith, and uninterruptedly and peaceably, up to the time that he sold the same to John P. Boagni, on July 24, 1900; that his title was duly recorded in the parish of St. Landry, and the tax sale made to him by the tax collector was duly ratified by the state auditor, and his ratification duly recorded in St. Landry on June 13, 1874; that he had paid taxes on the property while in his possession of \$600. He pleaded in bar of plaintiff's action the prescription of 3, 4, 5, 10, and 20 years. In the event his title should be set aside, and his plea of prescription not sustained, he prayed in reconvention and alternatively for judgment against plaintiff for \$600, and that payment of same be made before plaintiff should be permitted to take possession. The district court rendered judgment decreeing that the claim of the plaintiff be rejected at his costs, that the plea of prescription set up by the defendants be sustained, and that they be quieted in their possession of the land described in plaintiff's petition. Plaintiff individually and as administrator of the succession of Bennet Jopling appealed.

Opinion.

The plaintiff urges that the defendants are trespassers upon the land, and this claim is based upon the theory that until July,

1900, at which date the United States government issued a patent in favor of Bennet Jopling, his heirs or assigns, the property in question was the property of the United States. We do not think there is any dispute between the parties as to the facts: That on the 12th of March, 1812, the board of commissioners appointed under section 4 of the act of congress approved March 8, 1807, confirmed to Bennet Jopling under certificate No. 1,927, by virtue of occupancy and settlement under Joseph Chevalier Polret, 913.98 acres of land in Bayou Mallet woods, in the county of Opelousas. That on April 29, 1816 (3 Stat. 328), congress, reciting the various acts bearing upon the subject (Act March 10, 1812; Act Feb. 27, 1813; and Act April 12, 1814), passed an act for the confirmation of certain land claims in the Western district of the state of Louisiana, and that under section 4 of that act it was enacted "that the claims marked 'B' described in the reports of the commissioners for the Western district of the state of Louisiana, formerly territory of Orleans, and recommended by them for confirmation, be and the same are hereby confirmed." That the claim of Bennet Jopling, covered by certificate No. 1,927 of the board of commissioners, was confirmed in favor of Jopling by that act of congress. That, although the claim was so confirmed by act of congress, no patent was issued for the land by the United States government until July, 1900. It is contended in behalf of the plaintiff that until this patent was issued the ownership of the land and the title thereto was in the government of the United States; that the resulting effect of this fact was that no rights of ownership to third parties could be based or predicated upon Jopling's having any ownership or title to this property prior to the issuance of the patent, nor could any obligations which Jopling may have come under either to individuals or the state strike this land, or be enforced upon it, until a patent for the same had issued. The defendants deny the correctness of this proposition. The defendants maintain that not only was the claim confirmed by act of congress, but the land was surveyed and officially located as far back as 1856, under a survey and field notes which had been submitted to and approved by the then surveyor general of the United States for the state of Louisiana. The plaintiff does not deny that, as a fact, this was the case, but he insists that the evidence in the record does not disclose the date of the survey of the claim made by Phelps, or of any approval of his survey and field notes by a surveyor general of the state, prior to James Lewis' approval, in 1900; and counsel maintain that even if such survey had been made, and approved by the surveyor general, the survey and approval were inoperative and of no virtue and effect until acted upon in the form of a patent.

The following points are made in the syllabus

of plaintiff's brief: (1) A patent is the highest evidence of the divestiture of title of the government, and one relying upon prescription accruing before the issuance of such patent must show a prior divestiture, or his plea cannot be maintained. *Laidlaw v. Landry*, 12 La. Ann. 151. (2) Until the patent issues, prescription does not run against the government and its grantees. *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534; *Burgess v. Gray*, 16 How. 48, 14 L. Ed. 839; *Oaksmith v. Johnson*, 92 U. S. 343, 23 L. Ed. 343; *Maguire v. Tyler*, 8 Wall. 650, 19 L. Ed. 320; *Sparks v. Pierce*, 115 U. S. 403, 6 Sup. Ct. 102, 29 L. Ed. 428; *Coon v. Wilson*, 113 U. S. 271, 5 Sup. Ct. 537, 28 L. Ed. 963; *Perkins v. Vincent*, 47 La. Ann. 579, 17 South. 126; *Redfield v. Parks*, 182 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327. (3) Private land claims in the territory of Louisiana, which had not ripened into complete grants before the cession, required survey, confirmation by the board of commissioners, the approval of the secretary of the treasury, confirmation by act of congress, and patent. Such survey should be made under the directions of the surveyor general, and be approved by him, in order to segregate private land from the public domain. *Perkins v. Vincent*, 47 La. Ann. 579, 17 South. 176; *Butler v. Watts*, 13 La. Ann. 390; *Laidlaw v. Landry*, 12 La. Ann. 151; *Scuddy v. Shaffer*, 10 La. Ann. 133; *Kittridge v. Hebert*, 9 La. Ann. 154; *Millaudon v. De Lalonde*, Id. 438; *Foley v. Harrison*, 5 La. Ann. 75; *Haydel v. Nixon*, Id. 558; *Lobdell v. Clark*, 4 La. Ann. 99; *Pontalba v. Copland*, 3 La. Ann. 86; *Gonsoulin's Heirs v. Brashear*, 5 Mart. (N. S.) 35; *Redfield v. Parks*, 182 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Burgess v. Gray*, 16 How. 48, 14 L. Ed. 839; *Mitchell v. U. S.*, 15 Pet. 75, 10 L. Ed. 658; *U. S. v. Forbes' Heirs*, 15 Pet. 184, 10 L. Ed. 701; *Buyck v. U. S.*, 15 Pet. 215, 10 L. Ed. 715; *U. S. v. Desespine*, 15 Pet. 319, 10 L. Ed. 753; *U. S. v. Miranda*, 16 Pet. 159, 10 L. Ed. 920; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. Ed. 606; *Hardy v. Harbin*, 4 Sawy. 536, Fed. Cas. No. 6,060; *Le Roy v. Carroll*, 3 Sawy. 66, Fed. Cas. No. 8,268; *Dent v. Emmeger*, 14 Wall. 308, 20 L. Ed. 838. (4) Where such incomplete grants have not been identified and determined to cover a definite location, or are subject to conflicting rights, the land is not liable to taxation. 25 Am. & Eng. Enc. Law, p. 111, and authorities there cited; *Colorado Co. v. Pueblo Co. Com'rs*, 95 U. S. 259, 24 L. Ed. 495. (5) A tax sale of property belonging to a person notoriously dead long years before the assessment is null. *Stafford's Case*, 33 La. Ann. 520. (6) A tax sale which neither recites the assessment, nor any of the formalities required by law, and unaided by proof aliunde as to its correctness, is absolutely null and void. *Rapp v. Lowry*, 30 La. Ann. 1275; *Lambert v. Craig*, 45 La. Ann. 1109, 13 South. 701.

Defendants' counsel submit to the court the following propositions and authorities:

The rights of a state to tax lands which have, or may have, belonged to the United States, do not depend on the actual issuance of a patent, but on the complete and perfect right of the claimant to demand one. *Saund. Tax'n*, p. 40; *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Railroad Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Railroad Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Simien v. Perrodin*, 35 La. Ann. 981; *McGill v. McGill*, 4 La. Ann. 262; 19 Am. & Eng. Enc. Law, pp. 332-334; *Geoley, Tax'n*, pp. 59, 60. It is at this stage (when the right to demand a patent has been vested in the purchaser or claimant) that the land ceases to be the property of the United States, and becomes that of the pre-emptor or claimant to such an extent that it is liable to taxation by the state in which it lies. 19 Am. & Eng. Enc. Law, footnotes p. 334. Where the rights to a patent have once become vested in a purchaser of public land, it is equal, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Barney v. Dolph*, 97 U. S. 632, 24 L. Ed. 1063; *Stark v. Starra*, 6 Wall. 402, 13 L. Ed. 925. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. *Moran v. Horsky*, 178 U. S. 212, 20 Sup. Ct. 659, 44 L. Ed. 1088. (Confirmation of grants by congress.) A legislative confirmation of a claim to land is a recognition of the validity of such a claim, and operates as effectually as a grant or quitclaim from the government. A patent issued thereunder adds nothing to the force of the confirmation. It is merely documentary evidence, having the dignity of a record of the existence of the confirmed title. *Langdeau v. Hanes*, 88 U. S. 521, 22 L. Ed. 606; *Morrow v. Whitney*, 95 U. S. 551, 24 L. Ed. 456; *Whitney v. Morrow*, 112 U. S. 693, 5 Sup. Ct. 833, 28 L. Ed. 871. If a survey of the land is required, the title becomes perfect as soon as made. *Langdeau v. Hanes*, 88 U. S. 531, 22 L. Ed. 606. The surveyor general in each state is required to cause to be surveyed all private land claims within his district after they have been confirmed by authority of congress. *Rev. St. U. S. § 2223*. A survey having been made in this case by Noah H. Phelps, United States deputy surveyor, the presumption is it was made in pursuance of the above requirement, and this presumption is conclusive until overcome by proof to the contrary. 19 Am. &

Eng. Enc. Law (1st Ed.) p. 49; *Steph. Dig. Civ. art. 101*, and authorities quoted in the brief; *Martin v. Dickson*, 35 La. Ann. 1038; *Delassus v. U. S.*, 9 Pet. 118, 9 L. Ed. 71.

In passing upon the questions raised in this case, it will be seen at once that there is no issue between the parties based upon a claim that loss or injury has been occasioned by the Jopling claim having been left, after its confirmation by the board, and the action by congress upon the confirmation, in an uncertain condition as to its location. No conflict of interests has arisen between different parties by reason of the nonissuance of a patent. All parties admit that Bennet Jopling was entitled to the confirmation of his claim both from the board of commissioners and from congress, and none of the parties contest, but all admit, that the location of the claim, as shown by the survey and field notes attached to, and made the basis of, the patent, is correct. Defendants admit the original ownership of Bennet Jopling of this land. Neither the United States government, nor any one claiming under it adversely to the Jopling confirmation in regard to the land now in controversy, is before the court. It is not claimed that there ever has been any adverse claim to it as a whole, though there was at one time a conflict as to a part of the land, other than that involved herein between the Jopling claim and that of one or two other claimants. The conflict did not extend to any portion of the land now in litigation. The board of commissioners was not called upon, in dealing with Bennet Jopling's claims, to act upon a mere "floating" right held by Bennet Jopling, entitling him generally to locate land,—such a right, for instance, as he would have had had he been the owner of land scrip entitling him to locate so many given acres of land as he might afterwards select at his pleasure, or by agreement between himself and the board of commissioners. What they had presented them was a right or privilege claimed to be already existing upon certain specific property in favor of Bennet Jopling, and under and by reason of the original occupancy and settlement thereon of Joseph Chevalier Poiret, continued, we presume, by Jopling, as Poiret's assignee. The evidence which Jopling introduced before the board in support of his claims is not before us, but unquestionably there was proof before it justifying its confirmation. The certificate which was issued in this matter by the board of commissioners was in form as follows:

No.	Date.	Name of Person under Whom Land was Claimed.	In Whose Favor Issued.	Nature of Claim.	Situation of Land.	Number of Acres & Hundredths.	Acres & Hundredths in Front.
B 1927	March 11.	Joseph Chevalier Poiret.	Bennet Jopling.	Occupancy, 10 years.	County, Opelousas. Water Course, Mallet's Woods.	918 96-100	1,000

It is evident that Polret was shown to the board to have already occupied and settled a particular body of land for the time stated, and to have already had an existing right or privilege to a particular tract. The identity of the tract confirmed must have been fixed by evidence before the board, and the survey which followed was unquestionably based upon that evidence, preserved and made known to the surveyor. The Jopling claim under Polret was not based upon the survey, but the survey was based upon the existing claim, and simply identified the land to which Polret and Jopling were entitled by antecedent occupancy and settlement. The rights of Polret and Jopling did not originate in the action of the board of commissioners and that of congress. Their action was simply recognitive and declaratory, as the word "confirmed," used in connection with it, plainly shows. The government practically and substantially never claimed this land as belonging to it, and as forming part of the public domain. The confirmation was in the nature of a quit-claim or relinquishment by the government of any right or interest in the land claimed. The title of Polret, and of Jopling under him, was a title other and different from one which would have been held by either under a conditional sale to them of a part of the public domain under a homestead or similar right, where the title was to remain in the government until everything had been done by the vendee or transferee which the government exacted from him as a condition of obtaining ownership. In such cases the patent, and the right of ownership of the land described in it, were merged in each other,—became, as it were, one and the same; but in the case of a confirmed title there was no such merger. The right which was confirmed continued throughout separate and distinct, and antedating completely the patent, which evidenced not the right, but authentic evidence of the recognition of the right by the government. Neither Jopling nor his heirs could disconnect themselves, so far as they were concerned, from their claim of ownership of this land, under Polret's rights, in order, for their private purposes, to refer the origin of their right of ownership to the patent which the government issued, recognizing their right *ab initio*. The plaintiff here is contesting the already acquired rights of their own asserted author. Jopling and his heirs became the absolute owners of the land which was occupied and settled by Polret prior to the confirmation, against the government itself, and every one under it, from the date of confirmation by congress. In case any contest should arise prior to the issuing of the patent, the matter would have to be determined by the introduction, simply, of evidence. The confirmer could call for a government survey, if one had not already been made, and sustain his rights under the confirmation upon such survey independently of a patent. If, however, a survey of the

claim was necessary in order to complete the transfer of ownership of this property to Jopling, we are satisfied that a survey of the same was made and approved by the surveyor general, W. J. McCulloh, as far back as 1856. The present surveyor general of Louisiana refers to the survey and field notes of Phelps as having been approved, but not as a matter of original approval by himself, as the plaintiff seems to contend. In the act of sale of this land under which the plaintiff claims, from James W. Jopling to James H. Houston, Jr., the land transferred is referred to as a "Spanish grant" with the added words, "See parish map, and a list of private land claims where the above-described property is well defined as belonging to Bennet Jopling." We have before us a copy of the parish map here referred to, with the different private claims (among others, that of Bennet Jopling) distinctly set out, and the surveys on which they were located minutely detailed, certified to as far back as 1850 by the surveyor general. It may be that it is not strictly and technically in evidence, but it is before us by reference in one of the acts; and, were we not to act upon it, the only effect would be to remand uselessly the case in order to have it formally introduced. This sale of the property from James W. Jopling to Samuel H. Houston, Jr., was made on the 18th of May, 1895, antedating by several years the issuing of the patent which the plaintiff now insists was essentially necessary to convey title either to Bennet Jopling or his heirs. Plaintiff claims by purchase. If James W. Jopling had any rights in this property, they were not original, but derivative, rights,—derived through and under the confirmation of Bennet Jopling. We are of the opinion that the property in question became the property of Bennet Jopling from the moment his claim was confirmed by act of congress, and became subject from that time, in his favor, to full rights of ownership, and that it became subject also from that time to all the obligations which are incidental to property held in private ownership by individuals,—among other obligations, to that of state taxation.

We are informed by the record that the property was sold in 1871 to Victor Sitting in enforcement of state taxes assessed upon it in the name of Bennet Jopling, and that the sale made was confirmed by the state auditor in 1874, and that that act of confirmation was placed of record at that time in the parish of St. Landry; that the tax purchaser, Sitting, and his vendees, Chacheré and Boagni, have had actual, corporeal possession of the property ever since 1871,—the defendant Chacheré holding title to a portion of the property by purchase on the 29th of May, 1882, and the defendant Boagni to the balance of the property by purchase on the 24th of July, 1900. The defendants have set up their respective titles, and pleaded in bar of plaintiffs' action the prescription of 3, 4, 5, 10, and 20 years.

The plaintiff urges that a tax sale of property which belonged to a person notoriously dead long years before the assessment is null, and in support of this contention he cites *Stafford Case*, 33 La. Ann. 520, and, further, that a tax deed which neither recites the assessment, nor any of the formalities required by law, and unaided by proof *alunde* as to its correctness, is absolutely null; and in support of this proposition he cites *Rapp v. Lowry*, 30 La. Ann. 1275, and *Lambert v. Craig*, 45 La. Ann. 1109, 13 South. 701. The plaintiff did not attack by direct action the tax sale made of this property in 1871, under which the defendants have held actual, corporeal possession since that time. He ignored that sale altogether, and brought a petitory action for the property. He filed no pleadings after the defendants had set up the tax sale of 1874 as the original source of their title, nor did he introduce evidence to break the force and effect of a tax deed. The fact of Bennet Jopling's death was accidentally brought out as having occurred many years ago, in connection with the administration of his succession and his title to the property. The plaintiff testified that he himself was 53 years of age; that he knew nothing of Bennet Jopling, except by reputation; that he died long before the witness could remember. The plaintiff, upon a collateral attack which he makes upon a tax sale nearly 30 years after it took place, relies upon its being held to be absolutely null and void by reason of the insufficiency of the recitals of the tax deed in respect to the observance of the legal formalities preceding the sale. Plaintiff is correct in his statement that upon a number of occasions we have declared that an assessment made in the name of a dead person is improperly made, and carries with it the nullity of a tax sale based upon it; but that rule has its limitations, and we do not think it can or should be applied in this case. It is a latent defect, which the tax purchaser is not bound to ascertain or know. It is not one whose actual existence cuts him off from invoking good faith as a basis for the prescription of 10 years' *acquirendi causa*. We have just held that the property in question was in Bennet Jopling from the time of its confirmation by congress, if not before; that from that time it became subject to state taxation. All property in the state, independently of the question as to who is the owner of the particular property, is subjected to taxation and to expropriation for the purpose of carrying on the state government, though the state recognizes the individual rights of parties in property, and has sought to prevent their divestiture in various ways. It has enacted laws by which an assessment of property for purposes of taxation should be made annually, commencing and closing at a certain fixed date. It has fixed the date of the delinquency of taxes, and the time and place of tax sales. It has sought to give notice to parties interested in particular property by

placing the names of such parties in connection therewith, as far as they could be ascertained, upon the assessment rolls, and in the proceedings connected with the tax sales, but it has cast upon owners the affirmative duty and obligation of making themselves known by furnishing assessment estimates of their property to the state officials. Now, neither Bennet Jopling, nor any one claiming rights upon this property, has ever, so far as the record shows, paid a dollar of taxes upon it, made any returns for assessment purposes, or advanced any right or claim of ownership to it, since the confirmation of title. Bennet Jopling, we are informed by the record, was a soldier in the Revolutionary war, and necessarily died many years ago. He and his heirs entirely disappeared. Their residence—even their existence—was unknown. But it did not follow from this fact that the property in Louisiana was not subject to assessment for, and liability to sale for, taxes. The law expressly provides for the assessment and sale of property of unknown owners, and the assessment and sale of this property as property of an unknown owner would have passed the title. The parties concerned would, under such circumstances, have received, by mere description of the property itself, no warning whatever of their interest in the subject-matter. They certainly have no real or equitable reason to complain that the name of the original owner, as shown by the record, should have been made to appear in the proceedings. If the assessment and sale of the property as belonging to an unknown owner would have conveyed the title, plaintiff cannot urge now, adversely to the proceedings, the placing therein of the name of the original owner,—a fact calculated to call the special and direct attention of the Jopling family to the matter. We think the case is covered by that of *Webre v. Litcher*, 45 La. Ann. 574, 12 South. 834, and *Michel v. Stream*, 48 La. Ann. 341, 19 South. 215. Plaintiff is seeking to enforce a neglected and apparently an abandoned right to the ownership and possession of property to the prejudice of parties who have been in possession of it nearly long enough to have acquired ownership of the same without any title whatever. These particular parties, however, hold in good faith under titles derived originally through official proceedings taken out by state officers in the enforcement of the state's rights. They are not trespassers, as the plaintiff alleged them to be, nor were they originally trespassers. The mere conclusion of law to that effect announced by the plaintiff is backed by no fact. The mere failure of the tax collector in his deed to make recitals of fact which it would have been proper for him to have made does not render, *ipso facto*, the tax sale to which it refers absolutely null and void, nor destroy the good faith of the purchaser at the tax sale in taking possession of and holding the property as owner under it. *Welsch v. Augusti*, 52 La. Ann. 1955, 28 South. 363. The

failure of proper recitals in a tax deed may bring about very serious trouble, under some conditions and circumstances; but it does not carry, under the circumstances of this case, the legal results which the plaintiff contends for. In *Michel v. Stream* this court said: "It will be seen that the Code recognizes the existence of an abandonment, as it were, of even the right of constructive or civil possession resulting from ownership, not necessarily working an abandonment of ownership, but possibly modifying and affecting very materially the rights of the owner, though ownership may be retained, and the possession resumed. This condition of affairs if rights or claims of third parties under color of title should have intervened may be attended with serious, sometimes insurmountable, difficulties. So long as the owner of property holds it in actual possession, he occupies a position of great advantage, as against adverse claims advanced against him. As he loses his grasp upon the possession he surrenders this vantage ground, and when, in order to retake his own, he should be forced to have recourse to judicial proceedings, he may find himself successfully met by pretensions which originally would have been held utterly without foundation or merit. Prescription *acquirendi causa* or *liberendi causa* may cut off the enforcement of his rights." This is precisely what has happened here. The plaintiff occupies, quoad the state and the parties holding under the state's title, the status of an unknown owner, reappearing to assert neglected, abandoned rights to the prejudice of parties holding titles acquired from the state in good faith, and holding actual possession under them for nearly 30 years. Plaintiff's claim is without equity. He cannot oust the defendants from property which they have bought, paid for, and improved while he has stood in the background until values have risen to which he has contributed nothing. *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719; *Foxcroft v. Mallett*, 45 U. S. 368, 11 L. Ed. 1008; *Moran v. Horsky*, 178 U. S. 208, 20 Sup. Ct. 856, 44 L. Ed. 1038.

We think the judgment is correct, and it is hereby affirmed.

MONROE, J. I concur in the decree.

RICHARDSON v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

MURDER—SELF-DEFENSE—EVIDENCE.

1. In a prosecution for murder, evidence that a few days before the killing defendant threatened to kill deceased is admissible as tending to show malice.

2. Defendant was sleeping in a one-room house, the only opening in which was a door propped shut with a stick, and was aroused by deceased's breaking open the door and saying that he would kill defendant or defendant would kill him. Deceased then started towards defendant with an open knife, when defendant shot him. The evidence was con-

ficting as to whether the house was owned by defendant only or by him and deceased together, and as to whether defendant had previously threatened deceased's life. There was evidence of the good character of defendant and the bad character of deceased for peace and quiet. *Held*, that the question of whether or not defendant acted in self-defense was for the jury.

3. The evidence required the submission of the question of defendant's guilt.

Appeal from circuit court, Lee county; A. A. Evans, Judge.

Ulus Richardson was convicted of murder, and appeals. Affirmed.

On the trial of the cause there was no conflict in the evidence as to how the killing occurred, and the facts as shown by the bill of exceptions were as follows: "The defendant and one Bishop Drake, the only eyewitness to the difficulty, were sleeping in a one-room log cabin, the only opening to which was the door. There were no windows, and the only mode of ingress and egress was the door. The door was fastened by a stick being propped against the door and one end against the floor. About sunup the defendant and Bishop Drake, who was sleeping with the defendant, were aroused by some one breaking in the door, which was the deceased. The deceased forced an entrance into the room by breaking the stick which propped the door. The deceased entered with a knife open in his hand, and said to the defendant, 'What did you let them white men have my chairs for?' to which the defendant replied, 'Because you left them with me to give them if you didn't pay them the debt.' The deceased then said to the defendant, 'Yes, and now, God damn you, I am going to kill you this morning, or you have got to kill me.' The defendant said, 'Stand back, Henry; stand back, Henry,' at the same time grabbing his gun, which was on a shelf over the head of the bed. The deceased made a motion as to cut the defendant with his knife, when the defendant shot, hitting the deceased in the throat and on the chin, from which wound he died about two days later. As soon as the defendant shot, he jumped out of bed, and ran down to Sasser's house, about a quarter of a mile off, pursued by the deceased with a stick in his hands. The state introduced evidence that the defendant threatened to kill deceased on Monday night before the difficulty, at about 8 o'clock, to which evidence the defendant duly excepted, and moved the court to exclude the same. The court overruled said objection and motion, to which action on the part of the court the defendant then and there duly excepted. The defendant introduced evidence that he had made no threats against the deceased previous to the difficulty. The state introduced evidence to show that the house was both the house of the deceased and the defendant. The defendant introduced evidence to show that the house was his, and that the deceased had nothing to do with it, but only stayed there

sometimes at the request of the defendant. The defendant introduced evidence of his good character and the bad character of the deceased for peace and quiet. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) I charge you, gentlemen of the jury, that if you believe from the evidence that Henry Saint George broke into the house of Ullus Richardson, and assaulted him with an open knife, the defendant was under no duty to retreat, but had the right to defend himself to the extent of killing his assailant. (2) If the jury believe the evidence in this case, they cannot find the defendant guilty of murder in the second degree. (3) If the jury believe the evidence in this case, they will find the defendant not guilty."

Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. Evidence that on the Monday before the killing defendant threatened to kill the deceased was admissible as tending to show that defendant bore malice towards the deceased, and was actuated by malice in shooting him. Whether in shooting the deceased defendant was acting justifiably in self-defense was, under the whole evidence, a question for the jury, depending in part on whether he was impelled to shoot by a belief, reasonably engendered by the circumstances, that it was necessary to do so in order to save himself from a then impending danger of great bodily harm. This inquiry was improperly ignored by the first charge refused to defendant. The evidence was such as to require the question of whether defendant was guilty of murder to be submitted to the jury, and therefore charges 2 and 3 were properly refused. Other than these the bill of exceptions presents no questions for review, and no error is found in the record proper.

Judgment affirmed.

THOMAS v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

CRIMINAL LAW—JURORS—QUALIFICATIONS—RELATIONSHIP—INSTRUCTIONS—OMISSION OF WORDS—CONSPIRACY—EVIDENCE—DECLARATIONS.

1. Under Code, § 5016, declaring that a juror may be challenged for cause if he is related within certain degrees to "the defendant, or with the prosecutor, or the person alleged to be injured," a juror who was not related to defendant, but was related to a person awaiting trial under a separate indictment for complicity in the same murder, was subject to challenge for cause.

2. An instruction that if the jury "have a reasonable doubt as to the conclusions of the proof on any single fact, which it is necessary for the state to prove, they must acquit the defendant," was properly refused, not being clear.

3. It is not error to refuse an instruction from which a word is omitted, rendering it incomplete.

4. A requested instruction that "the proof of suspicious facts against the accused does not even require him to rebut it, and the jury cannot convict on suspicious facts merely," was erroneous in assuming proof of suspicious facts, and in ignoring the other evidence.

5. After the state introduced evidence tending to show a conspiracy between defendant and others to capture and kill deceased, it was not error to allow evidence of what was said and done by the defendant and such others after the capture of deceased.

Appeal from circuit court, Elmore county; N. D. Denson, Judge.

John Thomas was convicted of murder of one White, and appeals. Affirmed.

There was evidence introduced by the state tending to show that a conspiracy existed between the defendant and several other persons for the capture and lynching of said White. After the introduction of such evidence, the state asked several different witnesses to tell what was said and done by the defendant and the others after the capture of said White, and before he was hung. The defendant separately objected to each of these questions upon the ground that such evidence was incompetent, illegal, and immaterial. The court overruled each of the objections, and the defendant duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(19) If the jury have a reasonable doubt as to the conclusions of the proof on any single fact, which it is necessary for the state to prove, they must acquit the defendant." "(16) A reasonable is a doubt which naturally arises in the mind in considering the evidence." "(18) The proof of suspicious facts against the accused does not even require him to rebut it, and the jury cannot convict on suspicious facts merely."

W. M. Lackey, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant and one Tom Murphy were jointly indicted at a special term of the circuit court of Elmore county for the murder of Robert White, alias Robin White, by hanging him by the neck with a rope. The defendant Murphy was not arrested, and on motion of the solicitor a severance was ordered by the court, and the defendant Thomas was tried alone. The bill of exceptions recites as follows: "Thereupon it was, before the examination of any of the jurors on their voir dire, conceded by the defendant that the following named persons, to wit, Lem Strength, John Strength, Will Still, Martin Fuller, Dave Parker, Jim Pugh, Ben Martin, Jr., Tom Duncan, and Tom Dorrough, were indicted at this special term of the court for the murder of Robert White, alias Robin White, at the same time and place that the defendant Thomas is indicted for, and that said parties are not indicted in

the same indictment with defendant, but under different indictments, and that said indictments are pending in the court, and that Ben Martin, Jr., and Will Still are in custody awaiting trial at this time of this term on said indictments against them." In selecting the jury for the trial the name of W. F. Adkins was drawn as a juror, and upon examination on his voir dire it was shown that he was a second cousin to the wife of Ben Martin, Jr., who was then in custody awaiting trial under an indictment for the same offense. Against the objection of the defendant, the court allowed the state to challenge said juror for cause, to which ruling the defendant excepted. Likewise the name of W. Britt was drawn as a juror, who, on examination on his voir dire, was shown to be a second cousin to Will Still, who was then in custody awaiting trial under indictment on the same charge. Against the objection of the defendant, the court allowed the state to challenge this juror for cause, and to which ruling the defendant excepted. It is contended by counsel for the appellant that the relationship here is not named in the statute (Code 1898, § 5016) as a ground of challenge for cause. It is not questioned but that the degree of the kinship is within that specified in subdivision 4 of section 5016, but it is urged that the relationship of the juror is not with any one of the persons named in the statute, and therefore cannot be a ground of challenge for cause; the insistence being that, as the statute specifies certain persons whose relationship to the juror disqualifies and furnishes ground for challenge, it must be construed as forbidding as ground of challenge for cause the relationship of the juror to any other person. If the statute calls for such a construction, then it would follow that in the case of a joint indictment against two or more for the same offense, where a severance is demanded, which is a matter of right (Code, § 5273), the defendant on trial alone might have the father or brother of the other person jointly indicted with him and awaiting trial to sit as a juror in his case. It requires no argument to demonstrate that such a juror, in the very nature of things, would not be exempt from influences that would render him incompetent to act as a fair and impartial judge. Again, if the construction asked for be the proper one, the logic of the reasoning would confine the grounds of challenge of the juror for cause to those mentioned in the statute, since the reasoning proceeds upon the idea that the specifying of certain things in the statute is the exclusion of everything not mentioned; or, as it is put in argument, the mention of particular persons is to the exclusion of persons not mentioned. The decisions of this court are opposed to the views urged in argument by counsel for appellant. In *State v. Marshall*, 8 Ala. 302, it was decided that the enumeration in the statute of causes for challenge was not in exclusion of all others. The purpose of the stat-

ute is to secure a fair trial between the state and the defendant by an honest, impartial, and intelligent jury. It was never contemplated by the lawmakers that the enumeration of causes for challenge should operate to deny to either the state or the defendant the very thing that it was the purpose of the statute to secure,—a fair trial by an honest, impartial, and intelligent jury. The principle laid down in *Marshall's Case* supra, has since been reasserted and adhered to in the following cases: *Smith v. State*, 55 Ala. 1; *Brazleton v. State*, 66 Ala. 96; *Griffin v. State*, 96 Ala. 593, 8 South. 670; *Cart v. State*, 104 Ala. 4, 16 South. 150; *Id.*, 104 Ala. 43, 16 South. 155; *Wickard v. State*, 109 Ala. 45, 19 South. 491. In *Brazleton's Case*, supra, it was said: "Impartiality, freedom from bias or prejudice, capacity without fear, favor, or affection, a true deliverance to make between the accused and the state, the law demands as a qualification of a juror; and it is as essential as the impartiality of a judge. Relationship within certain degrees, whether of consanguinity or affinity, is an absolute disqualification. It is not only such relationship, but temporary relations formed in the course of business, or in the intercourse of life, which may disqualify, whenever they may import a just belief of a want of impartiality,—that a juror cannot stand indifferent, either from interest or from the favor springing out of the relation." In that case the juror was bail for the defendant, and it was held to be good ground of challenge for cause. Our conclusion is that the trial court in the case before us properly allowed the state to challenge the jurors for cause.

Charge No. 19 is involved, and far from being clear. It was calculated to confuse and mislead the jury, and for that reason the court committed no error in refusing it.

Charge 16 requested by the defendant is incomplete. Where a word or words are omitted from a charge, which render it incomplete, it is not incumbent on the court to supply such omission in order to give it sense and meaning. The statute requires charges, when requested in writing, to be given or refused as asked.

Charge 18, in assuming the proof of suspicious facts, and at the same time ignoring the other evidence in the case, was misleading in its tendency, and for this reason, if no other, was bad, and therefore properly refused.

There were exceptions reserved to other charges given and refused, but no comment is necessary, as it is conceded in argument by counsel for appellant that there is no merit in these exceptions.

After evidence introduced, from which the jury might reasonably infer the existence of a conspiracy, the declarations and conduct of a conspirator in furtherance of the common purpose are admissible in evidence against a co-conspirator. *Hunter v. State*, 112 Ala. 77, 21 South. 65; *Johnson v. State*, 87 Ala. 39,

6 South. 400; *McAnally v. State*, 74 Ala. 9. There is no merit in the exceptions reserved to the rulings of the court on the evidence.

We find no error in the record, and judgment must be affirmed.

MAYOR, ETC., OF TALLADEGA v. FITZPATRICK.

(Supreme Court of Alabama. June 4, 1902.)
MUNICIPAL CORPORATIONS—ORDINANCE—CONFLICT WITH STATUTE—REASONABLENESS—COMPLAINT—SURPLUSAGE.

1. Acts 1900-1901, p. 1557, §§ 5, 18, give the mayor and aldermen of Talladega power to pass by-laws and ordinances for the good government and order of the city, not inconsistent with the laws of the state. Code, § 4654, provides that any person who willfully disturbs a religious assembly must, on conviction, be fined. *Held*, that an ordinance in the same language as the statute, except that the word "willfully" was omitted, was not in conflict with it.

2. The ordinance was not unreasonable, as an act innocently done by mistake or accident, the natural consequence of which was not to interrupt or disturb the assembly, would not be punishable.

3. The fact that the complaint on an appeal from the mayor's court from a conviction and fine under a city ordinance claimed the amount of the fine imposed did not render the complaint bad, as such matter was mere surplusage.

Appeal from city court of Talladega; G. K. Miller, Judge.

Prosecution under a city ordinance by the mayor and aldermen of Talladega against Wiley Fitzpatrick. From a judgment sustaining demurrers to the complaint, the city appeals. Reversed.

W. T. Edwards and J. W. Vandiver, for appellant. Whitson & Graham, for appellee.

HARALSON, J. The ordinance of the city under which the defendant was arrested, tried and convicted, reads: "Any person who interrupts or disturbs any congregation or assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act at or near such place of worship, must on conviction be fined not less than one, nor more than one hundred dollars." This is a transcript of the statute on the subject making it an offense against the state to disturb religious worship, except as to the penalty imposed and that the word "willfully" is omitted in the ordinance before the word "interrupts."

The affidavit on which defendant was arrested, and the complaint in the city court, on appeal by the defendant from his conviction by the mayor, charged the offense in the language of the ordinance,—“that said defendant, on, to wit, the 28th day of July, 1901, did interrupt or disturb a congregation or assemblage of people, met for religious worship in the city of Talladega, at the Peace Baptist Church in said city, by noise, profane discourse, rude or indecent behavior, in violation of said ordinance,” etc.

The defendant demurred to the complaint, on grounds, substantially, that this ordinance was in conflict with the statute of the state, defining the offense of disturbing an assemblage met for religious worship, in this, that the act of disturbance, under the ordinance, need not be willful or intentional, to constitute a violation thereof; that it was not averred, that the defendant did willfully interrupt or disturb the congregation, and that the ordinance was unreasonable, in that any act however innocently or unintentionally done, which interrupts or disturbs such a congregation, is a violation of the ordinance. The court sustained the demurrer, and the city appeals.

The charter of the city bestows on the mayor and aldermen the power to preserve the peace and good order of the city (section 5); and to make and adopt by-laws and ordinances, upon whatever subject, not inconsistent with the laws of the state, for the good government and order of the city, and such as shall be needful for the government, police interest, welfare and good order of the city (section 18). Acts 1900-1901, p. 1557.

It was competent for the general assembly to delegate such power to the municipality, which, when enacted into an ordinance, had the force, as to persons bound thereby, of a statute passed by the legislature itself. *Moses v. Mayor, etc.*, 52 Ala. 207. The power to enact such ordinances was bestowed, not to punish for an offense against the public justice of the state, but to provide a police regulation for the enforcement of good order and quiet within the limits of the corporation. It was altogether immaterial, in bestowing this power on the city, whether the state had created this offense against its own laws or not. The offense against the corporation and the state are distinguishable, the one intended for the peace and good order of the city, and the other, for the maintenance of good government and the dignity of the state. *Mayor, etc., v. Allaire*, 14 Ala. 400; *City Council of City of Montgomery v. Montgomery & W. P. R. Co.*, 81 Ala. 83. If no statute had ever been enacted by the state, to punish persons for disturbing religious worship, it would have been perfectly competent for the legislature to confer the power on the city to adopt such an ordinance as a police regulation. *City of Anniston v. Southern Ry. Co.*, 112 Ala. 558, 20 South. 915; *Holt v. City of Birmingham*, 111 Ala. 369, 19 South. 735.

At common law any disturbance of a lawful assembly of people met for religious purposes is indictable. 5 Am. & Eng. Enc. Law (1st Ed.) 721. The statute in this state on the subject does not abrogate the offense at common law. Mr. Bishop, treating the subject, defines disturbance "to be any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the con-

gregation in whole, or in part." 2 Bish. Cr. Law, § 300. The act must have been pursuant to design, and not done through mere accident or mistake. *Id.* § 308.

Our later adjudications, in construing the state statute on the subject (Code, § 4654), establish, "that a purpose and intent to disturb is not a necessary factor in the crime, but on the contrary, that any act, which is within the terms of the statute, the natural consequence of which is to disturb, and which is willfully done, and which in fact does disturb an assembly of people, met for religious worship, comes under the denunciation of the law, though the actor may have had no intent to disturb the assembly." *Salter v. State*, 99 Ala. 207, 18 South. 535, and authorities there cited.

When properly construed, therefore, it is seen, that the statute and ordinance of the city mean the same thing, in substance and legal effect.

The ordinance is not unreasonable. Under it no one could be convicted for any act innocently done by mistake or accident, the natural consequence of which was not to interrupt or disturb the assembly. What would be a disturbance under the ordinance, is a question for the jury, under proper instructions from the court.

That part of the complaint which claims \$75, the amount of the fine imposed on the defendant by the mayor, was unnecessary and mere surplusage. It might have been stricken, but did not render the complaint demurrable.

Reversed and remanded.

KICKER v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

GAMING—EVIDENCE.

Where it appeared that defendant bet at a game played with cards in a room on the second story of a two-story building, the lower story of which was occupied by the owner of the room as a store for retailing liquors, which room was reached by a stairway from the sidewalk in front of the store, without any opening into the store, a conviction for betting at a game of cards played at a "tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time sold, retailed, or given away," was properly directed.

Appeal from city court of Montgomery; Wm. H. Thomas, Judge.

J. A. Kicker, alias, etc., was convicted of betting at a game of cards played at a place where spirituous liquors were sold, retailed, or given away, and he appeals. **Affirmed.**

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they must

find the defendant not guilty. (2) If the jury have a reasonable doubt as to whether the game was played in a private bedroom, and that the game did not take place at either of the places denounced by the statute, then they must find the defendant not guilty. (3) If the jury have a reasonable doubt as to whether the defendant bet or played at a game with cards at a tavern, inn, storehouse for retailing spirituous liquors, etc., house or place where spirituous liquors were at the time sold, retailed, or given away, or in a public place, or some other public place, or at an outhouse where people resort, then they must find the defendant not guilty."

Ohas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant offered no evidence. The evidence introduced by the state was without conflict, and showed that the defendant in October, 1901, and before the finding of the indictment, in Montgomery county, bet money at a game played with cards; that the game was played in a room in the upper story of O'Rear's store, in the county and city of Montgomery; that the room used, and the one in which said game was played, was in a two-story building, the room being in the second story of said building; that in the room was a bed, with mattress on it, a table, and chairs; that in the first or ground floor of said building there was a storehouse for retailing spirituous, vinous, and malt liquors, which was occupied by said O'Rear as a store, and liquors were kept by said O'Rear in said store for sale; that to reach said room where said game was played there was a stairway that led from the sidewalk in front of said store to the second story of said building; that there was a wooden partition that separated the stairway from the store occupied by O'Rear, that extended from the stairs to the ceiling; that there was no opening between said stairway and the said store; that during the time the game was played, which continued the greater part of the day, the defendant, with several others, came into and went out of said room by the stairway that entered said building from the street; that there was no opening connecting the room where the game was played and the storeroom underneath occupied by O'Rear, but it was all the same building, and known as O'Rear's. On this undisputed evidence, and under the decisions by this court in the following cases: *Johnson v. State*, 19 Ala. 527; *Brown v. State*, 27 Ala. 47; *Huffman v. State*, 29 Ala. 40; *Id.*, 30 Ala. 532,—the court properly gave the general affirmative charge as requested in writing by the state, and committed no reversible error in refusing the charges requested by the defendant. There were no other exceptions reserved.

There is no error in the record, and the judgment will be affirmed.

GRIDER v. STATE.

(Supreme Court of Alabama. June 5, 1902.)
EMBEZZLEMENT—TRAVELING SALESMAN—EXPENSE ACCOUNT—FALSE CHARGES.

On a prosecution under Code, § 4659, relating to embezzlement by clerks, agents, etc., evidence that defendant, a traveling salesman under a contract whereby his employer was to pay his expenses, in his account rendered for expenses made a false charge for a meal, was insufficient, there being no evidence that the employer advanced the money, or that defendant collected money out of which it was paid.

Appeal from Macon county court; M. B. Abercrombie, Judge.

W. D. Grider was convicted of embezzlement, and appeals. Reversed.

Jinks & Blue, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. For a "clerk, agent, servant, or apprentice of any private person or persons," to be guilty of embezzlement under the statute, he must have fraudulently converted to his own use, or the use of another, money or property which came into his possession by virtue of his employment. Code, § 4659.

For a conviction of the offense, it has been held, it is essential that the prosecution establish the propositions, (1), that the accused was the clerk, agent, servant, or apprentice of a private person; (2), that the money or property came into his possession by virtue of his employment; (3), that he embezzled, or fraudulently converted to his own use, or fraudulently secreted it with intent to convert it to his own use. Pullam v. State, 78 Ala. 31, 58 Am. Rep. 21; Reeves v. State, 95 Ala. 41, 11 South. 158.

Waiving the question whether or not the defendant was the agent of the prosecutor, and the alleged errors of the court in the exclusion of evidence offered by defendant for the purpose of showing that he was not the employé or agent of the prosecutor, there is nothing in the evidence tending to show that defendant ever received from or for him any money which he could possibly convert or embezzle. The charge of embezzlement for which the state elected to prosecute was, that in the account which defendant rendered for his expenses incurred while in the service of the prosecutor, there is an item, of May 9, 1900, of 35 cents for one meal, paid to W. M. Bates, the contract being that prosecutor was to pay defendant's expenses while traveling. The proof relied on by the state to convict was, that this was a false charge, which it introduced evidence tending to show,—the defendant, on the other hand, introducing evidence tending to show that it was a correct charge. But, whether correct or not, one of two things remains true, first, if not correct, then no money was paid out for the meal and there could have been no misappropriation or conversion of it; and second, if the amount was actually paid as defendant deposes it

was, it was as yet his own money, since there is no evidence that the prosecutor ever advanced it, or any other sum to him with which to pay expenses, or that defendant collected for prosecutor funds out of which the amount was retained; and in either case, the crime of embezzlement of the amount was impossible. If the charge was false, made with the view of charging the prosecutor with that much more than defendant actually paid out by way of expenses, and to that extent to gain an advantage of prosecutor on final settlement for services rendered, of whatever offense, if any, the defendant may have been guilty, it could not have been of embezzlement in such a transaction.

The court, therefore, erred in not charging the jury as requested by defendant, that if they believed the evidence they must find for defendant.

Reversed and remanded.

CULLI v. HOUSE.

(Supreme Court of Alabama. June 8, 1902.)
EXECUTORS AND ADMINISTRATORS—SALES OF LAND—CONFIRMATION—FAILURE TO KEEP BID GOOD—MEMORANDUM OF SALE—NECESSITY—MISREPRESENTATIONS BY ADMINISTRATOR—ACTION FOR DAMAGES—COMPLAINT.

1. A public sale of land, under order of court, by an administrator, properly reported to the court under Code, § 2154, providing that the return of the officer making a judicial sale shall be the note of the contract within the meaning of section 2152, requiring contracts for the sale of lands to be evidenced by a written note, is sufficiently evidenced to constitute a valid sale, and the fact that the auctioneer makes no memorandum of the sale is immaterial.

2. An administrator's sale by order of court is a judicial sale, and therefore misrepresentations by the administrator are no defense to an action by him against a bidder for damages for failing to keep the bid good, as the rule of caveat emptor applies to judicial sales.

3. The want of confirmation of an administrator's sale of real estate, which, under the express provisions of Code, §§ 175, 177, cannot be confirmed till the purchase price is paid or secured, is not a defense to an action against a purchaser for damages for failing to keep his bid good.

Appeal from circuit court, Etowah county; J. A. Bilbro, Judge.

Action by P. E. Culli, as administrator of the estate of D. B. Horton, deceased, against J. M. House, for damages for failure to keep good a bill made at an administrator's sale. From a judgment for defendant, the plaintiff appeals. Reversed.

This action was brought by the appellant, P. E. Culli, as administrator of the estate of D. B. Horton, against the appellee, J. M. House. A demurrer was sustained to the original complaint, and thereupon the plaintiff filed an amendment to the complaint, which was in words and figures as follows: "The plaintiff, as such administrator, further claims of the defendant the sum of one hundred dollars as damages, with interest from

Sept. 8th, 1898, for that heretofore, to wit, plaintiff avers that he is the administrator of the estate of D. B. Horton, who died intestate and who was at the time of his death a resident citizen of Etowah county, Alabama, owning real and personal property in said county; that plaintiff, as such administrator, on or about June 3d, 1898, filed his petition in the probate court of said county, praying to sell said lands for the payment of debts of said estate; that on the hearing of said petition by said court the said lands of said estate were decreed to be sold at public outcry to the highest bidder; that said land should be sold for one-third cash and a credit of one and two years for the deferred payments, the purchaser to execute his two notes for $\frac{1}{2}$ each of said purchase price; that due and legal notice was given as required by law; that in pursuance of said decree and notice, and by authority of said court in him vested for said purpose, he exposed for sale said lands; that at said sale the defendant, J. M. House, did become the purchaser and highest bidder for a portion of said lands for the sum of one hundred and sixty-three dollars; that defendant, though knowing the terms of said sale, failed and refused and does fail and refuse to comply with the terms of his purchase, but has wholly failed to do so; that plaintiff reported said sale to said court, showing said failure of said defendant to so comply with his purchase; said court ordered and decreed that plaintiff again sell said land, which on due and legal notice was done on, to wit, Dec. 28d, 1900; that said last sale was reported to and confirmed by said court before commencement of this suit; that the highest bid received was \$105, and said last sale was on same terms as the first sale. Plaintiff avers that by reason of said resale plaintiff had to readvertise said lands, incurred additional court costs to the amount of \$10 in the probate court, lost the difference between the first sale and the second sale, and incurred attorney's fees, to wit, \$20, for said resale; hence which amounts plaintiff claims in this suit." The defendant pleaded the general issue and the following special pleas: "(2) Defendant, for further plea, says that the sale referred to by plaintiff was at public auction, and no memorandum was made by the auctioneer, his clerk or agent, showing the price at which the land was sold, the terms of sale, the name of the person on whose account the sale was made, and the name of the purchaser. (3) Defendant, for further answer to complaint of plaintiff, says that at the time said sale was made plaintiff represented to defendant that the land in question contained about one acre of ground, and defendant, relying on said representation, bid off said land at said sale. Defendant avers that said representation was wholly untrue, and that said lands contained less than one-half an acre, and for this reason defendant refused to take said land. (4)

Defendant, for further plea, says that the sale referred to in plaintiff's complaint was never confirmed by the probate court ordering the sale of said lands by plaintiff, and that for this reason he never became liable to plaintiff on account of the matter complained of. (5) Defendant, for further plea, says that at the time said sale was made of said lot to defendant plaintiff represented that there was on the lot being sold a house with four rooms on the same; that defendant, relying on said representation, bid off said lands at said sale; and defendant avers that said representation was wholly untrue, and that the house and grounds contained only two rooms. (6) Defendant, for further plea, says that at the time said sale was made of said lot to defendant plaintiff represented that there was a three-room house on said lot, and that defendant, relying on said representation, bid off said lands at said sale; and defendant avers that said representations were wholly untrue, and that the house on said lot contained only two rooms." To the second plea the plaintiff demurred upon the following grounds: "(1) Said plea is no answer to the complaint, because the complaint shows on its face that it is a legal sale; (2) because the sale shown in the face of the complaint is a judicial sale, and needs a confirmation before sale is completed." To the third, fifth, and sixth pleas, the plaintiff demurred upon the following grounds: "(1) Because the complaint shows on its face that it is a judicial sale, of which due notice was given, and it is no answer to said complaint, and that the amount sold was only one-half acre in place of one acre. (2) The defendant had no right to rely on statements of plaintiff. (3) The defendant has no right to refuse to comply with the terms of sale. (4) Said plea is no answer to the complaint, in that the complaint shows on its face to be a judicial sale." To the fourth plea the plaintiff demurred upon the following grounds: "(1) Because it is immaterial whether the sale was or was not confirmed by the probate court. (2) The complaint shows on its face that defendant failed to comply with his bid, yet complains because said sale was not confirmed. (3) The sale not being confirmed is no answer to the complaint. (4) Said plea is no answer to the complaint, which shows on its face a judicial sale, and a noncompliance of defendant, and therefore could not be confirmed." The demurrer to the second, third, fifth, and sixth pleas were, by the court, overruled, and the demurrers to the fourth plea were sustained. Upon the trial of the cause there was judgment in favor of the defendant, but under the opinion on the present appeal it is unnecessary to set out the facts of the case in detail. The plaintiff appeals, and assigns as error the rulings of the court upon the pleadings, and the several rulings upon the trial to which exceptions were reserved.

P. E. Culll, for appellant. Burnett, Hood & Murphree, for appellee.

MCOLLELLAN, C. J. Upon every pertinent consideration, and by all ruling authorities, the sale of the land to J. M. House made through Culll, as administrator, etc., by the probate court of Etowah county, under its decree to that end, was a judicial sale. The complaint showed that the sale was within the letter and spirit of section 2154, and that it had been reported to the court rendering the decree of sale, as therein contemplated. Plea 2, setting up that the sale was at public auction, and that no memorandum was made of it by the auctioneer, etc., was no answer to the complaint, and the demurrer to it should have been sustained. The sale being a judicial one, the maxim of caveat emptor applies, and the purchaser cannot defend an action at law for the purchase money because of misrepresentations of the administrator while acting as the agent of the court in making the sale. *Fore v. McKenzie*, 58 Ala. 115. Pleas 3, 5, and 6, therefore, presented no defense to this action. Plea 4 was also bad. It was not necessary for the sale to be confirmed to support an action under section 149 of the Code. The default of the purchaser rendered a confirmation of the sale legally impossible. Code, §§ 175, 177. On another trial, with the pleas to which we have adverted eliminated from the case, and the evidence confined to proper issues, the plaintiff on adducing the evidence introduced by him on the first trial, will be entitled to the affirmative charge with hypothesis.

Reversed and remanded.

BROWN v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

BILL OF EXCEPTIONS—TIME FOR SIGNING—EXTENSION—RECORD.

1. Where the time for signing bills of exceptions in the criminal court of a county is limited to a certain number of days from trial, when not extended by order of court or written agreement of counsel an agreement for an extension, made after the time has expired, is of no avail.

2. A written agreement by counsel for an extension of the time for signing a bill of exceptions should be exhibited in the record.

Tyson, J., dissenting.

Appeal from criminal court, Jefferson county; Samuel E. Greene, Judge.

Floyd Brown was convicted of murder, and appeals. Affirmed.

The appellant was indicted, tried, and convicted for the murder of Joe Scott, and sentenced to be hung. Under the opinion on the present appeal it is unnecessary to set out any of the facts of the case. The following agreement, signed by the solicitor and the defendant's attorney, was incorporated in the bill of exceptions, and was dated July 20, 1901: "Whereas, the defendant in the above-stated

cause was convicted of murder in the first degree in said court on the 22d day of January, 1901; and whereas, within sixty days after said conviction, to wit, on the 24th day of February, 1901, defendant tendered his bill of exceptions to the presiding judge, Hon. Samuel E. Greene; and whereas, by reason of severe and protracted sickness in his family, the presiding judge was unable to examine and sign said bill of exceptions: Therefore the examination and signing of said bill of exceptions has been duly postponed from time to time by the consent of the solicitor and counsel for the defendant, and it is now agreed between them that said bill of exceptions may be now signed." The bill of exceptions was signed July 20, 1901.

Fred S. Ferguson, Sam Will John, and Bowman, Harsh & Beddow, for appellant. Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. The verdict in this case was rendered January 22, 1901, and that which is set out in the record as a bill of exceptions was signed on July 20, 1901. The time for signing bills of exceptions in the criminal court of Jefferson county is limited to 60 days from the trial when not extended by order of court or written agreement, as authorized by the Code. This transcript does not show there was any order of court making such extension, or that there was any written agreement on the subject, except an agreement to the signing between the solicitor and counsel for defendant, dated on the day the bill was signed. On the direct authority of *Tisdale v. Lumber Co.* (decided by this court at present term) 81 South. 729, it must be held that this agreement, not having been made till after the legally authorized time for signing had elapsed, was not effective to restore opportunity or authority for signing. Under the law as declared by many decisions of this court the signature of the judge does not authenticate a bill of exceptions so as to authorize its consideration by this court, unless the record shows affirmatively that the signing was done in respect of time in conformity with the statutes on that subject. *Dantzler v. Mill Co.*, 128 Ala. 410, 30 South. 674; *Railroad Co. v. Marcus*, 128 Ala. 355, 30 South. 679; *Sterrett v. Davie*, 129 Ala. 269, 29 South. 860, and cases therein cited. Such affirmative showing is not supplied by the recitation contained in the written agreement of counsel, which, after setting forth reasons for the postponement, recites further that "therefore the examination and signing of said bill of exceptions has been duly postponed from time to time by the consent of the solicitor and counsel for the defendant." This court must be enabled to judge from what was done, rather than from the opinion of counsel or of the trial judge, whether the time for signing was legally postponed; and therefore, if an order of court is relied on as effecting a postponement, it should be set

out in the transcript (Dantzer's Case, supra), and, for like necessity, written agreements intended to continue authority for signing should be exhibited in the record. For the reason stated, that which is incorporated in the record as a bill of exceptions cannot be considered as such. The record proper disclosing no error, the judgment must be affirmed.

TYSON, J., dissents from the conclusion that the written agreement did not authorize the signing of the bill of exceptions, adhering to his views expressed in *Tisdale v. Lumbar Co.* (at present term) 31 South. 729.

HALL et al. v. WESTERN ASSUR. CO.

(Supreme Court of Alabama. June 10, 1902.)

INSURANCE—SUBMISSION TO ARBITRATORS—QUALIFICATION OF ARBITRATORS—BURDEN OF PROOF—AGREEMENT TO ARBITRATE—EVIDENCE—FRAUD.

1. An agreement between the insured and insurer, under the policy, to submit differences as to amount and value of the property destroyed to competent and disinterested arbitrators "selected" by the parties, does not preclude an action on the policy where the arbitrator selected by the insurer was not disinterested, to the knowledge of the insurer.

2. In an action on a fire insurance policy containing an arbitration clause, based on the fact that the arbitrator appointed by defendant was not disinterested, the burden of proof is on the plaintiff to show disqualification.

3. Plaintiff agreed with defendant insurance company to submit all differences as to the property destroyed to a board of arbitration consisting of disinterested arbitrators appointed by the parties and an umpire selected by the arbitrators. The arbitrator appointed by defendant's agent was not a resident of the place where the destroyed property was located, but arrived there the day after his selection; was met by the agent appointing him and told to select as umpire M., who had frequently acted for insurance companies. He told the appraiser appointed by insured to take lots of time, as he was well paid by the insurance companies, and he sought to have insured's appraiser removed and another appointed, and his conduct was such that insured's appraiser refused to act with him. Defendant did not deny having often employed such arbitrator. *Held*, that the question of the disinterestedness of defendant's arbitrator was for the jury.

4. The question whether defendant knew of the disqualification of such arbitrator at the time of appointment and also whether plaintiff knew thereof should have been submitted to the jury, a concealment of such fact constituting fraud vitiating the agreement.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Action by Hall & Bro. against the Western Assurance Company. From a judgment in favor of the defendant, the plaintiffs appeal. Reversed.

This action was brought by the appellants, Hall & Bro., against the Western Assurance Company of Toronto, and counted in the statutory form upon a fire insurance policy, seeking to recover the loss, sustained by fire, of said articles included in the policy. The de-

fendant pleaded the general issue and several special pleas setting up a violation on the part of the plaintiffs of the arbitration clause contained in the policy of insurance, which provided for arbitration in the event of a disagreement between the insurer and insured as to the value of the property destroyed, in that after the plaintiffs and the defendant had agreed upon an arbitration, and had selected arbitrators who, in accordance with said arbitration clause, selected an umpire, the plaintiffs declined to proceed with the arbitration, and caused the arbitrator selected by them to refuse to take part in such arbitration. The arbitration clause referred to is set out in the report of this case on the former appeals, and is found in 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48, and 112 Ala. 318, 20 South. 447, and special reference is here made to the reports of the case as set forth in said appeals. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The court, at the request of the defendant, gave the general affirmative charge in its behalf, and to the giving of this charge the plaintiffs duly excepted. There were verdict and judgment for the defendant. The plaintiffs appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Cooper & Foster, for appellants. John London and R. W. Walker, for appellee.

TYSON, J. The two opinions in this case on former appeal settle the question of the binding efficacy of the "arbitration clause contained in the policy sued on." *Assurance Co. v. Hall*, 112 Ala. 318, 20 South. 447; *Id.*, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48. Pursuant to this provision of the policy, a written agreement for submission to two certain named appraisers, to estimate the loss upon specified items of property about which the parties disagreed, was entered into by them. Under this agreement the two appraisers were to select a third, who should act with them in matters of difference only; and their award was to be binding upon the parties. The policy in express terms prescribes the qualifications of the members of the board of arbitration. It requires each of them to be "competent and disinterested." It is of no consequence that one was to be "selected" by each of the parties. The naming of a person to act as appraiser by one of the parties was not a selection until the other had agreed to accept him. The purpose of the clause is to secure a fair and impartial tribunal to settle the differences submitted to them. In their selection it is not contemplated that they shall represent either party to the controversy or be a partisan in the cause of either, nor is an appraiser expected to sustain the views or to further the interest of the party who may have named him. And this is true not only with respect to es-

timating the amount of the loss, but also with reference to the selection of an umpire. They are to act in a quasi judicial capacity, and as a court selected by the parties free from all partiality and bias in favor of either party, so as to do equal justice between them. This tribunal, having been selected to act instead of the court and in the place of the court, must, like a court, be impartial and non-partisan. For the term "disinterested" does not mean simply lack of pecuniary interest, but requires the appraiser to be not biased or prejudiced." And if this provision of the policy was not carried out in this spirit, and for this purpose, neither party is precluded from going to the courts, notwithstanding the agreement to submit their differences to the board of appraisers. In other words, if it be true that the appraiser named by defendant, although his selection was agreed to by the plaintiffs, was not disinterested, and this was known to defendant but unknown to the plaintiffs at the time of entering into the agreement of submission, they are not bound by the agreement to arbitrate, and are at liberty to prosecute this suit. This would be a fraud upon the plaintiffs, and the agreement of submission to the appraiser is no defense to this suit. *Hickerson v. Insurance Co. (Tenn.)* 33 S. W. 1041, 32 L. R. A. 172; *Brock v. Insurance Co. (Mich.)* 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562; *Bradshaw v. Insurance Co. (N. Y.)* 32 N. E. 1055.

Pleas Nos. 3 and 5 as amended and 7 of the defendant practically and substantially presented this issue. It is true replications Nos. 2 and 3 to pleas 5 as amended and 7 also tendered this issue, but they were eliminated by demurrer, which ruling is assigned as error; but it is unnecessary to pass upon the correctness of it, since substantially the same issue of fact was tendered by the pleas. It is doubtless true that the burden of proof, under the issue made by these pleas, was upon the plaintiffs. The agreement to arbitrate having been executed for the purpose of carrying out the "arbitration clause" in the policy, in the absence of evidence tending to show that La Coste, the appraiser named by defendant, was not disinterested, it would be presumed that he possessed the qualifications required of him. It may be well to say here that these pleas present the vital issue in the case. It is true there were two other special pleas filed in the cause, upon which issue was taken, but there is not the slightest evidence to support either of them. The other plea, which was the general issue, only put the plaintiffs to proof of loss by fire of the property covered by the policy and the extent of the damage sustained, which they made.

The affirmative charge having been given at the request of the defendant, we must determine whether the evidence introduced was sufficient to authorize the submission to the jury of the question of La Coste's disqualification, and, if sufficient for that purpose,

whether it was sufficient to authorize a submission to the jury of the question of fraud in his selection. La Coste is shown not to have been a resident of Huntsville when the loss occurred, but of Birmingham. On the next day after his selection he appeared in Huntsville; was met at the hotel by Adams, the representative of the defendant who made the agreement for submission for it and named La Coste as an appraiser. He was then told by Adams that the first thing to be done is the appointment of an umpire, and that he must appoint Myers, who had frequently acted for insurance companies and was a good man for them. He secured the selection of Myers as umpire. After doing so he instituted a search for Myers and, failing to find him at his place of business, he went to his home, at night, where he spent more than an hour. He said to White, the other appraiser, "We don't want to be in too big a hurry about this thing, as I get ten dollars a day and my expenses out of these insurance companies." He made an effort to have White displaced and have some one from St. Louis or Chicago to take his place on the board. His conduct was such as to cause White to decline further to act with him. In a letter written by these plaintiffs to Adams, the fact is stated that La Coste had been repeatedly employed by the defendant and paid by it, which was never denied. Without attempting to draw any inferences from these facts, which are undisputed, it is clear to us that the disinterestedness vel non of La Coste was a question for the jury. So, too, we are of the opinion that whether the defendant knew of his disqualification and whether the plaintiffs also knew of it should, under the evidence, be submitted to the jury. For if the defendant knew of it and concealed that fact, and the plaintiffs had no knowledge of it, this would amount to a fraud, which would absolve the plaintiffs of all obligations under the agreement entered into by them to submit the differences between them and defendant to the board of which he was a member. Fraud may be perpetrated by the intentional concealment of a material fact as well as by the misrepresentation of a material fact, if relied on and ignorantly acted upon by the other party, to his injury, where a duty is upon the party possessing the knowledge to disclose the fact. *Vann Arsdale v. Howard*, 5 Ala. 596; *Gried v. Lemax*, 89 Ala. 420, 6 South. 741, and authorities there cited. When the defendant assumed to act under the terms of the arbitration clause in the policy, the obligation was upon it to name, as an appraiser to be selected, a "competent and disinterested" person. This duty it owed to the plaintiffs, and the plaintiffs had a right to rely upon its fulfillment of this obligation. If, instead of naming a qualified person, it named and secured the selection of La Coste, knowing that he was not disinterested, but would be a partisan in its behalf, and the plaintiffs were ignorant of these facts, this

would be a fraud which would vitiate the agreement.

Reversed and remanded.

CHARLESTON v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

CRIMINAL LAW — JURORS — CHALLENGE FOR CAUSE—INDICTMENT FOR SAME OFFENSE.

Under Cr. Code, § 5016, subd. 3, prescribing as a ground for challenge that the juror has been indicted within the last 12 months for an offense of the same character as that with which the defendant is charged, in a prosecution for murder, a challenge of a juror against whom is pending an indictment for assault with intent to murder preferred within the last 12 months is properly allowed.

Appeal from criminal court, Jefferson county; D. A. Greene, Judge.

Taylor Charleston was convicted of murder in the first degree, and he appeals. Affirmed.

Thos. G. Brown, Atty. Gen., for the State.

TYSON, J. The only exception reserved upon the trial was to the ruling of the court sustaining a challenge for cause by the state of a juror on the ground that there was pending in the trial court an indictment against him, preferred within the last 12 months, for an assault with intent to murder.

Subdivision 3 of section 5016 of the Criminal Code prescribes, as one of the grounds of challenge for cause of a juror, "that he has been indicted within the last twelve months for an offense of the same character as that with which the defendant is charged." This identical point was ruled upon in the case of *Orockett v. State*, 88 Ala. 387, and the challenge sustained. It was there said: "An assault with intent to commit murder is an offense of the same character as murder. They differ only in this: that in murder the purpose is accomplished. The will and the tendency of conduct are precisely the same in both cases. The identity of 'character' between the two offenses is as manifest as between an assault and a battery; and the question here is the same with that which would arise if one indicted for an assault had been challenged on the trial of one charged with a battery."

There is no error in the record, and the judgment must be affirmed.

ALABAMA G. S. R. CO. v. HALL.

(Supreme Court of Alabama. June 5, 1902.)

RAILROADS—NEGLIGENCE—DRIVING HORSE INTO TRESTLE—INSTRUCTIONS.

1. A complaint against a railroad company alleging that plaintiff claimed damages for that defendant negligently caused a horse of his to run into a trestle, whereby he was injured, is not demurrable as failing to aver or show

that defendant owed plaintiff any duty, or as being too vague in its averment of negligence.

2. In an action against a railroad for injuries to a horse, there was evidence that defendant's train was moving towards a trestle; that the horse was running along the track towards the trestle, in apparent fright of the train; that the track was on an embankment 5 or 6 feet high; that the train was from 30 to 50 yards behind the horse, and gaining on him; that the engineer was aware of the situation, but did not seasonably stop or check the train; that, had he done so, the horse would not have continued his flight onto and into the trestle, and the injury would have been averted. *Held* not error to refuse defendant's request for the general affirmative charge.

3. The court charged that, if it appeared that the animal was in such a state of fright that it would have fallen into the trestle anyway, plaintiff could not recover, "but, if that does not reasonably appear, then, when the animal got on the main line, if the engineer saw that it was headed towards the trestle, it became the duty of the engineer * * * to stop the train, and if the engineer failed to do so, and this train ran on, and the horse ran into the trestle, the plaintiff is entitled to a verdict, if the jury should also believe * * * that the failure * * * contributed to running the horse into the trestle." *Held* that, while the opening clause of the quoted portion tended to authorize a verdict for plaintiff upon the jury's not being reasonably satisfied that the horse would have gone into the trestle in any event, the last clause corrected the tendency.

4. In an action against a railroad for injuries to a horse, owing to his having been driven into a trestle by one of defendant's trains, a charge asserting that when the horse got on the main line, and the engineer saw it was headed towards the trestle, it became his duty to stop the train, was justified where the evidence was undisputed that the horse was frightened and running from the train along a considerable embankment, which led onto the trestle.

Appeal from circuit court, De Kalb county; J. A. Bilbro, Judge.

Action by C. L. Hall against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff claimed damages, under separate counts, for injury to a horse and a mule, but the court gave the general affirmative charge for the defendant as to the damages claimed for the mule. The count of the complaint claiming damages for the horse, and the substance of the demurrers to said count, are set out in the opinion. The recital in the judgment entry relative to the rulings upon the demurrer to this count of the complaint, which was the amended complaint, was as follows: "The defendant demurs to amended complaint, and, on consideration of the court, the demurrer is overruled." On the trial of the cause it was shown that the train which frightened the horse of the plaintiff was a local freight train going north. The evidence for the plaintiff tended to show the following facts: The train had backed onto a switch to get a car. The horse in question was on the side track, and ran along the side ahead of the train for a short distance—about 75 yards—to the main line. That when the horse was on the north side track the train was going

toward him, and was about 50 yards off. The horse then ran up the line to the trestle, ran on the trestle, and fell through it. The trestle was from 30 to 35 yards north of the point where the side track comes into the main line. The horse was frightened by the train, and ran along the track ahead of it until he fell into the trestle. The engineer did not blow the whistle or ring the bell of the engine. The engineer began checking the train before the engine got on the main line, but the engine and cars were moving when the horse fell in the trestle. When the train stopped, the engine was on the main line, and the tender and rest of the train were on the switch, and the engine was about 30 yards from the horse. The engine did not come in contact with the horse, and did not get nearer to him than about 30 yards. The engine was going faster than the horse, and was gaining on him. The fall of the horse was proven, and it was shown that he was worthless after the accident. The engineer on said train, as a witness in behalf of the defendant, testified that he saw the horse start down the side track towards the main line; that at that time the train was running at 5 to 6 miles an hour, and should have been stopped in from 15 to 30 feet; that the horse was about 200 feet in front of the engine, and the engine never got closer than 150 feet to him, and when he stopped the engine it had just gotten on the main line. It was shown that the main track was upon an embankment. The engineer testified that the embankment did not have precipitous sides, but was an ordinary embankment. A witness for the plaintiff testified that when the mule went down the embankment he partly slid down. The court, in its oral charge to the jury, instructed them as follows: "When the animals got on the main line, there are two matters for the jury to consider: First, were the animals in such a state of fright at that time that they would have fallen into the trestle anyway? If it reasonably appears that the animals would have continued in their flight and fallen into the trestle whether the train moved further or not, then the plaintiff cannot recover (but, if that does not reasonably appear, then, when the animals got on the main line, if the engineer saw that they were headed toward the trestle, it became the duty of the engineer, on perceiving the animals on the track, to take steps to stop the train; and if the engineer failed to do so, and this train ran on, and they ran into the trestle, the plaintiff is entitled to a verdict, if the jury should also believe from the evidence that the failure of the engineer to check his train contributed to running the horse into the trestle)." The defendant separately excepted to that portion of the charge copied above which is within the parentheses, and also separately excepted to the court's refusal to give the general affirmative charge requested by it. There were verdict and judgment for the plaintiff, assessing his damages at \$81.

Amos E. Goodhue, for appellant. Davis & Haralson, for appellee.

MCLELLAN, C. J. Action by Hall against the railroad company. The complaint is as follows: "Plaintiff claims of the defendant the sum of seventy-five dollars as damages for that on or about the — day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad, and thereby injured it so it was worthless." There was also a mule in the complaint and in the trestle; but as no injury to it was proved, and the court charged affirmatively for defendant as to the damages claimed as to it, we pretermitted the mule. There was a demurrer to the complaint on the grounds that it failed to aver or show that defendant owed the plaintiff any duty in respect of the animal, and that its averment of negligence was too vague and indefinite. The demurrer was overruled, and properly, under the authority of *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. 877; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376, 13 South. 553; and *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. We do not decide whether there was a judgment entry as to this demurrer.

On the evidence before them, it was open to the jury to find that defendant's train was being moved forward toward a trestle; that plaintiff's horse was on the track between the engine and the trestle, running, in apparent fright of the train, toward the trestle; that the track along which the horse ran was on an embankment 5 or 6 feet high, the sides of which, while not precipitous, were yet at such an incline as that a horse, in attempting to go down them, would partially slide; that the train was from 30 to 50 yards behind the horse, and going faster than he was,—“gaining on him”; that the engineer was aware of the situation, but did not seasonably stop or check the speed of his train; that, had he done so, the horse would not have continued his flight onto and into the trestle, and the injury to the animal would have been averted. In view of the phase of the case presented by these tendencies of the evidence, the court properly refused the affirmative charge requested by the defendant. Seeing the horse running directly toward the trestle, in fear of the advancing train,—the surroundings being such as that he would probably continue his flight along the track into the trestle if the train continued to advance,—the engineer owed the plaintiff the duty of stopping the train and thereby removing the cause of the flight of the animal; and if he negligently failed to discharge this duty, and in consequence the horse was injured, the defendant is liable.

Of course, it was a matter of inference for the jury whether the horse would or not have continued his flight into the trestle had the train been stopped when it should have been;

and it was necessary, of course, for the jury to be reasonably satisfied that he ran into the trestle in consequence of the continued advance of the train, before they were authorized to return a verdict for the plaintiff. That part of the oral charge to which an exception was reserved, taken as a whole, and in connection with its context, is not an erroneous statement of law in this regard; for while, in its opening clause, it is open to a construction which might authorize a verdict for the plaintiff upon the jury's not being reasonably satisfied that the horse would have gone into the trestle in any event, when it was necessary for them to find that he would not have gone there but for defendant's negligence, yet the last clause corrects this faulty tendency by requiring the jury to find for plaintiff only in the event the failure to stop the train contributed to the injury.

Nor, in our opinion, was the oral charge bad, when referred to the evidence, for asserting that when the horse got on the main line, and the engineer saw that he was headed for the trestle, it became the duty of the engineer to take steps to stop his train. The evidence is undisputed that the horse was frightened by, and in flight from, the train, and that he was running on a considerable embankment,—his easiest route of flight, but for the trestle being on and along the track. On these facts, there was such obvious danger of the horse's running into the trestle from the time he got on and began to run along the main track as to impress the mind of an ordinarily prudent man in the place of the engineer with the necessity of removing the cause of the horse's fright and flight by stopping the pursuing engine, and it then became the engineer's duty to stop it.

We find no error in the record, and the judgment must be affirmed.

MONTGOMERY ST. RY. v. MASON.¹

(Supreme Court of Alabama. April 9, 1902.)

STREET RAILROADS—INJURY TO PASSENGER—SAFE LANDING PLACE—DUTY TO PROVIDE DAMAGES—HOSPITAL FEES—PLEADING—COMPLAINT—HARMLESS ERROR—EVIDENCE.

1. The refusal of the court to strike out immaterial and irrelevant averments in the complaint does not constitute reversible error unless it affirmatively appears that such refusal was prejudicial.

2. In an action against a street railway company for injuries received by a passenger on alighting from a car, a complaint alleging the failure of the defendant to provide a safe place for alighting is not demurrable in not averring what constitutes a safe place, nor in giving a minute description of the place where the stop was made and of the alleged injuries.

3. A plea attempting to set up contributory negligence by alleging that "when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his

part," was defective in not alleging that the plaintiff failed to exercise ordinary and reasonable care or that he saw the lumber.

4. A plea assuming that it was the duty of a passenger to inquire of a street railway company or its agent as to whether the place of stopping is a reasonably safe place for him to alight was properly overruled.

5. Plaintiff became a passenger on defendant's street railway on a dark night, and on alighting from the car at his destination tripped on taking his first step over a pile of lumber left at the place by the defendant the day previous while repairing a bridge. *Held*, that the defendant was liable in failing to provide a reasonably safe place for the landing of its passengers.

6. Hospital fees for the expense of a nurse and a ward in the hospital are proper elements of damage in a personal injury action.

7. A deposition taken by one of two commissioners to whom the commission was jointly issued is invalid in the absence of a waiver of the presence of the other commissioner.

8. Evidence of the jurors as to the manner of arriving at the verdict is not admissible on a motion for a new trial.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Action by James M. Mason against the Montgomery Street Railway. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

This was an action brought by the appellee, James M. Mason, against the appellant, the Montgomery Street Railway, to recover damages for personal injuries. The complaint contained three counts, in each of which the plaintiff claims \$5,000 damages.

The first count of the complaint, after setting up the fact that the defendant was operating a street railway in the city of Montgomery, and that the plaintiff had taken passage upon one of the cars owned and operated by the defendant, then avers that the defendant received "said plaintiff as a passenger therein, to be carried through Hull street to a certain station near Julia street and opposite to a church known as 'Hull Street Methodist Church,' at or near Jenetta Ditch, sometimes called 'Boguehomo Ditch,' and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid (and to have provided a proper and sufficient place, light, and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant, not regarding its duties in that behalf, did not use due and proper care in providing a proper and sufficient place, light, and means and facilities to enable plaintiff safely to alight at said station opposite said church when the said car carrying plaintiff arrived there); by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, to wit, on the 6th day of August last aforesaid and at night, stepped and fell upon certain lumber and debris which had been negligently placed and

¹ Rehearing denied June 2, 1902.

permitted to remain at the place where plaintiff alighted from said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period, to wit, from then to the commencement of this suit, and was thereby forced to pay a large sum of money for expenses incurred, to wit, the sum of \$1,000, in and about attempting to be cured of the bruises, weakness, and injuries occasioned as aforesaid, and suffered and underwent great mental and physical pain, and was hindered and prevented and is still hindered and prevented from performing the duties of his occupation, which amounted to a large sum of money, to wit, the sum of \$5,000."

The second count of the complaint, after making the prefatory allegations as contained in the first count, then alleged that the defendant received "the said plaintiff as a passenger therein, to be carried through Hull street to a certain station near Julia street, and opposite to a church known as 'Hull Street Methodist Church,' at or near Jenetta Ditch, sometimes called the 'Boguehomo Ditch,' and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid (and to have provided a proper and sufficient place, light and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant, not regarding its duties in that behalf, did not use due and proper care in providing a proper and sufficient place, light, and means and facilities to enable plaintiff safely to alight at said station opposite said church when the said car carrying plaintiff arrived there), but negligently and carelessly piled the lumber and debris of an old bridge on the public highway where defendant stopped said car for plaintiff to alight, by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, or the place where said car was stopped for plaintiff to alight, to wit, on the 6th day of August last aforesaid and at night, stepped and fell upon said lumber and debris which had been negligently placed and permitted to remain at the place where plaintiff alighted from said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period," etc.

The third count of the complaint, after making the prefatory allegations and alleging that the plaintiff had taken passage on one of the cars operated by the defendant, then continues as follows: "And that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid, and to be stopped at the usual and proper place provided for passengers to alight at said station opposite said church; yet the said defendant, not regarding its duty in that behalf, did not stop said car at the usual stopping place, where plaintiff could with safety have alighted from said car, although signaled by plaintiff in ample time to do so, but carelessly and recklessly ran said car beyond said regular stopping place a distance of about 30 feet, to a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation there, and then and there stopped said car in the midst of said lumber and other obstructions, when plaintiff, believing that said car had stopped at the usual and customary place for passengers to alight at said station, while attempting to alight from said car, to wit, on the night of August 6th, 1899, stepped and fell in and upon a pile of lumber or other material, over and among which the defendant had negligently and carelessly stopped said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period," etc.

The defendant moved the court to strike from the first and second counts of the complaint the portions thereof which are in italics and which are in parentheses, upon the ground that said words as alleged in each of said counts were immaterial, irrelevant, and surplusage. The defendant also moved to strike from the third count of the complaint the words "carelessly and recklessly," upon the ground that said words were immaterial, irrelevant, and surplusage. The court overruled each of these motions. Thereupon the plaintiff amended the first count by striking out the portion thereof which is included within the parentheses, and inserting in lieu thereof the following allegations: "And to provide a proper and sufficient place so that plaintiff might alight safely at said station; yet the defendant, not regarding its said duty, failed to provide a proper and sufficient place for plaintiff so to alight, and stopped its car on which plaintiff was a passenger as aforesaid at a point where certain lumber and debris were lying within a few feet of its track." The plaintiff also amended the second count by striking out the words "light and means and

facilities," wherever they occur. The defendant demurred to the first count of the complaint upon the following grounds: (1) Because plaintiff does not show how or in what manner the defendant failed to use due and proper care in providing a proper and sufficient place to enable plaintiff safely to alight at said station; (2) because the complaint fails to show in said count that defendant placed said lumber and debris at the place where plaintiff alighted from said car; (3) because the complaint fails to show in said count any duty upon its defendant to have removed the lumber placed along the track at the place of the accident; (4) that there was no legal duty upon defendant to have provided a proper and sufficient place whereby the plaintiff might have alighted from said car; (5) because said count fails to show that defendant knew of the location of the lumber or debris at the point where plaintiff alighted from said car, or that such lumber or debris was there sufficiently long for defendant to have been informed thereof by the use of reasonable diligence on its part. The defendant demurred to the second count upon the same grounds of demurrer as interposed to the first count and upon the following additional grounds: (1) Because said count does not show that defendant did not carefully and securely carry and convey and propel the plaintiff along said railway; (2) because said count does not show how or in what respect the defendant failed to use due and proper care in providing a proper and sufficient place to allow plaintiff to alight from said car; (3) because the allegation in said count, "and to have provided a proper and sufficient place, whereon and whereby the plaintiff might have safely alighted at said station," is a mere conclusion of the pleader; (4) and the allegation that defendant did not use due and proper care in providing a proper and sufficient place to enable plaintiff to safely alight at said station is a mere conclusion of the pleader. To the third count the defendant demurred upon the same grounds of demurrer as interposed to the first and second counts of the complaint, and upon the following grounds: (1) Because said count does not show that there was any duty resting upon the defendant to have placed a light at the place where the plaintiff alighted from said car; (2) because said count fails to show that the defendant was in any wise responsible for the lumber or other obstruction being on the ground near its track. These demurrers were overruled. Thereupon the defendant pleaded the general issue and filed four special pleas. Plea numbered two is copied in the opinion. The remaining special pleas are as follows: "(3) The plaintiff ought not to recover of the defendant, because he was guilty of contributory negligence which proximately caused his alleged injury, in this: that he stepped from said

car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car was stopped. (4) Plaintiff ought not to recover, because he was guilty of negligence which contributed proximately to the injury complained of, in that, after the car ran beyond its regular stopping place, plaintiff voluntarily alighted therefrom, without requesting the defendant or its agent to carry him back to the regular stopping place, and without ascertaining before he alighted from said car that he was alighting at a safe place. (5) The plaintiff ought not to recover, because he was guilty of negligence which contributed proximately to the injury complained of, in this: that, when he boarded and took passage on defendant's car, he did so knowing that said car was being operated without a conductor and without anybody to look after the safety of his alighting, and that he alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom."

The plaintiff demurred to the plea numbered 2 upon the following grounds: (1) The facts therein set forth do not constitute such negligence on the part of the plaintiff as would prevent his recovery in this suit; (2) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. To the third plea the plaintiff demurred upon the following grounds: (1) It was not the duty of the plaintiff to make the inquiry therein referred to; (2) it shows no negligence on the part of plaintiff which proximately contributed to the injury complained of; (3) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. The plaintiff demurred to the fourth plea upon the following grounds: (1) It assumes that it was the duty of plaintiff to inquire for information which it was the duty of the defendant to give; (2) it assumes that it was the duty of plaintiff to inquire for information in regard to possible danger which it was the duty of defendant to provide against; (3) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. To the fifth plea the plaintiff demurred upon the following grounds: (1) It sets up no act of negligence on the part of the plaintiff that would legally relieve or release defendant from the negligence averred; (2) it assumes that it was plaintiff's duty to perform certain acts not required of him by law; (3)

because it seeks to avoid one act of negligence on the part of defendant, to wit, a failure to stop at a proper place for plaintiff to alight, by showing that defendant was guilty of another act of negligence, to wit, a failure to have a conductor or other person to look after the safety of passengers alighting from said car. These demurrers were sustained, and the trial was had upon issue joined upon the plea of the general issue.

The tendency of the evidence is sufficiently shown in the opinion. Before the trial was entered upon the defendant moved the court to suppress the deposition of the witness J. H. Drake, which was taken in the cause, upon the following grounds: "Because the commission issued by the clerk of this court was issued to John K. Watkins and T. D. Samford, Esqs., of Opelika, Lee county, Alabama, appointing them commissioners jointly to take the testimony of the witness J. H. Drake, and that the deposition of the said witness was taken by John K. Watkins, acting alone, as shown by his certificate to the deposition, and because the said Watkins was unauthorized to take said testimony alone, and because said commission issued by the clerk required that T. D. Samford, Esq., Co-commissioner, be given notice of the time and place of taking the deposition. And that the certificate attached to the deposition by John K. Watkins, one of the commissioners, does not show that he gave T. D. Samford any notice of the time or place of taking the said deposition of the said witness." In support of this motion, the defendant introduced in evidence the commission issued by the clerk of the court, under which the deposition purported to have been taken. This commission showed that it was issued to John K. Watkins and T. D. Samford, Esqs., "as commissioners to take the deposition of J. H. Drake, a material witness" in said suit. The defendant also introduced in evidence the certificate of John K. Watkins to the deposition. This certificate showed that the deposition of J. H. Drake was taken by John K. Watkins alone, he describing himself as "the commissioner in said commission named." There was no evidence that Commissioner Samford did not have notice, nor any evidence tending to show why he did not act. It was shown by the evidence that the plaintiff, when he applied for the commission to take the deposition of the witness Drake, suggested John K. Watkins as a commissioner and no one else, and that the name of T. D. Samford as commissioner was inserted in the certificate by the clerk and on motion of the defendant. The court overruled the defendant's motion to suppress said deposition, and to this ruling the defendant duly excepted.

During the examination of James M. Mason, the plaintiff, he testified that he had incurred an expense of \$650 in seeking recovery from the injuries sustained by him; that the items going to make up this expense of \$650

consisted of a doctor's bill of \$160 and a hospital bill of \$159; that the hospital bill included nurse's services and in payment of a private ward which he had engaged in the Johns Hopkins Hospital. The other items of the \$650 account were for railroad fare, hotel bills, and other expenses incurred in going to and being present in the Johns Hopkins Hospital. The defendant moved the court to exclude from the jury all the testimony of the witness relative to all the items going to make up the \$650 except that portion of the testimony regarding the doctor's bill. The court excluded from the jury the testimony of the witness regarding railroad fare, hotel bills, and other items mentioned, but refused to exclude the testimony relating to the hospital bill and the doctor's bill. To the court's refusal to exclude the testimony as to the hospital bill, the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they must find their verdict for the defendant under the first count of the complaint. (2) If the jury believe the evidence, they must find for the defendant under the second count of the complaint. (3) If the jury believe the evidence, they must find their verdict for the defendant. (4) The jury cannot find for the plaintiff unless they are reasonably satisfied from the evidence that the regular stopping place for said cars was opposite the South Hull Street Methodist Church, and that the car upon which the plaintiff was traveling did not stop in front of said church, but that the car was carried on past said regular stopping place, and stopped at a place that was not the regular stopping place for cars on that line, and that the motorman who was operating said car stopped the said car at a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation there; and the jury must further be reasonably satisfied, from the evidence, that the car stopped in the midst of said lumber and other obstructions, and that the plaintiff in stepping from said car stepped or fell on lumber or debris." "(10) If the jury believe from the evidence that the plaintiff alighted from said car onto the ground, and not onto lumber or debris, they must find their verdict for the defendant. (11) The court charges the jury that the undisputed evidence in this case shows that the plaintiff had ceased to be a passenger when he fell and was injured. (12) The court charges the jury that the plaintiff cannot recover anything for hospital fees. (13) The court charges the jury that unless they are reasonably satisfied, by a preponderance of the evidence, that the plaintiff received the injuries of which he complains while in the act of stepping from the car to

the ground, and before he had safely alighted upon the ground, they cannot find a verdict for the plaintiff. (14) The court charges the jury that, before the plaintiff can recover in this cause, you must be reasonably satisfied by a preponderance of the evidence that he received the injuries complained of while in the act of stepping or descending from the defendant's car on the occasion testified about, and not after he had safely landed upon the ground. (15) The court charges the jury that, under the evidence in this cause, the regular stopping place or station of the defendant company on its Cloverdale line, nearest the church testified about, was, at the time of the injury complained of, on, or just beyond, the bridge at which the injury occurred. (16) The court charges the jury, if they believe the evidence in this cause, they should find a verdict for the defendant. (17) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the third count of the complaint. (18) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the second count of the complaint. (19) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the first count of the complaint. (20) The court charges the jury that, at the time the plaintiff sustained his alleged injuries, he was not a passenger of the defendant company."

There were verdict and judgment for the plaintiff, assessing his damages at \$2,300. The defendant moved the court to grant a new trial, and assigned as grounds therefor the several rulings of the trial court which were adverse to the defendant, and also the following grounds: (1) That the verdict was contrary to the law and the evidence; (2) that the verdict of the jury was excessive; (3) because the amount of the verdict of the jury was ascertained by casting lots in the following manner, to wit: The jury agreed that each man should write down, on a slip of paper, the amount which he thought the plaintiff should recover, and then by taking the figures on these twelve slips of paper, adding them together, dividing the sum by 12, taking the quotient as a result, and rendering their verdict thereon, first having agreed to be bound by the result so ascertained. In connection with this motion, the defendant introduced evidence tending to show that the last ground of the motion was based upon the actual facts relating to the manner in which the verdict was arrived at by the jury. Several of the jurors testified, and each of them stated that the verdict was arrived at in such manner. They also testified in detail as to the occurrences in the jury room while the jury was deliberating upon the verdict. The court, upon motion of the plaintiff, excluded the testimony of the several jurors as to what occurred in the jury room, and to this ruling the defendant duly excepted. The mo-

tion for a new trial was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

C. H. Roquemore and Lomax, Crum & Well, for appellant. George P. Harrison and Fred S. Ball, for appellee.

DOWDELL, J. The appellee sued the appellant, the Montgomery Street Railway, to recover damages for injuries received by him as a passenger on one of the appellant's cars, in alighting from the car, caused by appellant's negligence. The plaintiff recovered a judgment in the court below, and from this judgment the present appeal is prosecuted.

There are numerous assignments of error, in all, 55. Some of these assignments are, however, not insisted on in argument, and such as are not insisted on will not be considered. The first 7 relate to the rulings of the court on motions of the defendant, the appellant here, to strike certain parts of the complaint as being immaterial averments and merely surplusage. After the action by the court overruling the motions to strike, the plaintiff amended the first and second counts of the complaint by striking out the words, "light and means and facilities," to which the motions to strike were in part directed. With the complaint as thus amended, no injury resulted to the defendant in overruling the motions to strike. If it be conceded that there was error, still we are unable to see that the defendant was in any way prejudiced, and, unless it affirmatively appears that the refusal of the court to strike immaterial and irrelevant averments results prejudicially, such refusal does not constitute reversible error. *Railway Co. v. Bridges*, 86 Ala. 448, 5 South. 864, 11 Am. St. Rep. 58.

The eighth, ninth, and tenth assignments of error relate to the overruling of the defendant's demurrer to the complaint, and the questions raised by these assignments that are insisted on in argument are also raised by charges requested by the defendant, and which were refused by the court. These embrace the vital points in the case, and, as they were argued together by counsel for appellant, will in like manner be considered together here. The gist of the action is in the alleged negligence of the defendant in stopping its car, upon which plaintiff was riding as a passenger, in an unsafe and dangerous place for him to disembark, so that while so disembarking or immediately upon alighting from said car, he received the injuries alleged in the complaint. The complaint in this respect sufficiently states a cause of action. It was not incumbent on the plaintiff in his pleading to aver, in connection with the duty of the defendant to provide a safe place for his alighting from the car, what should constitute a safe place, nor to undertake

a minute description of the place where the stop was made and the alleged injury received. After averring the duty of the defendant to provide a safe landing place for the plaintiff in alighting from its car, the complaint in the first and second counts, with sufficient certainty and definiteness, avers the failure to perform such duty, and in a manner to constitute negligence. So, in the third count, after averring the duty of stopping the car at the usual or customary stopping place, the averment of the failure to do so and the manner and form of the breach of this duty which resulted in the injury to the plaintiff is sufficiently definite in charging negligence and the consequent damage. The complaint upon the whole states a cause of action with that degree of certainty required in pleading, and the court properly overruled the demurrer.

The second, third, fourth, and fifth pleas of the defendant, to which demurrer was sustained, sought to set up contributory negligence on the part of the plaintiff. The second plea avers, "that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part." There is no averment in this plea that the plaintiff failed to exercise ordinary and reasonable care, or that he did see the lumber. In this respect the plea was bad. The third plea assumes that it was the duty of the plaintiff to inquire of the defendant or its agent as to whether the place of stopping was a reasonably safe place, while, on the contrary, he had a right to assume on the conduct of the defendant, as alleged in the complaint, that it was a safe place for him to alight. The fourth plea, for a similar reason, was bad. The fifth plea is nothing more than an effort to excuse one omission of duty on the part of the defendant by its omission of still another duty. For the reasons stated, these several pleas were subject to the demurrers, and there was no error in the court's action in sustaining them.

We do not understand it to be a contention on the part of the appellee, as supposed by appellant's counsel, that any duty rested on the appellant to provide, along the line of its railway, depots and stations for the convenience or safety of its passengers, as in case of steam railways, but only to provide for reasonably safe places for its passengers to get on and off its cars. It cannot be doubted that street railway companies, as common carriers of passengers for hire, are under the duty of exercising the highest degree of diligence and care in conserving the safety of their passengers, and are responsible for the slightest neglect. *Smith v. Railroad Co.*, 16 Am. & Eng. R. Cas. 310; 7 Rap. & M. Ry. Dig. p. 458, § 325. This duty arises when the relation of carrier and passenger

begins, and continues until that relation is ended. These propositions of law are not disputed, but it is contended in the present case that, at the time of the injury complained of, the plaintiff was no longer a passenger on the defendant's car after alighting from the same, and that the defendant was relieved of all responsibility after the plaintiff had alighted from its car onto the ground at the place where it stopped for that purpose; and this involves the question of the duty of the carrier to provide a reasonably safe place for the landing of its passengers. The same duty of exercising the highest degree of diligence and care in the carriage or transportation of passengers in law and reason extends to and includes the safe landing of the passenger at the termination of his journey or ride, and this duty is not performed when the carrier lands its passenger at a time and place of such unknown environment to him that, in his first effort to depart after alighting onto the ground, he is tripped and thrown by an unseen pile of lumber and debris. There was evidence which tended to show that the plaintiff became a passenger at night, and, being a dark night, on one of the defendant's street cars, and paid his fare to be transported thereon; that when nearing the end of his journey he gave the usual stop signal; that in obedience to the signal the car was stopped for him to get off; that he alighted from the car onto the ground; and that at the first step he attempted to take he was tripped and thrown by unseen lumber, which had been piled at the place by the defendant the day previous while repairing a bridge over which its tracks ran, and from the fall received the alleged injuries. There was evidence which also tended to show that the customary stopping place was immediately in front of the church where the plaintiff was going to attend religious services, but on the present occasion the car passed this customary stopping place, and stopped about 30 feet beyond, and where the lumber and debris were piled by the side of its track and between the track and the church. While there was conflict in the evidence as to the presence of the lumber and debris at the place of stopping, and as to the usual and customary place of stopping in that locality for discharging passengers, we think there can be no question of the defendant's liability on the phase of the evidence above stated, if believed by the jury. This case in principle is similar to the case of *Railway Co. v. Scott*, 86 Va. 902, 11 S. E. 404, and the doctrine there laid down, and the authorities cited in support of it, are applicable here. We quote from authorities cited in that case. In *Whart. Neg. § 649*, it is said: "When danger approaches, it is the duty of the officers of the road to notify passengers, so that they can take steps to avoid it; and failure to give such notice is negligence. So, also, if there is a dangerous place at the landing, it is the duty of the conductor to

warn those about stepping out." "And * * * he must give notice to all if any danger in alighting is probable." In *Cartwright v. Railway Co.*, 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274, Cooley, C. J., says: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or move the car to a more suitable place;" citing *Railroad Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Railroad Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *McGee v. Railroad Co.*, 82 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Maverick v. Railway Co.*, 38 N. Y. 378. This doctrine applies to street railway companies, and they are bound by the same liability. *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Id.*, 16 Am. & Eng. R. Cas. 819, cited above; *Railway Co. v. Twiname*, 111 Ind. 589, 18 N. E. 55; *Railway Co. v. Hilga*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754; *Railway Co. v. Findley*, 76 Ga. 311; *Barrett v. Railway Co.*, 45 N. Y. 628; *Hill v. Railroad Co.*, 109 N. Y. 239, 16 N. E. 61.

The record does not show that the item of \$159 of hospital fees paid by the plaintiff, while under treatment for his injuries, included anything other than that of the expense of a nurse and a ward in the hospital. The court excluded the items of board and traveling expenses paid out by the plaintiff. If the attendance of a nurse was necessary while the plaintiff was under treatment for his injuries received on account of the negligence of the defendant, we cannot see why this is not as essentially an element of recoverable damage as the professional fees of the attending physician. So, too, the necessary expense of a private ward in the hospital while undergoing treatment would constitute a proper element of recoverable damage. There was no error in the action of the court in refusing to exclude the item of \$159 from the consideration of the jury in estimating plaintiff's damages.

A majority of the court are of the opinion that there was error in overruling the motion to suppress the deposition of J. H. Drake. They hold that since the commission was joint and not several, and nothing was done by defendant to waive the absence of the commissioner Samford, the execution by Watkins was invalid, and in this they follow the rule mentioned in *Douge v. Pearce*, 13 Ala. 128, and sustained by other authority, for the maintenance of which they think there are substantial reasons. The writer is of a different opinion. What was said in *Douge v. Pearce*, *supra*, was dictum. The question here presented was not before the court for decision in that case. The depositions here were taken on interrogatories filed under section 1835, Code 1896, and that section directs what shall be done. This statute provides: "The party, after making affidavit, may file with the clerk interrogatories to be propound-

ed to the witness, of which, and of the residence of the witness, *and of the commissioner to be appointed* [italics are mine], he must give the opposite party, or his attorney, notice in writing, who has ten days thereafter to file cross-interrogatories, to which the party filing the interrogatories may file rebutting interrogatories. After the expiration of the ten days, a commission, accompanied by a copy of the interrogatories and of the cross and rebutting interrogatories, if filed, must be issued by the clerk to take the deposition, which may be taken at such time and place as the commissioner shall appoint. On failure to give the notice herein required of the residence of the witness and the commissioner, unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it." Code 1896, § 1835. I think the statute clearly contemplates that the party filing the interrogatories shall nominate the commissioner to whom the clerk shall issue the commission. As I construe the statute, he, the party filing the interrogatories, and not the clerk, is required to give the opposite party, or his attorney, notice of the commissioner to be appointed, and the last clause in the statute provides, "on failure to give the notice herein required, etc., unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it." It is quite clear to my mind that the duty of giving the notice required is imposed upon the party filing the interrogatories, and not upon the clerk; if the latter, why should the costs be imposed upon the party for the failure of the clerk to discharge his duty, in case the deposition is suppressed for failure to give the required notice? Again, it is not to be supposed that the clerk would be required to find out or ascertain, without the suggestion of the party filing the interrogatories, who could be procured to act as commissioner. It may be and often is the case that the deposition is to be taken at a place where the clerk is entirely unacquainted with any person. Certainly, the statute does not provide that the adverse party may suggest a commissioner, nor is there any authority expressly or impliedly given to the clerk to appoint on his suggestion. If the clerk may appoint a commissioner on the suggestion of the adverse party, and it be required that the commission shall be jointly executed, then it would be in the power of the adverse party to prevent ever obtaining the testimony of the witness on interrogatories, by the suggestion and appointment of a co-commissioner who would fail to act. I think the clerk acted without authority in appointing Samford as a co-commissioner on the suggestion of the adverse party, to act with Watkins, who was nominated by the party filing the interrogatories as the commissioner to be appointed. It is quite evident that the statute confers no such

authority. If Watkins was in any respect an unsuitable person to act as commissioner, upon the fact being shown to the court it would be within the power of the court to control the matter. There is no pretense that Watkins was an unsuitable person, or that the commission was in any respect improperly executed by him, except that Samford did not jointly act with him. It does not appear why Samford did not act; for aught that the court knows he refused to act. I can see no good reason for saying that the execution of the commission by Watkins was not valid. The statute under consideration received a construction as to the right of the opposite party to demand notice of the time and place of taking the deposition in *Wisdom v. Reeves*, 110 Ala. 418, 18 South. 13, and what was there said seems to me in principle to support my views above expressed.

On the motion for a new trial, the court very properly excluded all the evidence by the jurors who tried the case as to the manner of their arriving at the verdict. *City of Eufaula v. Speight*, 121 Ala. 613, 25 South. 1009. This evidence being excluded, the ground of the motion based on the conduct and action of the jury in reaching a verdict was unsupported. We do not think the verdict of the jury, as to the amount of damages awarded, excessive. Other grounds of motion for a new trial, which relate to the rulings of the court on the trial, we have already treated in the foregoing opinion.

For the error pointed out, the judgment will be reversed and the cause remanded.

McCORMACK v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

INTOXICATING LIQUORS—SALE TO INTEMPERATE PERSON—EVIDENCE—ADMISSIBILITY—WITNESS—CROSS-EXAMINATION—INSTRUCTIONS.

1. A conviction for selling liquors to a person of known intemperate habits cannot be had unless defendant is shown to have made the sale with knowledge that the purchaser was intemperate.

2. Evidence of the contents of a written notice to a saloon keeper, by the wife of an intemperate person, reciting the intemperate habits of the latter, and that his brother had told the saloon keeper not to sell him any whisky, and that the latter had frequently been under the influence of liquor during the year preceding the trial, and that he had been intemperate for six years, is admissible in a prosecution of the saloon keeper for a subsequent sale to the intemperate person, as tending to show the habits of the intemperate person and defendant's knowledge thereof.

3. The failure of the state to demand of defendant that he produce such notice does not authorize exclusion of evidence of the contents thereof.

4. A witness for defendant in a prosecution for selling liquor to a person of intemperate habits may be asked on cross-examination, for the purpose of showing his interest, if a prosecution is not pending against him for the same offense.

5. An instruction, in a prosecution for the illegal sale of liquor, that the sale must be shown to the satisfaction of the jury, is erroneous, as requiring too high a degree of proof.

6. The giving of an instruction in a criminal case which is erroneous in being too favorable to defendant does not authorize the reversal of a conviction.

7. Where the evidence in a criminal case shows that defendant ate his dinner and supper together about 6 p. m. on the day of the commission of the crime, a requested instruction that he must be acquitted if he was at home asleep from 11 a. m. till night is properly refused, as inapplicable.

8. Where there is evidence, in a prosecution for the illegal sale of intoxicating liquor, that the crime was committed in the evening, a requested instruction that defendant must be acquitted if he was asleep at his home till 6 p. m. is properly refused, as the crime might have been committed after that hour.

Appeal from Morgan county court; Wm. E. Skeggs, Judge.

Ben McCormack was convicted of the illegal sale of liquor, and he appeals. Affirmed.

The appellant in this case, Ben McCormack, was prosecuted and convicted for selling spirituous, vinous, or malt liquors to a person of known intemperate habits. It was shown by the evidence that the defendant had made several sales of whisky to one Charles S. Aycock. The state elected to prosecute for the sale alleged to have been made on August 7, 1900. Several witnesses for the state testified that the defendant made the sale of whisky to the said Charles S. Aycock on the evening of August 7th. The wife of said Aycock testified that her husband had been drinking to excess during the year previous to said alleged sale, and that she had given the saloon keepers notice not to sell him intoxicating liquors. Said Charles S. Aycock, as a witness, testified that he had been drinking heavily, and was able to get whisky from the defendant up to the time notice had been given by his wife not to sell him any more. The solicitor then asked the witness if the defendant showed him the paper he had received from his wife, telling him not to sell the witness any whisky; at the same time handing said paper to the witness. The defendant objected to this question, because it was irrelevant and immaterial evidence, and duly excepted to the court's overruling his objection. The witness answered he did. The solicitor then asked the witness the following question: "Did the paper shown you by the defendant state in it not to sell you on account of known intemperate habits?" The defendant objected to this question, because it called for irrelevant and immaterial evidence, and because it was not the best evidence of the contents of the paper, and because no demand was made on defendant to produce the same. The court overruled the objection, and the defendant duly excepted. The witness answered that it did, but that after such notice he had bought whisky from defendant almost every day in 1900 until the filing

of the affidavit in this case. Lee Aycock, a witness for Charles S. Aycock, against the objection and exception of the defendant, testified that he had also notified the defendant not to sell whisky to said Charles S. Aycock, his brother. There was other evidence introduced by the state tending to show that said Charles S. Aycock was a man of known intemperate habits. The evidence for the defendant tended to show that he did not sell whisky to said Charles S. Aycock on August 7, 1900. Charles E. Woodward, who was proprietor of the Palace saloon, where the defendant was employed as a bartender, testified that he was in the saloon on August 7, 1900, continuously up to the time he went to supper; that between 10:30 and 11 o'clock in the day the defendant came into the saloon with another person, got a drink, and left in a few minutes, but that the defendant did not go behind the counter, nor did he make any sale during the day of August 7, 1900. The solicitor asked said witness the following question: "You have a prosecution pending against you for the same offense, have you not?" The defendant objected to this question upon the ground that it called for irrelevant and immaterial evidence. The court overruled the objection, and the defendant duly excepted. The witness answered that there was such a prosecution pending against him. The defendant, as a witness in his own behalf, testified that he was the clerk at the general election on August 6, 1900; that he sat up all night, counting the votes, and finished about 10 o'clock on the morning of August 7th; that he, in company with another person, went to the Palace saloon, where he was accustomed to clerk, and took a drink, and that, after remaining there a few minutes, he left, and went home and went to bed, where he remained until about 6 o'clock in the evening, when he got up, and ate his dinner and supper together; that he did not leave the house until after supper, and was not in the Palace saloon on August 7th, except as stated above, and until after supper, but that he was not at the saloon on that day, and made no sales to Aycock or any one else that day. There was other evidence introduced on the part of the defendant tending to corroborate his testimony. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The court, in its general charge to the jury, among other things, instructed them as follows: "It devolves upon the state to prove to your satisfaction a sale of liquor by defendant to Chas. S. Aycock on August 7, 1900." The defendant duly excepted to the giving of this portion of the court's general oral charge, and also separately excepted to the court's refusal to give each of the following written charges requested by him: "(1) If you believe the defendant was at home asleep from about eleven o'clock on August 7, 1900, until night,

your verdict should be for the defendant. (2) If you believe from the evidence that defendant was a returning officer of the election on August 7th, and went to the Palace saloon, and between fifteen and thirty minutes went to the Patton's or Land's, and then went home, and slept until 6 o'clock that evening, your verdict should be for the defendant."

Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. This appeal is prosecuted from a judgment of conviction upon the charge of selling spirituous, vinous, or malt liquors to a person of known intemperate habits. To authorize the conviction, the sale must be made to a person of intemperate habits, and the seller must have been shown to have had a knowledge of such habits. In other words, the jury must be convinced by the evidence beyond a reasonable doubt of the existence of these facts,—the sale of spirituous, vinous, or malt liquors, the intemperate habits of the person to whom the sale is alleged to have been made, and a knowledge on the part of the defendant of such habits. *Jones v. State*, 100 Ala. 88, 14 South. 772. Of course, the burden of establishing each and all of these facts is upon the state. For the purpose of tracing knowledge to the defendant of the intemperate habits of Aycock it was entirely competent for the state to prove the contents of the paper in defendant's possession, written him by Aycock's wife, in which she told him of his habits. Nor was it necessary for the state, before being allowed to offer this evidence, to have demanded of defendant the production of the letter. So, too, there was no error in permitting witness Lee Aycock to testify that he had told defendant not to sell his brother whisky. Likewise it was competent for the state to prove by Brock that Aycock was frequently, within the 12 months preceding the trial, under the influence of intoxicants. The same may be said of the statement of the witness Will Aycock that his brother had been a man of intemperate habits for the past six years. This testimony not only tended to show the habits of Aycock, but also knowledge on the part of the defendant of those habits. *Atkins v. State*, 60 Ala. 45; *Smith v. State*, 55 Ala. 1; *Tatum v. State*, 63 Ala. 147.

The interest of a witness in the cause may always be shown as affecting the credibility of his testimony. It was doubtless upon this theory that the solicitor was permitted, on cross-examination of Woodward, the proprietor of the Palace saloon, and the employer of the defendant, to ask him if a prosecution was not pending against him for the same offense. There was no error in this.

The exception to the portion of the oral charge of the court can avail the defendant nothing. It was too favorable to him, in that it exacted too high a degree of proof. It required the state to prove to the satisfaction

of the jury a sale of the liquor by defendant, etc. "Before it can be said that the mind is satisfied of the truth of a proposition, it must be relieved of all doubt or uncertainty; and this degree of conviction is not required" in any case. *Torrey v. Burney*, 113 Ala. 504, 21 South. 348; *Dennis v. State*, 118 Ala. 79, 23 South. 1002; *Railroad Co. v. Gedley*, 119 Ala. 527, 24 South. 753; *Railroad Co. v. Burgess*, 119 Ala. 564, 25 South. 251; *Abbott v. City of Mobile*, 119 Ala. 599, 24 South. 563; *Moore v. Heineke*, 119 Ala. 639, 24 South. 374; *Coghill v. Kennedy*, 119 Ala. 667, 24 South. 459. Charge 1 refused to defendant was abstract. There was no evidence that defendant was at home asleep from about 11 o'clock on August 7th until night. On the contrary, the evidence shows that he ate his dinner and supper together about the hour of 6 o'clock in the afternoon of that day. Every fact postulated in charge 2 may have been believed by the jury, and yet the defendant would not have been entitled to a verdict of acquittal, if the jury believed that the sale of liquor was made by him about dusk of the evening of August 7th.

There is no error in the record. Judgment affirmed.

STEVENS et al. v. STATE.

(Supreme Court of Alabama. June 5, 1902.)

HOMICIDE — CONSPIRACY — EVIDENCE — ADMISSIBILITY — DECLARATIONS OF CO-CONSPIRATOR — VERDICT — SUFFICIENCY — EXAMINATION OF JURY — JURISDICTION.

1. A written verdict finding the "defendants guilty of manslaughter, and fixing the punishment at two years' imprisonment," even if erroneous in failing to show whether it means a two-year sentence of each of two defendants, is cured by an examination of the jury by the court, in the presence of defendants, on the return of the written verdict, in which the jury states that the verdict fixes a two-year sentence as to each defendant.

2. In a prosecution for homicide, there was evidence tending to show a conspiracy to commit the crime between defendants, their father, and a brother-in-law. The killing occurred immediately after the adjournment of a lawsuit between defendants' mother and deceased, which was asked by the mother for the purpose of having witnesses subpoenaed. Held, that a statement by the brother-in-law to the justice, in the presence of defendants, that he "need not be issuing those d— old subpoenas; we intend to fix it up in our own way,"—having reference by inference to defendants,—was admissible against them.

3. Where a witness for defendants in homicide testifies, on direct examination, that there was no conspiracy between himself and defendants to commit the crime, he may be impeached, after the proper foundation has been laid, by proof of his declaration, the day before the homicide, that defendants would be out and "h— would be raised the next day."

4. Where there is evidence in a homicide case tending to show that a defendant went to the scene of the homicide, where court was being held, for the purpose of provoking a fight with deceased, but defendant testifies that he was there as a witness in a certain case, he may be cross-examined as to the subject-matter of

such case, for the purpose of showing that his presence was not for the purpose of giving evidence.

5. A requested charge in homicide, that defendant had the same right to act in self-defense as if he had been first attacked, even though the evidence shows that deceased had attacked defendant's brother, and defendant had interfered to prevent a further attack, is erroneous.

6. Where there is evidence of a conspiracy between defendants in homicide, who were armed with pistols, and their father, who used a rifle, a requested charge that defendant must be acquitted if deceased was killed with a rifle ball is erroneous, for omitting reference to the conspiracy.

Appeal from Walker county court; A. H. Alston, Judge.

Adolphos Stevens and another were convicted of homicide, and they appeal. Affirmed.

The appellants, Adolphos Stevens and Walter Stevens, were jointly indicted for murder in the second degree for killing one Vester Henson by shooting him with a pistol, were convicted of manslaughter in the second degree, and sentenced to two years' imprisonment in the penitentiary. The evidence for the state tended to show that on the day of the killing there was to be a trial of a case between the mother of the defendants and Vester Henson, the deceased; that this case was a suit in a justice of the peace court, in which the defendants' mother was suing the deceased for rent; that when the case was called for trial it was continued, but before it was continued the defendants' mother asked for some subpoenas to be issued for witnesses; that after the case was continued Walter Stevens, one of the defendants, got up in the room where the people were assembled for the trial, and stepped over to the deceased, and said he wanted to see him; that the deceased walked from the house with Walter and Adolphos Stevens, the defendants; that as they walked along the defendants were cursing the deceased, and upon Adolphos asking him why he had treated their sister as he had he denied having done anything wrong towards the defendants' sister; that thereupon Adolphos replied that he intended to whip him for it; that the deceased pulled his knife and cut at Adolphos, who stepped backwards, and stumbled over a bush; that thereupon Walter Stevens stepped between them, and the shooting commenced; that while the shooting was going on Jesse Stevens, the father of the defendants, was seen to level his Winchester rifle at the deceased and fire it, and upon the firing of the rifle of Jesse Stevens the deceased fell. There was conflict in the evidence as to whether the deceased or Walter Stevens fired the first shot. The evidence for the defendants tended to show that neither of them fired at the deceased until after he had cut at Adolphos Stevens with his knife and cut his collar, and that after cutting at Adolphos Stevens the deceased cut Walter Stevens'

throat and shot him twice; that thereupon Walter Stevens pulled his pistol, and began shooting at Henson; that Adolphos Stevens did not shoot at all. The defendants, as witnesses in their own behalf, testified that there was no conspiracy between them and their father and John Morgan, their brother-in-law, to kill the deceased. During the examination of the justice of the peace before whom the case between the defendants' mother and the deceased was pending for trial, and after he had testified that the defendants' mother asked for subpoenas for witnesses, the state asked said witness the following question: "Did John Morgan, a brother-in-law of defendants, say anything about issuing a subpoena in the defendants' presence?" The defendants objected to this question, upon the ground that it was irrelevant, immaterial, and not binding on the defendants. The court overruled the objection, and the defendants excepted. The witness answered that John Morgan said in the presence of the defendants, "By God, you need not be issuing these damn old subpoenas; we intend to fix it up in our own way." The court overruled the defendants' motion to exclude this answer, and to this ruling the defendants duly excepted. It was shown by the evidence that John Morgan was a brother-in-law of the defendants, and lived at Horse Creek, 9 or 10 miles away; that the night before the difficulty the defendants came to the house of John Morgan, and spent the night, and that he came to the place where the killing occurred with the defendants the next morning. John Morgan was introduced as a witness for the defendants, and testified that he was present at the shooting, but that there was no conspiracy existing between him and the defendants to kill the deceased. The solicitor asked the witness the following question: "Did you tell Andy Pebly the evening before the shooting, at Horse Creek, that the Stevens boys would be out on the night train, and hell would be raised up above the next day?" The defendants objected to this question, upon the ground that they were not shown to be present at the time the statement asked about was made, and were not shown to have known anything about the conversation. The court overruled the objection, and the defendants duly excepted. The witness answered that he did not make said statement to said Pebly. The said Andy Pebly was introduced as a witness, and he was asked by the state the following question: "Did John Morgan tell you the evening before the shooting, at Horse Creek, that the Stevens boys would be out on the night train, and hell would be raised up above the next day?" The defendants objected to this question, upon the ground that it called for incompetent and hearsay testimony. The court overruled the objection, and the defendants excepted. The witness answered that John Morgan did make said statement at the time

specified. J. Henson, the father of the deceased, when examined as a witness, identified certain clothes which were shown him as the same which were worn by the deceased when he was shot, and stated that they had been in his possession ever since the killing, and were in the same condition as they were at the time of the shooting. A witness, Dan Rhodes, was, during his examination, shown the same clothing, and he identified them as the clothing Vester Henson had on at the time he was shot. Thereupon the state offered the clothing in evidence, and defendants objected on the ground that the clothes had not been properly identified, and that the witness had not been in possession of the clothes. The court overruled the objection, and the defendants duly excepted.

The defendants separately excepted to the following portion of the court's oral charge to the jury: "(b) In order to invoke the doctrine of self-defense, defendants must have been free from fault in bringing on the difficulty; reasonably free from fault will not do. (c) If you believe from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants and the father to take the life of Vester Henson [the deceased] or do him great injury, and the father of defendants fired the fatal shot that killed the deceased, then they would be equally guilty with the father, if the shooting by the father was done in carrying out the conspiracy previously entered into by them. (d) If you believe from the evidence beyond a reasonable doubt that these defendants entered into a conspiracy to kill the deceased, and the deceased was killed with a pistol, you would find them guilty of murder in the second degree, if it was done unlawfully and with malice." The defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(12) I charge you, gentlemen of the jury, that Walter Stevens had the same right to act in self-defense as if he had been first attacked, even though the evidence shows that Vester Henson had attacked his brother Dolph Stevens, and Walter had interfered to prevent Henson from further attacking Dolph Stevens. (a) I charge you that if you believe that Vester Henson was killed by a shot from a rifle gun, and not with a pistol, you must acquit the defendants."

The judgment entry was as follows: "This, the 19th day of March, 1902, came C. W. Ferguson, solicitor, who prosecutes for the state of Alabama, and also came the defendants in their own proper persons and by attorneys, and the said defendants, being duly arraigned upon said indictment, for their plea thereto say, in person, that they are not guilty. Issue was joined on this plea. Thereupon came a jury of good and lawful men, to wit, T. B. Hyche and eleven others, who, being impaneled and sworn according

to law, upon their oaths do say, 'We, the jury, find the defendants guilty of manslaughter in the first degree, and fix the punishment at two (2) years' imprisonment.' The jury being asked by the court, in open court, in presence of both of the defendants and their counsel, if the word 'defendants' included both defendants, they answered that the verdict included both defendants, and fixed punishment of each at two (2) years' imprisonment. And thereafter, before the jury was discharged, the defendants demanded a poll of said jury on said verdict, and each of said jurors separately stated that that was his verdict." There was a motion made by the defendants in arrest of judgment, upon the ground that the verdict returned by the jury was insufficient and uncertain, in that it does not state whether both of the defendants or each of them shall suffer one year, so as to make two years, and that it fails to state what punishment each of the defendants shall suffer. This motion was overruled. Subsequently the court rendered its sentence upon the defendants, which was in words and figures as follows: "And now upon this the 22d day of March, 1902, Walter Stevens, the defendant, being in open court, and being asked by the court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing. It is therefore considered by the court, and it is the judgment and sentence of the court, that the said defendant Walter Stevens be imprisoned in the penitentiary of the state of Alabama for a term of two (2) years." A summary sentence was passed upon the defendant Adolphos Stevens.

D. A. McGregor, J. T. Shugart, and Coleman & Bankhead, for appellants. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. Upon the authority of *Driggers v. State*, 123 Ala. 46, 26 South. 512, and *Wilkinson v. State*, 106 Ala. 28, 17 South. 458, we must hold that there is enough expressed in the minute entry to show that the judgment of the court was invoked and pronounced upon the guilt of the defendants. If it be conceded that the verdict of the jury as expressed in writing was too uncertain and indefinite—a point we do not decide—to support a judgment of conviction, this defect was cured by what was said by them in explanation of the written verdict. Since verdicts may be ore tenus, the oral statement by the jury of their findings, in connection with the written verdict, was entirely sufficient, and eliminated all ambiguity, if it existed, in the latter. This principle is clearly announced in the case of *State v. Underwood*, 2 Ala. 744, where it was said: "It is not essential to a verdict that it should be written. The jury may announce it to the

court ore tenus, or upon paper at their pleasure; and, however rendered, upon the suggestion of the judge it may be varied by the jury in its terms, so as to make it speak their intentions. And the change thus made in the finding need not be noted in writing, even if it be such as to entirely supersede the verdict." See, also, *Robinson v. State*, 54 Ala. 86. The record affords abundant evidence from which the jury were authorized to infer that there was a conspiracy between the father, the brother-in-law of these defendants, and the defendants themselves to kill the deceased. In the light of the results which followed almost immediately upon the declaration of Morgan, the brother-in-law, made in their presence, to the justice of the peace, it was clearly inferable that he had reference to defendants as well as to their father, who are shown to have participated in the deadly combat.

In view of Morgan's testimony, on direct examination, that there was no conspiracy between him and the defendants, it was entirely competent for the prosecution, for the purpose of impeachment, after proper predicate laid, to prove by Peby that he (Morgan) made the statement which he denied making. So, too, in view of the inference afforded by the evidence that defendants went from their home, in an adjoining county, to the place of the difficulty, for the purpose of provoking a fight with the deceased, and in view of the statement of the defendant Adolphos that he was at the place of the difficulty as a witness in a suit pending between his mother and deceased, and knew what the contract was between his mother and deceased, it was competent for the solicitor, on cross-examination, to further ask him what was the contract between his mother and the deceased, for the purpose of showing, if he could, that defendant's presence was not for the purpose of giving testimony as a witness, but was in furtherance of the common design to slay the deceased.

The only other exception reserved upon the trial to the admission of evidence was the action of the court in permitting the state to introduce the clothing worn by deceased when killed. This exception is not urged in argument. Besides, there is manifestly no merit in it, the clothing having been fully identified.

Charge 12, refused to defendants, is so clearly bad no further comment is necessary.

Charge "a" pretermits all reference to a conspiracy, which the testimony tended to show existed between the defendants and their father to kill the deceased, and was therefore properly refused.

There was no error in those portions of the oral charge of the court excepted to.

There being no error in the record, the judgment must be affirmed.

LOWE v. STATE.

(Supreme Court of Alabama. June 12, 1902.)

LARCENY—INDICTMENT—JOINDER OF OFFENSES—SUFFICIENCY—EVIDENCE OF ANOTHER OFFENSE.

1. Under Code, § 4913, providing that offenses of the same character and subject to the same punishment may be charged in the same count or in the alternative, an indictment which charged in one count that defendants took 18 cows of one owner, and in another count that defendants took 18 cows of another owner, was not bad for duplicity, as the two offenses were of the same character.

2. An indictment for larceny was not bad because it failed to aver the Christian name of the owner of the stolen property, or that such Christian name was unknown to the grand jury.

3. On a prosecution for larceny of 18 head of cattle, evidence that while the defendants were driving away the cattle they also took a bull belonging to another party was admissible, as it was a part of the same transaction.

Appeal from city court of Montgomery; William H. Thomas, Judge.

Will Lowe was convicted of larceny, and appeals. Affirmed.

The indictment under which the appellant was tried was in words and figures as follows: "The grand jury of said county charge that, before the finding of this indictment, Will Lowe and Tom Crittenden feloniously took and carried away eighteen cows, the personal property of J. B. Milligan. The grand jury of said county further charge that, before the finding of this indictment, Will Lowe and Tom Crittenden feloniously took and carried away eighteen cows, the personal property of J. H. Milligan, against the peace and dignity of the state of Alabama." Upon a demand, a severance was ordered, and the defendant Will Lowe, who is the appellant in this case, was tried separately. The defendant demurred to the indictment upon the following grounds: "(1) Because said indictment charges two separate and distinct offenses of larceny, from two separate and distinct owners. (2) Because said indictment in each count fails to aver the Christian name of the owner of the property alleged to have been stolen, and fails to aver that such Christian name of said alleged owner in each count was to the grand jury unknown." This demurrer was overruled. On the trial of the case the state introduced evidence tending to show that the defendant, Will Lowe, and Tom Crittenden had feloniously taken and carried away 18 head of cattle; that 5 or 6 of said cattle belonged to J. H. Milligan, and 12 or 13 of them belonged to J. B. Milligan; and that the cattle were taken while out in a range owned by Milligan, a long distance from Montgomery, and were carried by the defendant and Crittenden, with the assistance of others, to Montgomery, and there sold. Against the objection and exception of the defendant, the state was allowed to prove

that, while the defendant and Crittenden were driving the 18 head of cattle taken from Milligan to Montgomery, they also took a bull belonging to one Reynolds, and drove it, with the other cattle, into Montgomery. There was evidence introduced for the defendant tending to prove an alibi. The defendant requested the court to give to the jury the following written charge, and separately excepted to the court's refusal to give the same as asked: "(1) If the jury believe all the evidence in this case beyond a reasonable doubt, they must find the defendant not guilty." From the judgment of conviction, the defendant appeals.

Ohas. G. Brown, Atty. Gen., for the State.

SHARPE, J. Contrary to what is assumed by the first ground of the demurrer to the indictment, two or more offenses may well be charged in one indictment as having been committed by the same defendant, where, as in this case, the offenses are of the same character. Code, § 4913. *Wooster v. State*, 55 Ala. 217; *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383; *Cawley v. State*, 37 Ala. 152.

The second ground of the demurrer is not well taken. *Gerrish v. State*, 68 Ala. 490; *Crittenden v. State* (Ala.) *infra*.

To the general rule which, in a prosecution for one offense, rejects evidence of another and distinct offense, an exception obtains where the offense charged and that proposed to be proved form part of the same transaction, so that the evidence offered will bear on the issues in the pending case. *Gassenheimer v. State*, 52 Ala. 313; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *Miller v. State* (Ala.) 30 South. 379. This exceptional rule justifies the admission of the evidence tending to show that, while the cattle which were the subject of the alleged larceny were being carried away from the owners, a bull belonging to Reynolds was driven into and carried away with them.

The other evidence to which exceptions were reserved was relevant,—some of it to identify the cattle referred to in other evidence as having been taken by defendant, and some as corroborating other testimony for the state. See *Crittenden's Case*, *supra*.

For obvious reasons, the charge refused to defendant was bad.

No error appearing, the judgment will be affirmed.

CRITTENDEN v. STATE.

(Supreme Court of Alabama. June 12, 1902.)

LARCENY—INDICTMENT—DUPLICITY—SUFFICIENCY—JURORS—SELECTION OF PANEL—INSTRUCTIONS—RES GESTÆ—CORROBORATION OF CONFESSION—ALIBI—CONSPIRACY—OWNERSHIP—TESTIMONY OF WIFE OF ACCOMPLICE—ANIMUS OF ACCOMPLICE.

1. An indictment which charged two offenses, both a part of the same transaction, was not bad for duplicity.

2. An indictment for larceny was not bad because it failed to aver the Christian name

¶ 3. See *Indictment and Information*, vol. 27, Cent. Dig. §§ 273-275.

of the owner of the stolen property, and that such Christian name was unknown to the grand jury.

3. Where the state, on a prosecution for larceny, had peremptorily challenged 3 jurors, it was not error to require the defendant to pass upon the remainder before summoning others to fill the places of those challenged.

4. Under Cr. Code, § 5012, and Acts 1900-1901, pp. 1844, 2000, § 9, allowing the summoning, when necessary, of petit jurors from the qualified citizens of the county, where, on a prosecution for larceny, the number of jurors had been reduced to nine by the state's peremptory challenges, the defendant was not entitled to have such deficiency made up by drawing from the jury box as in capital cases.

5. Where, on a prosecution for larceny, there was evidence of a conspiracy between the defendant and others to commit the offense charged, it was proper to show their acts and declarations in connection with and in furtherance of the common purpose.

6. On a prosecution for larceny, where the evidence showed that cattle were stolen in one county and taken into another, evidence of what was said and done along the route was admissible as a part of the res gestæ.

7. Under Cr. Code, § 5300, providing that conviction of a felony may be had on the evidence of an accomplice, if the corroborating evidence tends to convict the defendant with the commission of the crime, on a prosecution for larceny instructions that the slightest corroboration of the testimony of an accomplice is sufficient if it tend to connect the defendant with the commission of the offense; that proof of the commission of the offense, together with the confession of defendant, would authorize conviction; and that a confession was admissible as corroborating evidence of an accomplice,—were proper.

8. It was not error to instruct that if the jury believe, beyond a reasonable doubt, that an alibi set up by defendant was false, they might consider this as a circumstance against him, in connection with the other evidence.

9. On a prosecution for stealing 18 head of cattle, a requested charge that if defendant was at home on the evening in question at sundown, and if three men stopped at another place with a bunch of 18 cattle, and unless defendant, with the other men, drove such cattle to that place, he must be acquitted, is erroneous, as it ignored evidence tending to show a conspiracy.

10. On a prosecution for larceny, where the indictment charged ownership in different persons in separate counts, and the evidence showed a single taking, requested charges that defendant should be acquitted on failure to prove ownership in the owner as alleged in the first count, and on failure to prove ownership in the owner as alleged in the second count, were properly refused, as each ignored the charge in the other count.

11. An instruction that defendant should be acquitted on failure to prove joint ownership was properly refused, as the indictment did not so charge.

12. A requested charge that the independent loss of the property did not constitute the offense as charged in the indictment was properly refused, as it was misleading.

13. A charge that, if there was a reasonable doubt that defendant was not in a certain place on the day the offense was committed, he should be acquitted, was properly refused, as it ignored evidence of a conspiracy.

14. A charge that, unless defendant's confession tends to corroborate the testimony of his accomplice, he should be acquitted, was properly refused, as it ignored other corroborating evidence.

15. A charge that the jury must view testi-

mony of the wife of an accomplice with caution, and give every consideration to the fact that she is the wife of an accomplice, was properly refused, as it invaded the province of the jury.

16. A charge that the animus actuating the accomplice in testifying against defendant must be considered was properly refused, as it invaded the province of the jury, and assumed that there was an animus proven.

17. A charge that, in order to convict defendant, the corroborating evidence of the accomplice should be upon some part of the testimony material to the issue, and that it must also tend to show that defendant committed the crime charged, for it is not a sufficient corroboration to prove the offense was in fact committed in the manner described by the accomplice, unless proof of the corpus delicti necessarily involves defendant's connection with the crime, was properly refused, as it was argumentative and misleading.

Appeal from city court of Montgomery; William H. Thomas, Judge.

Tom Crittenden was convicted of larceny, and appeals. Affirmed.

The indictment under which the appellant was tried and convicted was in words and figures as follows: "The grand jury of said county charge that, before the finding of this indictment, Will Lowe and Tom Crittenden feloniously took and carried away eighteen cows, the personal property of J. B. Milligan. The grand jury of said county further charge that, before the finding of this indictment, Will Lowe and Tom Crittenden feloniously took and carried away eighteen cows, the personal property of J. H. Milligan, against the peace and dignity of the state of Alabama." Upon a demand a severance was ordered, and the defendant Tom Crittenden was tried separately. The defendant demurred to the indictment upon the following grounds: "(1) Because said indictment charges two separate and distinct offenses of larceny from two separate and distinct owners. (2) Because said indictment in each count fails to aver the Christian name of the owner of the property alleged to have been stolen, and fails to aver that such Christian name of said alleged owner in each count was to the grand jury unknown." In reference to the organization of the jury for the trial of the defendant, the bill of exceptions contains the following recital: "During the organization of the jury, twelve of the regular jurors for the week of said term were in the jury box. The state challenged three of said jurors, and the court thereupon ordered the defendant to pass upon the remaining nine jurors. Thereupon the defendant moved the court to complete the jury from the regular jurors who were in attendance upon the court, before he be required to pass upon the jurors remaining in the box. The court refused to grant said motion, to which action of the court defendant then and there duly and legally excepted. The venire for the week being exhausted, the jury being incomplete, the defendant moved the court to draw from the jury box a sufficient number of names

to complete said jury. The court overruled said motion, and the defendant then and there duly and legally excepted to the ruling of the court. The court ordered the sheriff to summon from the qualified citizens of the county the regular number of jurors to complete said jury, to which action of the court the defendant then and there duly and legally excepted." On the trial of the case the state introduced evidence tending to show that the defendant, Will Lowe, and Tom Crittenden had feloniously taken and carried away 18 head of cattle; that 5 or 6 of said cattle belonged to J. H. Milligan, and 12 or 13 of them belonged to J. B. Milligan, and that the cattle were taken while out in a range owned by one of the said Milligans, a long distance from Montgomery, and were carried by the defendant and Crittenden, with the assistance of others, to Montgomery, and there sold. There was further evidence on the part of the state that the defendant, in conversation with the wife of Tillman Crittenden, one of his accomplices, confessed to having stolen the cows as charged in the indictment. The defendant introduced evidence tending to show an alibi. The defendant denied having made a confession to Mrs. Tillman Crittenden. The other facts of the case are sufficiently stated in the opinion. The court, at the request of the state, gave to the jury the following written charges: "(1) The slightest corroboration of the testimony of an accomplice is sufficient if it tend to connect the defendant with the commission of the offense. (2) If the jury believe from the evidence, beyond a reasonable doubt, that in this county, and within three years before the finding of this indictment, J. B. Milligan or J. H. Milligan had 18 or any number of cows feloniously taken and carried away, and that the defendant Tom Crittenden confessed that he was one of the persons engaged in such felonious taking and carrying away of said cows, this is sufficient to authorize the conviction of the defendant, without regard to the testimony of the accomplice. (3) A confession by the defendant, if one was made, is admissible as corroborating evidence of that of an accomplice, and may be taken by the jury as a sufficient corroboration to authorize a conviction. (4) If the jury believe from the evidence, beyond a reasonable doubt, that the alibi set up in this case is simulated, false, and fraudulent, they may consider this as a circumstance against the defendant, in connection with all the other evidence in the case." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: "(19) The court charges the jury that if they believe that Tom Crittenden on the evening of the 19th of March, 1900, was at his home, at Shady Grove, and that on the same evening, before sundown, three men stopped at the

house of Dan Seagers with a bunch of 18 cattle, they must acquit the defendant. (20) Before the jury can find the defendant guilty, they must find, beyond a reasonable doubt, that the defendant and Will Lowe and Tillman Crittenden drove 18 head of cattle to the house of Dan Seagers on the afternoon of March 19, 1900." "(22) Before the jury can find the defendant guilty, they must believe beyond a reasonable doubt that the 18 head of cattle alleged to have been stolen on the 19th of March, 1900, was the property of J. B. Milligan." "(17) The court charges the jury that they must believe beyond a reasonable doubt that 18 head of cattle were stolen from J. H. Milligan and J. B. Milligan on the 19th day of March, 1900, by the defendant, before they can convict this defendant." "(23) Before the jury can find the defendant guilty, they must find beyond a reasonable doubt that the property stolen was the property of J. H. Milligan." "(21) The court charges the jury that the independent loss of 18 head of cattle does not constitute the offense as charged in this indictment." "(8) If the jury have a reasonable doubt that the defendant was not in the city of Montgomery on the 21st day of March, 1900, then they must find the defendant not guilty." "(14) If the jury have a reasonable doubt as to whether Tillman Crittenden assisted in driving the cattle from the pasture of Mr. Lowe to the stock pen in the city of Montgomery, then they must acquit the defendant." "(22½) Although the jury may believe from the evidence that the defendant made a confession to Mrs. Crittenden, unless that confession tends to corroborate the testimony of the accomplice, Tillman Crittenden, then the jury must find the defendant not guilty." "(15) The court charged the jury that the testimony of the wife of the accomplice must be viewed with caution, and that they must give every consideration to the fact that she is the wife of the accomplice." "(12) The court charges the jury that they are to take into consideration the animus actuating the accomplice in the testimony given against defendant." "(6½) The court charges the jury that it is necessary, in order to convict the defendant, that the corroborating evidence of Tillman Crittenden should be upon some part of the testimony which is material to the issue. It must also tend to show that defendant committed the crime charged in the indictment; for it is not sufficient corroboration to prove the offense was in fact committed in the manner described by Tillman Crittenden, the accomplice, unless proof of the corpus delicti necessarily involves the defendant's connection with the crime."

Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. There was no error in overruling the demurrer to the indictment and

the motion to quash, on the ground of charging two offenses in different counts. *Wooster v. State*, 55 Ala. 220; *Maynard v. State*, 46 Ala. 85; *Butler v. State*, 91 Ala. 87, 9 South. 191; *Rollins v. State*, 98 Ala. 79, 13 South. 280.

Nor was there any error in overruling the demurrer to the indictment on the ground that the Christian name of the owner of the property alleged to have been stolen is not averred. *Thompson v. State*, 48 Ala. 165; *Franklin v. State*, 52 Ala. 414; *Gerrish v. State*, 53 Ala. 480; *Lyon v. State*, 61 Ala. 224; *Lowe v. State* (decided at the present term) 32 South. 273.

There is no merit in the exceptions reserved to the actions and rulings of the court in the organization and impanelling of the jury which tried the case. After the state had peremptorily challenged several jurors, there was no error in requiring the defendant to pass upon the remaining jurors before summoning others to supply the places of those who had been challenged. *Sellers v. State*, 52 Ala. 368; *Wilson v. State*, 31 Ala. 371.

To complete the jury after the number had been reduced below 12 by challenges, the defendant was not entitled to have such deficiency made up by drawing from the jury box as in capital cases. In felony cases other than capital, the statute provides for the completion of the jury for the trial of the case, where the regular jurors in attendance have been exhausted without completing the jury, by summoning the required number from the qualified citizens of the county. Cr. Code, § 5012; Special Jury Law for Montgomery County (Acts 1900-1901, pp. 1994, 2000, § 9).

The bill of exceptions shows many exceptions reserved on the trial to the rulings of the court on the introduction of the evidence. It can serve no good purpose to review these exceptions in detail. We have carefully considered them all, and fail to find any merit in any of them.

There was evidence tending to show a conspiracy on the part of the defendant and others mentioned in the evidence to commit the offense charged in the indictment. Every act or declaration done or made by the defendant or any one of the co-conspirators in connection with and in furtherance of the common purpose was clearly competent and admissible in evidence.

The testimony tended to show that the cows alleged to have been stolen were taken by the defendant in an adjoining county, and brought into the county of Montgomery, and sold in the city of Montgomery. All that was said and done by the defendant and those aiding him in the commission of the offense, along the route, in carrying the cows from the place of original caption to the city of Montgomery, was competent as a part of the *res gestæ*.

It is sufficient to authorize a conviction on the evidence of an accomplice if the corroborating evidence tends to connect the defendant with the commission of the crime. Cr. Code, § 5300; 1 Mayfield, Dig. p. 8, subd. 10.

Charge 1 requested by the state was free from reversible error. Nor was there any error in the giving of charges numbered 2, 3, and 4, requested by the state.

Charge 19 requested by the defendant is faulty, in that it ignores evidence which tended to show a conspiracy to commit the offense, and gives undue prominence to certain portions of the evidence to the exclusion of all the other evidence. If the defendant was connected with the conspiracy to commit the crime, proof of his personal presence at the time of its commission would not be necessary to a conviction.

Charge 20 likewise singles out a part of the evidence, to the exclusion of the evidence tending to show a conspiracy. Besides, the evidence tended to show that they drove 17, and not 18, cows to the house of Dan Seagers. The charge was properly refused.

The ownership of the property stolen was laid in different persons in separate counts. The evidence shows a single taking. This form of pleading was adopted to meet any phase of the evidence as to ownership. Charge 22 postulates an acquittal on a failure of proof as to ownership in J. B. Milligan. This ignored the charge contained in the second count, which laid ownership in J. H. Milligan. Charge 23 postulates an acquittal on failure of proof of ownership in J. H. Milligan, ignoring the charge in the first count which put the ownership in J. B. Milligan. These charges for this reason were bad, and were properly refused.

There was no charge in the indictment of a joint ownership in J. B. and J. H. Milligan, and consequently charge 17 was rightly refused.

Charge 21 was clearly misleading.

Charge 6 ignores the evidence which tended to show a conspiracy on the part of the defendant and others in the commission of the theft.

Charge 14 is so palpably faulty as to require no comment.

Charge 22½ ignores other evidence in the case, besides the confession of the defendant, which tended to connect him with the commission of the offense charged.

Charge 15 is invasive of the province of the jury, besides being bad in other respects.

Charge 12 likewise invades the province of the jury, and assumes that there was animus proven.

Charge 6½ is both argumentative and misleading, and for this reason, if no other, properly refused.

We find no error in the record, and the judgment is affirmed.

SURGINER v. STATE.

(Supreme Court of Alabama. June 12, 1902.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—
DEFENSE OF ANOTHER.

1. On a prosecution for assault with intent to murder, it was error to permit a physician to state that a wound received from defendant, by a brother of the complaining witness, at the time of the assault, contributed to such brother's death, which occurred, two or three months after, from typhoid fever.

2. On a prosecution for assault with intent to murder, it appeared that defendant's brother-in-law voluntarily engaged in a quarrel with one of three brothers, and made an aggressive announcement with reference to the other two, calculated to provoke hostile action. The two brothers went to the assistance of the third, and defendant shot, wounding them. *Held* that, as the right to use violence in defense of another exists only where the imperiled person would be justified in using such violence in his own defense, evidence of the general reputation of the three brothers as being dangerous men, as tending to show defendant acted in defense of his brother-in-law, and instructions thereon, were properly refused.

Appeal from circuit court, Limestone county; A. H. Alston, Judge.

Jesse Surginer was convicted of an assault with intent to murder, and he appeals. Reversed.

The defendant requested, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(3) If you believe from the evidence beyond a reasonable doubt that the fight in first place began between Campbell and Bert Yarbrough upon the proposition, and the acceptance thereof, to fight a 'fair fight,' and that, after Bert Yarbrough and Campbell had so engaged in such fight, Walter Yarbrough and Will Yarbrough appeared upon the scene, and began an attack upon Campbell, and that said Campbell did not mean or intend that he would fight all three of the Yarbroughs at once, then I charge you that the right of self-defense revived in favor of Campbell as against Walter and Will Surginer; and that the defendant, Jesse Surginer, had the right to shoot Will Yarbrough to prevent the commission by him of a felony on Campbell, or to prevent the infliction of great bodily harm upon the said Campbell, if, at the time of shooting, there was a well-grounded and honest belief on the part of the defendant that it was necessary for him to act to prevent the taking of the life of the said Campbell, or the infliction upon him of great bodily harm. (4) In order to convict this defendant of an assault upon William T. Yarbrough with intent to murder him, the jury must believe from the evidence, beyond all reasonable doubt and to a moral certainty, that the situation of Charlie Campbell, William T. Yarbrough, Walter Yarbrough, and Bert Yarbrough was such as not to impress upon the mind of this de-

fendant a reasonable belief that Charlie was in danger of grievous bodily harm or in danger of losing his life when this defendant shot William T. Yarbrough; and the jury must also believe from the evidence, beyond all reasonable doubt and to a moral certainty, that this defendant fired the shot at William T. Yarbrough with intent to murder him; and they must also believe, beyond all reasonable doubt and to a moral certainty, from the evidence in this case, that the defendant shot William T. Yarbrough with malice. (5) I charge you that in this case the acceptance of a challenge by Campbell to fight Bert Yarbrough a fair fight, and their engaging in such fight, gave no right to the brothers Will and Walter Yarbrough to interfere, and aid Bert Yarbrough, in such fight, under the circumstances disclosed by the evidence in this cause; and I further charge you that if you find from the evidence that Will and Walter Yarbrough did attack Campbell under the circumstances above detailed, and the defendant was convinced from the situation of the parties that Charlie Campbell's life was in danger, or that he was likely to suffer grievous bodily harm, then, in that event, this defendant had a right to shoot William T. Yarbrough in order to prevent the [apparent (?)] grievous injury or death of Campbell. (6) I charge you, gentlemen of the jury, that if the defendant shot William T. Yarbrough when the situation of the parties Bert Yarbrough, William T. Yarbrough, Walter Yarbrough, and Charlie Campbell was such as to reasonably convince a prudent and a reasonable man that said Charlie Campbell was in danger of grievous bodily hurt, or in danger of being killed by said Yarbrough boys, then he was justifiable; and I further charge you that the danger need not have been real, for the defendant would be justified though the danger was only apparent." "(8) If you believe from the evidence in the case that the invitation, whether issued by Yarbrough or Campbell, was to fight one Yarbrough at a time, then if Walter and Will Yarbrough appeared upon the scene and engaged Campbell, after he and Bert had commenced to fight, then I charge you that the right of self-defense revived, or came into existence in favor of Campbell, against Will and Walter Yarbrough."

W. R. Walker, for appellant. Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. In a quarrel which first arose between defendant and one or more of three brothers Yarbrough, defendant's brother-in-law, Campbell, sided with him, and fought with Bert Yarbrough. Walter and Will Yarbrough engaged, either in attempting to separate those combatants or in fighting Campbell, and while the latter was underneath Bert Yarbrough, fighting and being

fought, defendant, by separate shots, wounded each of the Yarbroughs. This prosecution is for the shooting of Will Yarbrough. In behalf of the state, a physician testified he attended Bert Yarbrough's wound about 30 days, and then dismissed him; that, two or three months after the shooting, Bert Yarbrough had typhoid fever, and died. Thereupon the state was allowed, against objection, to elicit as evidence the physician's opinion that the wound inflicted on Bert Yarbrough contributed to his death.

The contributory effect of his wound in producing the death of Bert Yarbrough was not a matter pertaining to the *res gestae* of the offense charged. The testimony concerning it had no tendency to prove either the fact, manner, or motive of the shooting of Will Yarbrough, and could not have properly assisted in determining whether the defendant was guilty of murderously assaulting Will Yarbrough. This testimony was, therefore, irrelevant. Its admission involved error which may have operated to defendant's prejudice, and therefore the judgment must be reversed. Whether evidence as to the ultimate effect on Bert Yarbrough of his wound, alone, as disconnected from other causes, would have been admissible, is not a question raised or decided.

The right of one to use violence in defense of another is recognized by the law only where the imperiled person would have been legally justifiable in using like violence in his own defense, and in no case is a necessity for acting in self-defense regarded as ground for an acquittal, unless the person seeking shelter thereunder was free from fault in bringing on the difficulty, or had retired therefrom, and was thereafter assailed. *Gibson v. State*, 91 Ala. 64, 9 South. 171; *Bostic v. State*, 94 Ala. 45, 10 South. 602; *Wood v. State*, 128 Ala. 27, 29 South. 557. That Campbell was not free from fault in that respect was proved by undisputed evidence, and this is so whether the difficulty be considered as had with one or with the three Yarbroughs; for the testimony, including that of Campbell himself, leaves no room for doubt that he not only entered willingly into the fight with one, but on the same occasion made an aggressive announcement with reference to the other two, brothers, calculated to provoke hostile action on their part. Only in connection with evidence tending to establish a right to shoot in defense of himself or Campbell could the defendant have been entitled to prove the Yarbroughs were generally known to be dangerous; and, there being no such evidence, defendant's offer to make such proof, and his requested charges third to sixth, inclusive, as well as the eighth charge, were properly rejected. The other rulings, both on matters of evidence and charges, to which exceptions were reserved, were plainly correct.

Reversed and remanded.

LEARNED v. OGDEN et al.

(Supreme Court of Mississippi. June 2, 1902.)

TENANCY BY CURTESY—WASTE—CUTTING TREES FOR PROFIT—JOINT ACTION BY REMAINDER-MEN—LIMITATION—EVIDENCE—PREJUDICIAL ERROR.

1. A tenant by the curtesy commits waste by cutting and selling trees for mere profit.¹

2. A sale of trees for profit by a tenant by the curtesy is not binding on the life tenant.

3. A joint action by several heirs against an assignee of the tenant by the curtesy in possession for waste, was barred as to acts of waste committed after the eldest child attained his majority, where the period of limitation had elapsed between that time and the time when the action was commenced.

4. In an action by remainder-men for waste committed by an assignee of the tenant by the curtesy, the admission of evidence of waste by others prior to the time when defendants' trespasses began, and of acts of waste by defendant, barred by limitation, was prejudicial error, not cured by an instruction confirming the recovery to the proper period.

5. In an action for waste in cutting timber, the sawmill books of defendant were not admissible.

6. The number of stumps of trees counted by witnesses did not bend to fix the number of trees cut by defendant.

7. Plaintiffs must show with reasonable certainty what trees were severed by defendant.

8. The fact that a life tenant should protect the inheritance from injury, and might sue for injuries thereto, does not affect the right of action of the remainder-men for waste committed by a third party.

9. The fact that a tenant by the curtesy is guardian of his minor children, entitled to the remainder, does not cause the statute of limitations to run against their right of action for waste.

Appeal from circuit court, Adams county; W. R. Harper, Special Judge.

"To be officially reported."

Action by W. F. Ogden and others against R. F. Learned. From a judgment for plaintiffs, defendant appeals. Reversed.

E. H. Brown and Green & Green, for appellant. Smith, Hush & Landau and Pintard & Ratcliff, for appellees.

TERRAL, J. In 1878, Elizabeth Ogden departed this life intestate, seized of Black Creek plantation, containing more than 2,200 acres of land, lying north of Coles creek, and near the Mississippi river, in Jefferson county. She left surviving her husband, W. F. Ogden, Sr., who was entitled to a life estate in said lands as tenant by the curtesy, and who died in 1899, and six children, entitled to said estate in reversion. Two of said children died in infancy, leaving the four others to inherit their interest in said lands. The said four children of Mrs. Elizabeth Ogden, in June, 1900, brought suit against appellant, Learned, for trespass on the said Black Creek plantation in cutting, felling, removing, and destroying between January 1, 1879, and the commencement of this suit 30,000 cypress trees standing and growing upon said land, of the

¹ See *Curtsey*, vol. 15, Cent. Dig. § 64.

value of \$2.50 per tree, aggregating \$75,000, to the great injury of their inheritance. They recovered a verdict of \$68,267.92. Upon a motion by appellant for a new trial the court required appellees to remit one-half the amount of said verdict, and thereupon entered a judgment against appellant for \$34,133.96, and from that judgment Learned appeals.

As a new trial must be granted, it will be unnecessary to notice in detail the pleadings or the evidence. While the law of waste, as established in England, is modified by its transplantation to this country to suit the conditions of a new and uncleared country, and to allow a tenant for life to open wild lands for necessary cultivation or to change the course of agriculture without being liable for waste, yet the cutting down of trees for his mere profit is here, as there, considered waste. A tenant by the curtesy, as an incident to his estate, may take reasonable estovers of all kinds, and he may cut timber to pay taxes, or to improve the land, and when so cut it belongs to the tenant, and not to the reversioner. But the cutting down by the tenant of trees for sale is waste, and the felling of trees by the tenant or others for a sale of them is an injury to the inheritance, for which the reversioners have their appropriate action. Trees, when felled, or severed from the soil, become personal property, in which the tenant in possession has no interest when cut for profit; and the reversioner may maintain his action for the possession of the property, or for damages therefor, in the same manner and with like effect as if he were the owner of the estate in possession. A tenant by the curtesy in possession has no authority, as such, to represent the reversioner, or to bind him or his estate in any manner whatever. Notes to *Allen v. De Groodt* (Mo. Sup.) 14 Am. St. Rep. 628 et seq. (s. c. 11 S. W. 240); notes to *Miles v. Miles*, 64 Am. Dec. 367 et seq.; 4 Kent, Comm. 74 et seq. From these views of the subject it results that the sale of the cypress trees growing on Black Creek plantation by W. F. Ogden, Sr., the life tenant, to the defendant, Learned, of date February 8, 1881, was in every respect void, and of no force whatever.

As the action of the plaintiffs below is a joint action, we think the court correctly ruled that the plaintiffs were entitled to recover only for the injury to their inheritance inflicted upon it by the defendant prior to the 18th day of January, 1888, when the eldest of the plaintiffs became 21 years old, because it is perfectly manifest that for all injuries done to the inheritance since the 18th day of January, 1888, the plaintiffs are barred of all recovery by the statute of limitations relating to actions. A consideration of the record discloses the fact that the evidence of the felling of trees upon Black Creek plantation was not confined to proof of the injuries inflicted by Learned between

February 18, 1881,—when it may be assumed, if specific proof justified it, that Learned commenced cutting timber upon the said lands,—and January 18, 1888, after which time plaintiffs were barred of remedy against him; but said evidence extended to any and all injuries done by any and all persons prior to February, 1881, and since January 18, 1888, aggregating many years of trespass upon said plantation, for which Learned was not liable in this suit. The court, in its instructions, correctly confined plaintiffs to a recovery for wrongs done by Learned or his servants to their inheritance after February 8, 1881, for there is no pretense upon the evidence that he trespassed upon Black Creek plantation before that time, and before January 18, 1888, when the eldest of the plaintiffs came of age, as all trespasses committed by him since said time are barred. And yet evidence of trespasses committed before February 8, 1881, and since January 18, 1888, was freely and abundantly submitted to the jury, to the great detriment of the defendant. While the instructions put a proper limit upon the period during which plaintiffs could recover, the evidence relating to the cutting of the trees upon the lands to which plaintiffs were entitled in reversion extended to trespasses manifestly committed during a course of many years before and after the time for which defendant was liable to plaintiffs in this action, and for which it is evident from the record that the defendant is not liable in this action. The sawmill books of Learned furnished no evidence to determine his liability in this suit, and were not admissible in evidence, and the stumps of trees counted by McGrew and the Taylors in no wise tended to fix the number of trees cut by Learned, or his servants under his direction, during the period for which he may be made responsible in this suit. In order that plaintiffs may have a recovery from the defendant, it is necessary for them to show with reasonable certainty what trees were severed by him or his servants from the soil, or what other injury was done by him or his servants to their inheritance, during the period for which the bar of the statute does not apply. The sum here recovered is largely in excess of any sum justified by the evidence.

The fact that Ogden, the life tenant, should have protected the inheritance from injury, and might have sued for the injuries of others thereto, does not affect their right of action. Nor does his becoming the guardian of his minor children put the statute of limitations into operation so as to affect their right of action, for it is only where the legal title to the property is in the guardian that the statute of limitations begins to run. The legal title here was in the plaintiffs.

The verdict and judgment are contrary to the law and the evidence, and must be reversed. Reversed and remanded.

ADAMS, State Revenue Agent, v.
SCHWARTZ'S HEIRS et al.

(Supreme Court of Mississippi, June 16, 1902.)

TAXATION—BACK ASSESSMENT—PROPERTY IN
LEGATEE'S POSSESSION.

Under Acts 1894, c. 34, § 3, providing that if the revenue agent discover after the expiration of the fiscal year that any property has escaped taxation by reason of not having been assessed, he shall notify the tax collector, who shall make the proper assessment, assessments for back taxes cannot be made against property purchased by legatees with their legacies because the testator failed to pay taxes on such legacies; the property never having been owned by the deceased testator, and the taxes thereon having been paid.

Appeal from circuit court, Adams county; Jeff. Truly, Judge.

Action by Wirt Adams, state revenue agent, against the heirs of J. C. Schwartz, deceased, and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

J. C. Schwartz died February 1, 1890, having made a will. It was executed and the executors discharged March 21, 1891. The state revenue agent has assessed for back taxes. The case was heard in the circuit court of Adams county on the following agreed facts: "J. C. Schwartz resided in Adams county, Mississippi, for many years prior to the year 1886, continuously to February 1, 1890, when he died. He had when he died, and for several years prior thereto, considerable estate, of real and personal property, in said county,—the personalty consisting, in part, of money, bonds, and stocks; and all of his property was disposed of by his will, duly made, which will was probated in said county soon after his death, and letters testamentary thereof granted on February 10, 1890, to W. P. Stewart and J. Ed Schwartz, the executors therein named; and on the 21st day of March, 1891, his executors were discharged by the court, his estate having been distributed according to the will. In said will J. C. Schwartz bequeathed to his daughter Mrs. Estelle S. Carson a legacy of forty thousand dollars, to his son J. Ed Schwartz a legacy of ten thousand dollars, to his daughter Mrs. Agnes Metcalf a legacy of forty thousand dollars, and to his daughter Mrs. Katie S. Stewart a legacy of ten thousand dollars; and to each of said children he devised separate pieces of real estate, and made them equal residuary legatees after payment of the specific legacies. The state revenue agent has caused to be assessed for back taxes from 1886 to 1899, inclusive, a large sum of bonds, notes, stocks, solvent credits, and money alleged to be taxable to the said decedent, as having escaped taxation while owned by him, as will appear from a copy of the assessment, made Exhibit A to this agreement. Notices of the assessment were duly given to Mrs. Estelle S. Carson, Mrs. Agnes Metcalf, Mrs. Katie S. Stewart, and J. Ed Schwartz, the beneficiaries under

the will of their deceased father, J. C. Schwartz. The legacies bequeathed to the above-named children of J. C. Schwartz were paid to them and his estate distributed prior to February 1, 1891, and it is not claimed by the state revenue agent in this proceeding that since the distribution of decedent's estate any of the property distributed has escaped taxation by reason of not having been assessed. While they received the real estate and legacies devised and bequeathed to them, Mrs. Katie S. Stewart, Mrs. Estelle S. Carson, Mrs. Agnes Metcalf, and J. Ed Schwartz never owned or held jointly any real estate or any of said personal property which the state revenue agent has attempted to have assessed for back taxes; nor do J. Ed Schwartz, Mrs. Katie S. Stewart, or Mrs. Estelle S. Carson now own or hold, either jointly or separately and individually, any of the property of any kind owned by their father at the time of his death. Mrs. Carson is now, and has been for a number of years past, a resident of the state of Kentucky, and has no property of any kind in Mississippi; and Mrs. Katie S. Stewart and J. Ed Schwartz have invested the legacies received under their father's will in property which they now own, and upon which the taxes have been paid. Mrs. Stewart, Mrs. Carson, and J. Ed Schwartz claim that, as they own or hold none of the property owned by their father at the time of his death, they cannot be held personally for any taxes that may be taxable against personal property owned by their father, nor can the property acquired by them with their legacies be subjected to the payment of any taxes that may be assessed against the personal property held by their father during his life or at the time of his death. They also further claim that said assessment, of which Exhibit A is a copy, is void for indefiniteness, in that it does not state what amount of money on deposit, or what bonds or notes or stocks, with the values of each, have escaped taxation. Mrs. Carson makes the further claim that, as she has no property of any kind in Mississippi, said assessment, in any view, must be stricken off as to her. The claim of the state revenue agent is that the decedent, in his lifetime, might have been assessed for any property which had escaped taxation in former years, and that any other property owned by the said decedent might have been subjected to the payment of taxes assessed, and that the legatees and devisees of the said Schwartz who have received his estate under his will hold said estate, and any property in which it has been invested, subject to be taken for the taxes now sought to be assessed on property which has escaped taxation. The revenue agent does not claim the right to assess such property, but only the right to assess against the legatees and distributees the property which, in the hands of the decedent, had escaped taxation, and for which he

would have been assessed, and that the property in the hands of the legatees and devisees, or any property in which it has been invested, may be charged with said taxes as should have been assessed, as if his will had not been made or he had not died. The revenue agent further claims that said assessment, of which Exhibit A is a copy, is sufficient, and is not defective or void for indefiniteness. For the purpose of presenting the isolated legal question as to which claims are correct, and without prejudice to either party in any further stage of the case as to the real facts, if different from this statement, it is agreed, so far as Mrs. Stewart, Mrs. Carson, and J. Ed Schwartz are concerned, that the case may be disposed of by the board of supervisors and by the circuit court and by the supreme court on appeal, and that this statement of facts, with said Exhibit A thereto, shall constitute the whole record of this case." In the circuit court there was a judgment discharging the assessment against the heirs of said Schwartz. From that judgment the state revenue agent appealed.

T. E. Cooper, for appellant. J. A. P. Campbell and Ernest E. Brown, for appellees.

WHITFIELD, C. J. Nothing more is necessary to show the correctness of the judgment appealed from than to read the agreed statement of facts, which the reporter will set out in full, and section 3, c. 34, Acts 1894. It is expressly agreed that the appellees never owned any of the specific property which the revenue agent is attempting to have back-assessed, and that they do not now own any of it when this back assessment is attempted,—any of the property of any kind owned by their father at the time of his death. It is further agreed that the two resident distributees have invested the legacies received by them under their father's will in property which they now own, and upon which last property all taxes have been paid. True enough, if the deceased were alive he might be back-assessed. But he is dead; the property he left, not in existence to be assessed; and the argument here is, because he might, if alive, be back-assessed for any property he owned which had escaped taxation by reason of not having been assessed, and since in such case any other property owned by the decedent might, by proper proceedings, have been subjected to the payment of the taxes assessed, that therefore the legatees and devisees of the said Schwartz, who have received his estate under his will, hold said property received under said will, and any other different property into which it may have been converted, subject to be taken for the taxes now sought to be assessed on property which has escaped taxation. The revenue agent claims no right to back-assess the specific property now in the heirs' hands, but he claims that he has the right to charge this specific property, now owned by appel-

lees, never owned by decedent, with these back taxes, just as if the decedent were alive. It is too plain for discussion that Acts 1894, c. 34, covers no such case. If property which had escaped taxation was in the hands of one who had received it from a decedent, the act would apply, for the person having the property could be notified. It is entirely incongruous to apply this act to this case, proceeding nunc pro tunc, as if the decedent were alive. It would be a most unique and bizarre sort of nunc pro tunc proceeding. The power of the revenue agent is doubtless very great. Some faint impression of that sort has gotten abroad. But, confessedly great as it is, here it must stop with the grave! There can be no nunc pro tunc resurrection of the dead, for the mere purpose of back taxation! It is doubtful, much as we love life, if Mr. Schwartz would consent to resurrection if the light of life was to be relumed only long enough to enable the revenue agent to effectually fix him with the back-tax machinery. Certainly the statute has not provided for an in invitum resurrection of that sort. Only property assessed is bound for taxes. The purpose of section 3 is to back-assess upon property, which has escaped taxation its own taxes, not by suit to charge such taxes upon, and make them out of, other and different property. Whatever the legislature may do as to this last, it has not done it by this act. Plainly, the effort here is to obtain a decree against a dead man, and satisfy it out of property in the hands of legatees, which specific property the dead man never himself owned, but which has been bought with the proceeds of property received from the ancestor and devivor. Most manifestly the act of 1894 authorizes no such proceeding.

Affirmed.

SHIPP v. McKEE et al.

(Supreme Court of Mississippi. June 16, 1902.)

INFANTS—DEEDS—AFFIRMANCE—SILENCE.

1. Mere silence, without any positive act, does not amount to an affirmance of a deed executed by an infant, but such infant has the full time fixed by the statute of limitations after majority in which to disaffirm by voluntary act.

On response to suggestions of error. Overruled.

For former opinion, see 31 South. 197.

Counsel for appellee filed lengthy suggestion of error, making the following points:

"The court is earnestly requested to re-examine the case in view of these three propositions, viz.: (1) There was no life estate in Jno. W. Shipp, preceding Miss Shipp's estate in remainder, after the deed from Busby made August 2, 1882, and the statute of limitations began to run against her from her majority in 1888. (2) Even if

¶ 1. See *Infants*, vol. 27, Cent. Dig. §§ 45, 54.

the life estate continued up to Jno. W. Shipp's death, which occurred in 1890, the right to file this bill existing all the time, the statute was put in motion when Miss Shipp attained her majority. (3) According to the doctrine announced by the former decisions of this court, and according to the weight of authority, an infant must disaffirm an executed contract within a reasonable time after attaining majority. The facts are these: J. R. Miller died in 1877, leaving a will, in which he devised all his lands to his wife, Cynthia Miller, for life, with a remainder in fee in one half to his daughter Mrs. Maynard, and with power of alienation in his wife to the other half. Mrs. Miller afterwards married Jno. W. Shipp, and died in 1879, leaving a will, in which she devised the land to her husband, Jno. W. Shipp, for life, with remainder in fee to one-half to Mary B. Shipp and her two sisters, all of them being children of Jno. W. Shipp, with remainder in fee to Miss Florence Miller. When J. R. Miller died, there was pending against him a suit in the United States circuit court, in equity, seeking to have the land sold. A decree was rendered in that court, directing the lands to be sold by a commissioner. It was so sold, and J. J. Busby became the purchaser on March 7, 1882. On August 2, 1882, Busby conveyed the land to Jno. W. Shipp and the devisees in remainder under the will of Mrs. Cynthia Shipp. In November, 1883, Jno. W. Shipp and the devisees of the remainder under Mrs. Shipp's will executed a deed of trust on the lands to the American Freehold Mortgage Company to secure a debt. On the 3d of January, 1885, Jno. W. Shipp and Mary Shipp conveyed the lands to Toof, McGowen & Co., and afterwards the other devisees of the remainder of the estate conveyed their interest in the land to Toof, McGowen & Co. The trustee in above deed of trust sold the land, and Toof, McGowen & Co. purchased it at that sale. Mrs. McKee claims under this firm. The bill was filed in 1900, and shortly before the suit was brought appellant disaffirmed in writing her deed of January 3, 1885. It is only necessary to consider the bill as against Mrs. McKee as one to cancel her claim as a cloud upon appellant's title.

"First. There was no life estate in Jno. W. Shipp after the execution of the deed from Busby, August 2, 1882. The sale and conveyance carried the paramount title, which was superior to the will of Jno. R. Miller. The conveyance was in express terms in fee simple to grantees. If it had not been so, it would have carried the fee under section 1180 of the Code of 1880. Under section 1197 of said Code, no other estate being defined, the vendees took an estate in common. The vendees in said deed took the land as tenants in common in fee simple, and the life estate of Jno. W. Shipp under the will of Mrs. Cynthia Miller became ipso facto extinguished by the conveyance of the superior and paramount legal title by Busby to

him in fee simple. Where a life estate and a fee vest in the same person, the life estate merges in the fee, and is extinguished. 11 Bl. Comm. side page 178; 15 Am. & Eng. Enc. Law, pp. 303, 315. Appellant could, then, in 1882, have filed a bill to vacate the deed and for partition of the land, and there never has been a time since her majority that appellant could not have filed a bill to vacate her deed. It is apparent that the bill is barred by the 10-years statute of limitations as a bill for partition as well as one to cancel the deed.

"As to the second proposition it is respectfully submitted that it is a well-settled doctrine of equity jurisprudence that a remainder-man may file a bill in equity to remove a cloud upon his title, and to settle the title to land during the existence of a preceding life estate. Fox v. Coon, 64 Miss. 465, 1 South. 629. Under the authority of this case this bill against Mrs. McKee, as the holder of the legal title under the voidable deed of appellant, to vacate said deed, could have been filed by her at any time after attaining her majority, and the statute of limitations began to run against her then, which was in 1883, and the 10-years statute of limitations bars this suit.

"Third. A minor must disaffirm an executed contract within a reasonable time after attaining majority. Wallace v. Latham, 52 Miss. 291, is cited in the opinion of the court in the present case in support of the proposition that a minor has the period prescribed by the statute of limitations for bringing a suit to disaffirm a contract unless circumstances raise an estoppel. This question was not involved in that case, and the observations of the learned judge who delivered the opinion of the court on that subject are obiter dicta. The case of Thompson v. Strickland, 52 Miss. 574, announces just exactly the opposite doctrine. On the authority of Thompson v. Strickland, a minor is bound by any unreasonable delay in disaffirming an executed contract. This doctrine is expressly and most clearly announced by the court in its opinion, delivered by Chief Justice Sharkey, in Scott v. Freeland, 7 Sneed & M. 409, 418, 45 Am. Dec. 810. It is respectfully submitted that it always was accepted in Mississippi as the common-law doctrine that an executed contract of an infant, to be avoided, must be disaffirmed within a reasonable time after he attains his majority. This doctrine is expressly and clearly announced in Edmunds v. Mister, 58 Miss. 765, the latest decision on this question. The appellant waited 12 years after attaining majority before disaffirming her contract, with the right all this time to file this bill to vacate her deed. The exercise of her right of election to affirm or to disaffirm did not depend in any manner upon whether there was or was not a preceding life estate in the land. The decisions outside the state are divided, but the weight of authority, as

well as the reasoning on the subject, support the doctrine that there must be reasonable diligence in disaffirming, and this must be done in a reasonable time, in case of an executed contract, after the infant becomes of age."

WHITEFIELD, C. J. Owing to the great regard we have for any views seriously urged by the learned counsel for appellee, we will make response to the second suggestion of error filed in this case. The distinction between disaffirming a contract by a minor and bringing an action at law by a remainder-man during the existence of a life estate is, of course, clear; but learned counsel is mistaken in asserting that the American doctrine is that the minor must, in all cases, disaffirm the executed contract in a reasonable time after reaching majority, though that reasonable time be short of the period which would bar the action under the statute of limitations. He relies chiefly on the case of *Long v. Williams*, 84 Ind. 118, but that case merely reannounces the doctrine of *Law v. Long*, 41 Ind. 568, and *Scranton v. Stewart*, 52 Ind. 68, and all three of these cases are impliedly, if not expressly, overruled by *Sims v. Bardoner*, 86 Ind. 94, 44 Am. Rep. 268; and they are also clearly in conflict with the doctrine announced by the supreme court of the United States in *Sims v. Everhart*, 102 U. S. 306, 26 L. Ed. 87. All this will clearly appear if learned counsel will carefully examine the note to *Sims v. Bardoner*, re-reported in 44 Am. Rep. 273. In that note the learned editor says, at page 273: "It is true that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant, to avoid it, must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance, and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was, in effect, the ruling in *Irvine v. Irvine*, 9 Wall. 627, 19 L. Ed. 800. See, also, *Prout v. Wiley*, 28 Mich. 164, a well-considered case, and *Drake's Lessee v. Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But these cases either rely upon *Holmes v. Blogg*, 8 Taunt. 508 (which was not a case of an infant's deed), or subsequent cases decided on its authority, or they are rested in part upon other circumstances than mere silent acquiescence,—such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. The preponder-

ance of authority is that in deeds executed by infants mere inertness or silence, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed; and those confirmatory acts must be voluntary." It is thus clearly shown that the true doctrine is, and that the preponderance of authority is, that in deeds executed by infants mere silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by conduct that would estop, will not bar an infant's right to avoid the deed. It may be true that a majority of cases carelessly state the case as counsel puts it; but, as shown in the quotation above, these cases relied upon *Holmes v. Blogg*,—a wholly false basis, since it was not the case of an infant's deed at all,—or depend upon conduct upon the part of the infant which would work an estoppel on him. In this case there is no evidence whatever to show anything on the part of this minor beyond mere silence. She was almost the whole of the time out of the state, having done nothing affirmatively, having not bound herself by any positive conduct which would work an estoppel. She had the full time fixed by the statute of limitations after majority within which to disaffirm. This is well settled in our state by *Wallace v. Latham*, 52 Miss. 291; *Brantley v. Wolfe*, 60 Miss. 420; *Allen v. Poole*, 54 Miss. 323.

Learned counsel is also mistaken in saying that there is no evidence showing that Busby was trustee. The recitals in the instruments of record show this with sufficient clearness and distinctness.

Overruled.

SOUTHERN RY. CO. v. McLELLAN.

(Supreme Court of Mississippi. June 16, 1902.)

RAILROAD EMPLOYEES—SAFE PLACE TO WORK—ROADBED—BALLAST—EVIDENCE—STATEMENTS OF PLAINTIFF—PECUNIARY CONDITION.

1. A flagman walking beside a moving train at night stumbled over a piece of slag beside the track, and fell, and was injured. *Held*, that his statement just after the accident, that no one was to blame, while probably intended to express his opinion, merely, that the trainmen were not to blame, was admissible for such value as the jury might give it.

2. Where a flagman was injured by stumbling in the nighttime over a piece of slag beside the track, the roadbed being ballasted with slag, it was error not to permit defendant to show that other responsible railroads used slag to ballast their roadbeds.

3. It was error to refuse to permit defendant to show that no accident had ever before happened at that place.

4. It was error to permit plaintiff to show that he was performing extra duties, and that the train was short of hands, in the absence of any claim on his part that such fact was a contributory cause to the injury.

5. It was error not to permit defendant's counsel to argue to the jury the long and safe

use of the place since it was ballasted with slag.

6. In an action by a servant against his master for injuries, it was error to permit plaintiff to show that he was poor.

Appeal from circuit court, Montgomery county; A. T. Roan, Special Judge.

"To be officially reported."

Action by Jesse McLellan against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jesse McLellan, appellee, a young man about 20 years old, was employed by appellant as a flagman, on one of its local freight trains, and had been so employed about 2½ months when the accident for which this suit is brought happened. On October 31, 1900, this train got into Greenville at night, and got orders there to go out again that night. On its trip out, the train stopped at Huntington switch, a small station near Greenville, to take from the switch there some cars. In obedience to orders of the conductor of this train, appellee assisted in making the switch, and the cars were brought from the switch to the main line; the switch was closed, and appellee then closed a "knuckle" on the rear car, and gave the back-up signal, and proceeded on the outside of the rails, along the side of the roadbed, to make the coupling to the caboose which had been left on the main line. It was night, and while thus going along the track he stumbled on some obstruction, fell, and was thrown upon the track, and had both his hands crushed so that they had to be amputated. Appellee testified, describing the accident: "In backing up, I gave the back-up signal, and stepped on the rock with my left foot, and that threw me under the train; that is, my side under the left wheel." He also testified that the rock was, as near as he could get at it, very near as large as his head, at least as big as his double fist; that the rock was about a foot from the end of the cross ties. The court gave the following instruction for defendant: "The court instructs the jury that the mere fact that a railroad employé knows of defects in machinery, ways, and appliances is not a bar to a recovery for injuries received by him on account of such defects." The giving of this instruction is assigned as error by appellant. The opinion of the court contains a further statement of the facts. There was a verdict and judgment for plaintiff for \$20,000. Defendant's motion for a new trial was overruled, and it appeals.

S. M. Roane and Catchings & Catchings, for appellant. Hill & Sesson, for appellee.

TERRAL, J. Upon the trial of the case in the circuit court the appellant offered several objections to the proceedings, which were overruled.

(1) It offered to show that the materi-

al used by it for ballasting its roadbed at Huntington switch, where the injury occurred, was like material as that commonly used by other railroad companies in ballasting their roads; and this offer was denied. (2) As a further circumstance relating to the question of negligence charged against it, it offered to show that no injury had ever occurred at Huntington switch by reason of any defect in its way at that point; and this offer was also excluded. (3) The appellant objected to the proof made by the plaintiff that he was poor; had no property and no money. (4) It also objected to his evidence that at time of receiving his injury he was performing extra duties, the train being short of hands, though the injury is not claimed to have occurred in consequence thereof. (5) The defendant's counsel was denied the right to argue the want of any evidence of an injury along Huntington switch was a circumstance tending to show that the roadbed of the switch track was properly ballasted, to which he excepted. (6) And it complains that it was not permitted to prove that the plaintiff, shortly after his hurt, said to Dr. Toombs that no one was to blame for his injury, and that it was purely accidental. And in these several respects we think the appellant has reasonable ground of complaint.

The statement of McLellan to Dr. Toombs that his hurt (a sorely grievous one) was an accident, and no one was to blame for it, was probably intended to express his opinion that no one engaged in the operation of the train was to blame for it, and it perhaps did not relate to the question whether the roadway constituting Huntington switch was or not negligently constructed by reason of too large pieces of slag used in ballasting it; which is the gravamen of the complaint,—the servants of appellant being entitled to a reasonably safe roadway; yet the statement of a party hurt in relation to it, in a suit for damages therefor, is always admissible in evidence for such consideration and value as the jury may give it.

The offer of defendant to show that other responsible railway companies used slag to ballast their roads tended to rebut any inference that the defendant was negligent in the mere use of slag on its roadbed, and for this purpose that item of evidence was admissible, leaving to the jury the question whether the method of the use of the slag was negligence or not. For the common use of slag by them for ballast by other roads is an argument that the use of slag itself is not negligence. It is its character as applied, as large or small, that gives room to the consideration of negligence in its use. The rejected evidence related in some degree to the general question of negligence of the defendant company, and should have been received.

The offer of defendant to show that no accident had ever before happened at Huntington switch bore also, as we think, upon the same question. *Wats. Dam.* § 156.

¶ & See Damages, vol. 15, Cent. Dig. § 498.

The evidence that the train was short of hands should not have been admitted, as it is not insisted that that was a contributing element to the injury.

And we do not perceive the ground of denying appellant's counsel the privilege of arguing to the jury, as a circumstance in its favor, the long and safe use of Huntington switch by its trains after it had been ballasted with the slag in question.

That the plaintiff was poor was not a matter to be placed before the jury. *Wats. Dam.* § 620. As some, or all, of these errors may have entered into the finding of the jury, we have, after long reflection, concluded that the case should be reversed.

Reversed and remanded.

FOGG, Tax Collector, v. HEBDON.

(Supreme Court of Mississippi. June 9, 1902.)

BANKS—INSOLVENCY—TRUST FUNDS—TAXES—INTERMINGLING OF FUNDS—ENFORCEMENT OF TRUST.

1. The fact that public moneys deposited with a bank by the tax collector are intermingled with its funds, and incapable of identification, does not prevent its collection as a trust fund from the assets of the bank, on its insolvency before the judgment of unpreferred debts; such deposit being a trust fund from its nature and by the express provision of Code 1892, § 3077.

2. The fact that a tax collector required by Code 1892, § 3840, to settle monthly, has accounted for public funds deposited in a bank, which has become insolvent, does not preclude him from afterwards maintaining a suit to establish such deposit as a trust fund.

Appeal from chancery court, Coahoma county; A. McC. Kimbrough, Chancellor.

"To be officially reported."

Suit by Geo. W. Fogg, as tax collector, against R. B. Hebdon, as receiver of the Bank of Friar's Point, to establish a trust fund. From a decree for defendant, the plaintiff appeals. Reversed.

In 1900, appellant was sheriff and tax collector of Coahoma county, and, as such, collected certain funds that belonged to the state of Mississippi, the county of Coahoma, and the board of levee commissioners for the Yazoo and Mississippi delta, and deposited them in the Bank of Friar's Point, which was doing a banking business in Coahoma county. Subsequently, the said bank made an assignment for the benefit of its creditors, and R. B. Hebdon was made assignee. He afterwards qualified as receiver of the bank under chapter 8 of the Code of 1892. Appellant then filed his petition, setting up the fact of the deposit of the aforesaid funds, charging that they were trust funds in the hands of the bank, and that they could not be taken by the creditors of the bank, and asking that the assignee be directed to pay him the amount thus deposited. The receiver answered this petition, admitting the deposit and the character of the deposit; but denied that it was a trust fund, because ap-

pellant could not trace the funds into any particular property or security held by the bank at the time of the assignment, and because the appellant had, before the filing of his petition, settled in full with the state, county, and levee board on account of said deposit. The cause was heard on petition, answer, and agreed statement of facts; it being agreed that the bank was insolvent when the deposits were made and when the assignment was executed, that appellant was and is not able to trace the moneys mentioned into any particular part of the property of the bank which came into the hands of the receiver, and that subsequent to the filing of the petition, and before final hearing, appellant, as tax collector, had from his private funds paid the state, county, and levee board the funds due each. The petition of appellant was dismissed by the court on final hearing. From that decree the tax collector appeals.

J. W. Cutrer, for appellant. Fitz Gerald & Maynard, for appellee.

TERRAL, J. In this case it is not possible for Tax Collector Fogg to put his finger upon any particular asset of the Bank of Friar's Point, now in the receiver's hands, and say, "This is my deposit or the product of my deposit," but it is quite certain that the moneys deposited by Fogg in the bank are in their transmuted form in the hands of the receiver, Hebdon. The moneys of the tax collector were intermingled with the other moneys of the bank, and in consequence of the confusion a right to a particular individual asset cannot be asserted; yet a priority of payment out of the mass of assets arises to the tax collector. Section 3077, Code 1892, makes the deposit of the tax collector a trust fund. It is a trust fund from its nature and character (the legal estate being in the tax collector, and the beneficial estate being in the state, county, and levee board), as well as by the express declaration of section 3077. The bank received it as a trust fund *volens*, and the principles of equity relating to trusts fully apply to it. It is a leading principle of equity jurisprudence that "wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right rather than wrong; to act conscientiously rather than with bad faith; to perform his duty rather than to violate it." It must therefore be presumed, so far as it may, that the bank as trustee preserved the trust fund until all its other estate was exhausted, and that the trust moneys, so far as possible, are represented in the remaining assets of the bank. *Pom. Eq. Jur.* § 420; *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Central Nat. Bank v. Mutual Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693.

It is said however that the statute does not apply in this case because the tax col-

lector, before bringing this suit, had settled with the state, county, and levee board. That should not affect the result, for, if so, it would be in the power of the trustee in every case to defeat the trust by a mere delay of payment. Every tax collector must settle monthly (Code 1892, § 3840), and, if such settlement destroyed the equity, the right conferred by the statute would be almost valueless. The fund is primarily preserved as a trust for the benefit of the state, county, and levee board, and a payment to these several beneficiaries would subrogate the tax collector to their respective equities. A different result would defeat the wisdom of the legislature, and cannot be entertained.

Reversed and remanded.

McINNIS et al. v. THAMES, Dist. Atty., et al. (Supreme Court of Mississippi. June 16, 1902.)
ELECTIONS—PRIMARIES—STATUTE—CONSTITUTIONAL LAW.

Const. § 247, declares that the legislature shall enact laws to secure fairness in party primary elections. *Held*, that Laws 1902, p. 105, c. 68, whereby a candidate of a party, in order to have his name on the official ballot, must have been nominated by a primary election, is not unconstitutional.

Appeal from circuit court, Issaquena county; George Anderson, Judge.

"To be officially reported."

Mandamus by James D. Thames, as district attorney, and others, against Charles McInnis and others, as the Democratic executive committee of Issaquena county. From a judgment overruling a demurrer to the petition, defendants appeal. Affirmed.

Appellees, several citizens and taxpayers and legal voters of Issaquena county, filed the petition in this case, in the circuit court of Issaquena county, against appellants, averring that appellants are members of and constitute the Democratic executive committee of said county; that a special election had been ordered in said county to fill a vacancy in the office of justice of the peace; that appellants, as such committee, had ordered a Democratic convention for the purpose of nominating a party candidate to be voted for at the special election in violation of the act of the legislature approved March 4, 1902. Laws 1902, p. 105 et seq. The prayer was for a mandamus to compel defendants in the court below to order and have held a primary election to nominate said candidate as required by said act of the legislature. To this petition appellants, defendants below, demurred, the demurrer was overruled, and final judgment was entered directing them to proceed and hold a primary election. From that judgment defendants appeal.

McWillie & Thompson and H. P. Farish, for appellants. J. A. P. Campbell, E. F. Noel, and Monroe McClurg, Atty. Gen., for appellee.

TERRAL, J. We are requested to pass upon the questions raised in this controversy without regard to the validity of the proceedings. The question made is one of legislative power. We are asked to annul a solemn act of the legislative branch of the government; and yet there is no hint of its impropriety except that arising from the assertion that the methods of getting candidates for public office cannot be restricted, and, especially, that nomination by conventions cannot be interfered with. The insistence is that the legislature cannot restrict the modes of nomination to political offices. Yet this act was passed by both branches of the legislature, and received the approval of the governor. The first hint of its unconstitutionality comes from the Democratic executive committee of Issaquena county calling for a convention to nominate a candidate of the party for justice of the peace for the Fifth district of said county. Under well-settled rules of law, we are not authorized to declare an act of the legislature void unless it be plainly and unmistakably so. This we cannot here affirm. The political franchises of the citizen are given and secured by the constitution of the state, and cannot exist except as therein provided. These rights, though sovereign and fundamental, can have force and operation only through the forms established by law for their expression. The legislature devises the means for this end. In this respect, its authority is supreme. It is restrained only by constitutional inhibitions. But there is no constitutional inhibition on this subject. On the contrary, section 247 declares that: "The legislature shall enact laws to secure fairness in party primary elections, conventions or other methods of naming party candidates." By chapter 68, Laws 1902, the legislature, attempting to carry out section 247 of the constitution, has provided for party nominations for office, to be made only by primary election. In choosing a particular plan—the primary election plan—it has, in effect, excluded the adoption of all other methods, in conformity with the maxim, "Expressio unius exclusio est alterius." Undoubtedly, it might have adopted the convention plan, or it might have left open either mode to the choice of the political parties of the state. That the adoption of the primary election plan of nominating candidates by the political parties is within the legislative power and discretion, we have no doubt. It is a proceeding in the line of power heretofore adjudged to belong to the legislative authority. To prescribe a ticket of a certain character is, in a degree and as far as it goes, as restrictive of the voting franchise as is the one here made, that all party nominations shall be made by primary elections. An elector's right to vote is restricted by registration and other requirements found in the statute on that subject; his right to be elected to office, or rather his pursuit of it, is likewise restricted to the methods provided by

law. Prior to the act of 1902, every elector, though eligible to office, could not get his name upon the official ballot except upon certain specified conditions. The act here questioned merely limits the method of getting the name of a candidate upon the official ballot as a party nominee by the result of a primary election. If the legislature may put upon a party candidate for office any restriction whatever, which it has all along heretofore done, why may it not restrict him to the choice of a primary election? If the plan of nomination opened to him be just, honorable, and fair, can he complain that another plan of selection, though it be likewise fair and just, is not open to his choice? Does his eligibility to hold office secure to him a vested right in the choice of the means of his selection? Or may the legislature safeguard his right by reasonable regulations for the common good? Since the opinion of Chief Justice Holt in the great case of *Ashby v. White*, 2 Ld. Raym. 938, the right of suffrage (a political, not a natural, right) has been held to rest upon a basis as secure as rights of life, liberty, and property. And while every right, whether conferred by nature or by law, should have, for its security and enforcement, some adequate remedy, has long been settled, yet the legislature may restrict a litigant to a single proceeding where one full and adequate to his use and enjoyment is left open to his pursuit. In such case, he may not complain that he has only one remedy. And, if the highest property rights may be restricted to only one remedy, why may not political rights be regulated by such legislative restrictions as the public welfare demands? We think they may. Conventions, if necessary for the declaration of party principles, may be called and held, but they cannot be used, under our present law, for the making of party nominations for office. The question here presented is, how may a party nominee get his name on the official ballot? It must be remembered that any qualified elector may have his name placed upon the official ballot, as a candidate for office, provided a request for that purpose be signed by 15 qualified electors for any beat or municipal office in a town or village of less than 300 inhabitants, or 50 qualified electors for any other office, if made 15 or more days before the election. Notice is not taken by the commissioner of the proceedings of a convention; the choice of a convention as such is ignored; but the name of any elector may be placed upon the official ballot upon the petition of 15 or 50 signers, according to the nature of the office. Electors have an easy method of getting on the ticket; they can demand nothing more. It is party nominees, only, that must have their right to a place on the official ballot determined by a primary election. We are not at liberty to call in question the wisdom of the act, and we are not advised that, in the respect to the provisions of the law before us, it goes

beyond the legislative discretion. If the primary election contravenes any provision of the constitution, it must stand annulled; but, in the matter before us, we find no error in the judgment of the circuit court.

Affirmed.

RUSSEL v. SMITH GRAIN CO. et al.

SEARLES et al. v. SAME.

(Supreme Court of Mississippi. June 16, 1902.)

SALES—TRANSFER OF DRAFT WITH BILL OF LADING—RIGHTS OF BUYER AGAINST TRANSFEREE—NATIONAL BANK—ATTACHMENT.

1. A bank buying a draft from the vendor to which a bill of lading of corn is attached is placed, as to the buyer, in the same situation as its assignor stood, and is liable to the buyer who had paid the draft for breach of contract in the delivery and quality of the corn.

2. Where a national bank purchased a draft with bill of lading of corn attached, which was paid, and the money was in the bank's possession, a suit in equity, in attachment, by the buyer of the corn, against the seller and the bank for breach of contract, and praying a return of the money from the bank, is not an attachment within Rev. St. U. S. § 5242, providing that no attachment shall issue against any national bank or its property before final judgment in any suit.

Appeal from chancery court, Warren county; W. C. Martin, Chancellor.

"To be officially reported."

Two separate suits by A. G. Russel and Searles Bros. against the Smith Grain Company and others. From decrees in favor of defendants, the complainants appeal. Reversed.

Searles Bros. filed a bill in the chancery court of Warren county, in attachment, under section 486 of the Code of 1892, against the Smith Grain Company and the Exchange National Bank, both of Little Rock, Ark., and the Merchants' National Bank and the Vicksburg Bank, of Vicksburg, Miss., in which they allege that they purchased a lot of corn from the Smith Grain Company at a fixed price; that only a part of the corn was shipped; and that, in order to supply their customers, they were compelled to go into the market and buy other corn at a higher price; that the corn shipped them was defective in quality, whereby they suffered loss; that for the corn shipped them the Smith Grain Company drew on them for \$364 in favor of the Exchange National Bank, and that they paid said draft through the Vicksburg Bank. They allege, further, that on a different date they bought other corn, and suffered losses in the same way as above averred, and that the Smith Grain Company drew on them, through the Exchange National Bank, for \$245.22, which was paid through the Merchants' National Bank of Vicksburg; that the proceeds of the two drafts were in the possession of said banks. The prayer was for judgment against the defendants, and that the money in the said banks, or so much as might be neces-

sary to cover amount due them, be turned over to them, and that the Exchange National Bank be required to come into court, and show cause why said order should not be made. The Vicksburg banks answered, admitting that they held the money which was collected on the drafts attached to the bills of lading on the shipment of corn to complainants, which were payable to the Exchange National Bank of Little Rock, Ark., and offering to pay the money into court to await the determination of the matter by the court. The Smith Grain Company did not answer the bill at all. The Exchange National Bank answered, setting up that it was a purchaser of the corn in good faith, for value, without notice of any contract between complainants and the Smith Grain Company, or any failure on the part of the Smith Grain Company to carry out its contracts with complainants. It set up the further defense that it was a national bank within the meaning of section 5242 of the Revised Statutes of the United States, and that under that section this attachment suit could not be maintained against it, and that the court was without jurisdiction to determine their rights in the matter. Testimony was taken to show complainants' losses under the contracts with the Smith Grain Company as alleged in the bill. The court, on final hearing, dismissed the bill as to all the defendants. From that decree, complainants appealed. The same issues are involved in the case of A. G. Russel against the Smith Grain Company.

McLaurin, Armistead & Brien, for appellants. Catchings & Catchings, for appellees.

WHITFIELD, C. J. This case falls within *Miller v. Bank*, 76 Miss. 84, 23 South. 439, which is in accord with and supported by *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48; *Bank v. White*, 65 Mo. App. 679, and *Finch v. Gregg*, 120 N. O. 176, 35 S. E. 251, 49 L. R. A. 679. We especially refer to the reasoning in *Landa v. Lattin* as thoroughly sound. There are cases to the contrary of our view, but they clearly fail to apprehend the true nature of this sort of transaction. The bank buying the draft and bill of lading is bound to comply with all the terms of the contract between seller and buyer. It is placed, as to the buyer, in the exact situation in which its assignor stood. We quote, to adopt, the following from the Texas court of civil appeals:

"The banks know that shipments of this character are seldom made without some understanding between the original assignor and the original assignee [the person to be notified]. * * * The real inquiry is as to what effect should be given to this transaction, so far as it related to the rights of appellant Landa under the contract between him and Lattin Bros. The correct rule concerning the rights of a purchaser or an as-

signee by the transfer of a bill of lading, and the quasi quality of negotiability of such instruments, is thus stated in the fourth volume of the second edition of the *American and English Encyclopedia of Law* [page 540], where it is said: 'While the transfer of bills of lading may pass the title to the goods, unless the common law has been modified by statute, these instruments are not negotiable, in the sense in which that term is applied to bills and notes and other negotiable instruments of a like character. Although it has sometimes been said that a bill of lading is negotiable, nothing more is meant by this than that the transfer of the bill of lading passes to the transferee the title of the transferor to the goods described therein. Negotiability may be predicated of bills of exchange and promissory notes because they are representatives of money, which is itself negotiable to the extent that it cannot be reclaimed from any one who receives it in good faith, for value. On the other hand, bills of lading do not stand as representatives of money, but of the goods therein described, and as chattels are not negotiable; that quality cannot be given to the symbol; no greater effect can be given to the transfer of the symbol than to that of the thing which it represents. The transfer of a bill of lading, then, by the person in possession of the instrument, can give no higher title than would the transfer of the property itself by the same person. Hence it may be stated as a general rule that, where bills of lading are made negotiable by statute, the holder of a bill of lading, in the absence of either title to the goods or authority to transfer them in himself, cannot, by a transfer of the instrument, pass the right of property in the goods, even to a bona fide purchaser for value; he can convey no greater rights than he himself has.' The supreme court, in support of the text, in the case of *Shaw v. Bank*, 101 U. S. 557-564, 25 L. Ed. 892, 894, says: 'The function of that instrument [bill of lading] is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, representative of those goods. * * * Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose, and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to

change totally their character, putting them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of nondelivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief.' * * * But a different principle, we think, governs this case. Here, the First National Bank of Hutchison purchased from the consignor, before delivery to the appellant, the wheat in question, and knew at the time that the wheat was not paid for by the appellant, and undertook to deliver the same to him, and in effect carry out the contract which had been entered into between the appellant and Lattin Bros. The Hutchison bank, as the purchaser from Lattin Bros., the original consignors, acquired against Landa no greater right in the property or shipment than that possessed by the vendors of the bank, and, between the latter and the consignors, it is charged with the same defense that could be urged where the contract was sought to be enforced between these parties.

"Now the bank, when, by a transfer of the bills of lading to it by Lattin Bros., it acquired the right to the property they represented, could enforce against the purchaser thereof no greater right than that possessed by its vendors. It acquired title to the property in its then condition, and, if it was wheat of a damaged or defective quality, the fact that it supposed that it was worth the amount of money paid therefor to Lattin Bros. did not convert it into wheat of a superior quality, nor authorize them to demand from Landa, upon a tender of the wheat, payment of the full sum it was out by the transaction. When the bank purchased the wheat, it was substituted to the same rights, and no more, possessed by the vendors to enforce against Landa the contract entered into between him and Lattin Bros.; and, if it had sought to enforce the contract by action, it could only do so charged with its burdens, and Landa could have in defense asserted any breach thereof that he could have urged against Lattin Bros. The bank in this case reaped the benefit of the contract in this: that, upon presentation to Landa of the bills of lading, it received the full amount due under the contract for a shipment of sound wheat. Landa, before payment, did not have an opportunity to inspect the wheat, and only discovered its damaged condition thereafter. The bank, in this way electing to reap the benefit of the contract existing between Lattin Bros. and appellant, became bound by it; and as it was the owner of the wheat, and undertook to carry out the contract, it assumed the same

position in relation to the transaction as its vendors. It enjoyed no greater rights, and occupied its position charged with the demands that could have been urged against its vendors for a breach of the contract. The facts, beyond dispute, show clearly that there was a breach of the contract. Lattin Bros. and the Hutchison bank, which succeeded to their rights under the contract, delivered to the appellant wheat in a damaged condition when the contract called for sound wheat, and the bank received therefor payment for sound wheat. This presents a clear case of a breach of warranty as to the quality of the article purchased; and because the bank, in purchasing from Lattin Bros., may not have known of the inferior quality of the article purchased, would not, in its undertaking to perform the contract with Landa, justify it in imposing upon Landa wheat of a quality different from that called for in the contract.' The court in the case of *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 98, 23 L. Ed. 208, says: 'That the holder of a bill of lading, who has become such by indorsement, and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only quasi negotiable. 1 Pars. Shipping, 192; *Blanchard v. Page*, 8 Gray, 297. The indorser does not acquire a right to change the agreement between the shipper, which was not in the power of the drawer and consignor.' *Bank v. White*, 65 Mo. App. 697, was a case where a manufacturer of lumber and shingles sold and shipped to a dealer a car load of shingles, and at the same time drew a draft on the purchaser, with a bill of lading attached, and assigned the same to plaintiff, the banking company. When the shingles arrived, they were found to be of inferior quality, and the purchaser, the defendant, refused to pay the draft. Thereupon, the bank sued him for the entire amount of the draft. The purchaser interposed his defense; and, from the brief of appellant in the report of the case, it appears that the bank contended that it acquired the bill of lading, and became the purchaser of the shingles, in the due course of trade, for a valuable consideration, unaffected by the contract under which they were purchased by the defendant. The court, in supporting the contention of the defendant, says: 'We can discover no prejudicial error in the trial of this case; since, too, substantial justice has been done, the judgment will not be disturbed. Plaintiff's counsel are right in the contention that when the bank took an assignment of the draft and bill of lading from the lumber company,—whether as an absolute purchase or as collateral security,—it became

vested with the title of the property. From that time on, plaintiff occupied the same relation toward the shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolical delivery of the property covered by it. However, the rights of White, the consignee, were not impaired or disturbed by the change of ownership in the property. He was left with the same defense as against the plaintiff bank that he would have against the lumber company.'

"Now, from these views, the conclusion is reached that the First National Bank of Hutchison, in becoming the owner of the wheat and undertaking to deliver it to Landa, became responsible for the performance of the contract which had been entered into between the latter and Lattin Bros. They could not by delivery of the wheat, and electing to reap the benefits of that contract, and demanding the payment of the sum called for, and receiving the same, take the position that they were not parties to the contract between appellant and Lattin Bros., and that in acquiring title to the wheat they became purchasers thereof unaffected by the burdens of the contract. The facts and circumstances show that the bank undertook its performance, and, such being the case, they had no greater rights against Landa than were possessed by Lattin Bros. The injury to the appellant is in part traceable to the conduct of the bank in delivering to the appellant, and exacting payment therefor, wheat of a damaged and defective quality; and, upon a discovery of the defective quality of the wheat by Landa, a cause of action arose in his behalf against the bank, to recover from it the damages he had sustained by reason of the wrong imposed upon him in delivering to him, and exacting from him payment for, damaged wheat. * * * The inconvenience to which banks may be put, in the manner in which commercial transactions with its customers may be affected, by the rule announced in this opinion, is a question with which we are very little concerned, as we apprehend that the principles of law that would apply to individuals in dealing in transactions of this character would also apply to banks in dealing with their customers. The appellees, on this branch of the case, in their brief say: 'If the banker had to examine the contract between the original shippers and purchaser of the goods, to see and know its terms, and then examine the cargo, to see if it complied with the terms of the original contracting parties, upon penalty of being held liable for some real or imagined defect therein, we fancy that there would be very little business of this kind carried on by the banks.' The diligence required of banks in their efforts to protect themselves for the money advanced to their customers should extend to an inquiry as to the value of the articles upon which they make their advan-

ces. It was a matter of slight inconvenience to this bank to have made investigations as to the quality of the wheat which it purchased from Lattin Bros., and as to the terms of the contract between Lattin Bros. and appellant. It could not, by relaxing diligence in this respect in the purchase of wheat in a damaged condition, by paying therefor a price for sound wheat, impose its want of caution by exacting from him payment for sound wheat. Landa was only responsible for the character of the wheat which was actually delivered to him; and this was of an inferior quality and in a damaged condition. The bank, which because of it was imposed upon by Lattin Bros., would not have the right to likewise impose upon Landa. The duty of the bank to exercise diligence to protect and guard its interests in a transaction of this character is as great as would be the case in a bank advancing or loaning money upon a security offered by a borrower. Except in cases of the purchase of negotiable paper, or advancing money upon paper of that character, a bank, or any one else advancing money upon a contract which its customer may have with another party, would be put upon inquiry to ascertain the terms of that contract and the extent of the right of its customer thereunder; and the bank, in dealing with one claiming under such a contract, and as to the articles it represents, could not, because it was ignorant of its true terms and the rights of the other party, enlarge the responsibility of that party, and impose upon him a liability different from that called for in the contract."

We think the courts which have taken the other view have dealt with half the transaction,—not the whole of it. They have looked to the draft, not to the bill of lading. They have failed to give to every factor in the transaction its full significance, and to look through form to substance. This is no attachment against a national bank, in any proper legal view. The case is in chancery. All the parties are before the court for the adjustment of all the equities. The national bank is a mere claimant of the fund; intervening as such claimant, and preferring its claim. Being in equity, the equities can all be adjusted, and the rights of all parties protected. It is a misconception to say that the national bank is in this proceeding attached, within the meaning of the United States statute relied on.

Reversed and remanded.

LUM v. FAUNTLEROY.

(Supreme Court of Mississippi. June 9, 1902.)
CONSTITUTIONAL LAW—CREDIT TO FOREIGN
JUDGMENT—LEGALITY OF CLAIM
—PLEADING.

1. Const. U. S. art. 4, § 1, declares that full faith and credit shall be given in each state to the judicial proceedings of any other state. Held, that where a citizen of the state is sued

and served with process in another state, on being found temporarily within the jurisdiction of the court, in a suit in the state, on the judgment, authenticated according to the act of congress, the court is not precluded from ascertaining whether the claim on which the judgment was rendered was such a one as the courts of the state, on grounds of public policy, are prohibited from enforcing.

2. Where a claim is based on a gambling contract in "futures," but on an award of arbitration the legality of the transaction is not submitted, the award is not conclusive on such question.

3. In an action on a foreign judgment, defendant pleaded that he had pleaded in the action in which the judgment was obtained; that the award on which the judgment was based was founded on a gambling contract void under the laws of the state; that the court held the award conclusive; and he further alleged that the legality of the claim was not determined on the award. A demurrer on the ground that the court could not inquire into the legality of the cause of action was overruled. Held, that a replication averring that defendant had pleaded that the award was based on an illegal contract, and that, under the federal constitution, the consideration could not be inquired into in the suit on the judgment, was simply again calling in action the correctness of the ruling on demurrer.

Appeal from circuit court, Warren county; S. M. Shelton, Special Judge.

"To be officially reported."

Action by Thomas J. Fauntleroy against James J. Lum. From a judgment for plaintiff, defendant appeals. Reversed.

C. J. Searles secured a judgment against appellant, Lum, in the circuit court of St. Louis, Mo., and assigned it for value to appellee, Fauntleroy. Fauntleroy brought this suit in the circuit court of Warren county, Miss., against Lum, on this judgment, which was duly authenticated according to the provisions of the act of congress. The defendant filed a plea to this declaration, alleging that the C. J. Searles Company, a corporation, in 1893 was doing a brokerage business in Vicksburg, Miss., engaged in negotiating what is known as future contracts; that it negotiated for defendant certain future contracts, upon which appellant failed to pay the margins required; that C. J. Searles, the plaintiff in the Missouri court, had been engaged in the same business in Vicksburg, and had retired, and was succeeded in it by the C. J. Searles Company, he retaining an interest in the business; that when Searles retired from the business he agreed, at the instance of defendant, to secure him a line of credit with the C. J. Searles Company; that, when appellant failed to maintain the margins required, the C. J. Searles Company closed out his contracts, leaving him behind in a considerable sum; that C. J. Searles claimed that he had paid this sum to the C. J. Searles Company, and he declined to pay Searles; that thereupon the controversy was by mutual agreement submitted to arbitration, and there was an award in writing in favor of C. J. Searles; that Searles afterwards became a resident of St. Louis, Mo., and, finding defendant tempo-

rarily in St. Louis, brought suit against him; that defendant pleaded in said court, and offered to prove, that the award upon which the suit was based was founded upon a gambling contract, which was in violation of the laws of this state; that the Missouri court refused to allow him to make such proof, ruling that the award of the arbitrators was conclusive, and under the instructions of that court to the jury, to the effect that if they believed that such an award had been rendered they should find for the plaintiff the amount fixed by the award, the jury rendered a verdict against defendant for the amount of said award. A demurrer to this plea was overruled, and plaintiff filed a replication, in which he averred that the judgment was rendered by the Missouri court upon an award, and that defendant in that court had pleaded that the award was based upon future contracts, and that, under the provisions of the United States constitution, the consideration of the award could not be inquired into, and that the judgment was conclusive. Defendant demurred to this replication, but it was overruled. He declined to plead further, and judgment final was rendered against him for the amount sued for. From that judgment he appeals.

Catchings & Catchings, for appellant. McLaurin, Armistead & Brien, for appellee.

TERRAL, J. Until the supreme court of the United States shall expressly so declare, we will not hold that a contract condemned by our civil and criminal laws as immoral, and which the courts of this state are prohibited from enforcing, is sanctified, and purged of its illegality, by a judgment rendered in another state against a citizen of this state, sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause of action may not be inquired into. There are decisions of the supreme court which seem to hold that it is not allowable to go behind the judgment for the purpose of examining into the validity of the claim, but we are unwilling to believe that it will ever be held that a court is precluded, by the constitution of the United States, from ascertaining whether the claim on which a judgment is rendered in another state is such a one as the courts of the state in which suit on the judgment is brought are, on grounds of public policy, expressly prohibited from enforcing.

If this be law, all that is necessary to free the most corrupt transaction from all objection is to obtain service on a party, and get judgment in another state, and then come into a court of this state, and obtain judgment by virtue of article 4, § 1, Const. U. S., and the act of congress in pursuance of it. It is true, the suit in Missouri was on an award of arbitrators; but the matter sub-

mitted, as averred by the plea, was a claim based on a gambling contract in "futures," and the illegality of the transaction was not involved in the submission, and therefore was not, if it could be, concluded by the award. The second replication to the plea of defendant does not controvert the allegation of the plea as to its averment that the illegality of the transaction was not involved in the arbitration; and we interpret this replication as merely intended to invoke the constitution of the United States as precluding inquiry into the nature of the cause of action on which the judgment was rendered.

This question had been raised by the demurrer to the plea, which the court overruled, and the second replication was no more than calling in question at a later stage of the case the correctness of the former ruling. We approve the former ruling, believing that the plea presents a bar to the action.

Reversed and remanded.

COHN v. PEARL RIVER LUMBER CO. et al.

(Supreme Court of Mississippi. June 9, 1902.)

PUBLIC LANDS—GRANTS—CANCELLATION—REFUNDING PURCHASE MONEY—PARTIES—LAND COMMISSIONER — TRIAL — DISMISSAL — BURDEN OF PROOF.

1. Plaintiff alleged that he was owner of certain described lands, part of them by virtue of grants from the state, evidenced by certificates of purchase, given by the treasurer of the board of commissioners of swamp and overflowed land to plaintiff's grantor; that certain of the defendants claimed title by virtue of grants from the state, whereas the state had no title; that plaintiff thereafter made application to, and purchased from, the state, certain portions of the land, under the mistaken impression that his grantor had never bought them, when in truth he had bought and paid for them. The bill asked that the court declare the grants to defendants void, and that the land commissioner be directed to cancel them, and issue patents on the certificates issued to plaintiff's grantor, or to refund the purchase money paid therefor, with interest. *Held*, that the land commissioner was not a proper party.

2. Where plaintiff filed a bill, claiming title to land by prescription, and showed a residence sufficient in time, but one surveyor testified that the house was on the land in controversy, while another testified to the contrary, it was not error to dismiss without ordering another survey; as it was incumbent on plaintiff to satisfy the court as to the occupancy.

3. Where plaintiff filed a bill claiming certain lands by virtue of grants from the state, evidenced by certificates of the "treasurer of board of commissioners of the 'eastern' district of Pearl River," and defendants specifically denied such grants, and that such commissioners or treasurer were appointed, or the authority to organize, and it appeared that there was no authority in law for the organization of an "Eastern" district, or that one was in fact organized, though there was a "Southern" district, and it was not pretended that any patent was ever issued on the certificate by the secretary of the state, such certificate was insufficient to establish title; as it was incumbent on plaintiff to show a substantial compliance with the statutes concerning such grants.

4. Plaintiff filed a bill, alleging that he was owner of certain lands by virtue of certificates of purchase issued, by the treasurer of the board of commissioners of the swamp and overflowed lands, to plaintiff's grantor, but that subsequently, under the mistaken belief that his grantor had never bought a certain portion of such lands, plaintiff made application to, and purchased from, the state, such portion. *Held*, that none of the statutes relating to the refunding of money paid the state on such lands gave plaintiff any right to a refund.

5. Though title based on certificates of purchase of swamp and overflowed lands fails, there is no law authorizing a refunding of the purchase money, but Laws 1902, c. 20, expressly prohibits the use of any of the appropriation therein made to refund money "paid on account of any land obtained, or claim for money paid, under any patent or certificate heretofore issued by any secretary of state."

Appeal from chancery court, Lawrence county; H. C. Conn, Chancellor.

Bill by Albert Cohn against the Pearl River Lumber Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Appellant, Cohn, filed the bill in this case in the chancery court of Lawrence county against the Pearl River Lumber Company and J. M. Simonton, land commissioner of the state of Mississippi, in which he alleged that he was the owner in fee of the following land in said county, to wit: N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 26, township 8, range 10 E., and the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, section 25, township 8, range 10 E., and the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 23, township 8, range 10 E., and deaigned his title as follows: The state of Mississippi to W. A. Fox, September 4, 1868, S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 26, and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 23, township 8, range 10 E.; state of Mississippi to W. A. Fox, July 19, 1855, E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, section 25. The N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 26, was claimed by adverse possession. W. A. Fox, by D. M. Lee, commissioner in the case of Albert Cohn v. W. A. Fox in chancery court of Lawrence county, to A. Cohn, deed to all above-described land. That the written evidence of the transfers from the state consists of receipts or certificates of purchase given by the treasurer of the board of commissioners of swamp and overflowed lands. That said Fox paid for said lands, and went into immediate possession of same, and so remained in the actual adverse possession and occupation of it until ousted from the possession by complainant under the aforesaid sale. That the Pearl River Lumber Company, is claiming title to the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 26, township 8, range 10 E., under and by virtue of a deed to it by G. W. Carlisle and H. A. Evans. That Carlisle and Evans assert title by virtue of a conveyance from A. H. Longino and J. M. Buckley, made July 3, 1891, and they claim title by virtue of a deed from the state of Mississippi executed April 25, 1891. That these deeds were void because the state had no title to the lands attempted to be conveyed at the time

of the sale to Longino and Buckley. That on the 28th day of April, 1891, complainant made application to, and purchased from, the state, for the sum of \$100, the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 25, township 8, range 10 E., under the mistaken impression and belief that Fox had never bought it from the state, when in truth he had bought and paid for it in July, 1855. That on the 28th day of April, 1891, A. H. Simon made application to purchase from the state of Mississippi the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 23, township 8, range 10 E., and afterwards complainant purchased it from Simon under the mistaken belief that Simon's title was superior to his own; he not knowing that Fox had bought the land from the state. The bill asks the court to declare the patents issued to Longino and Buckley on the 25th day of April, 1891, be canceled, and annulled, and the land commissioner be directed to cancel same, and that he take up the receipts issued to Fox by the board of commissioners of swamp and overflowed lands, and issue patents thereon to complainant; that as to the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 25, and the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 23, the land commissioner either issue patents on the receipts of the treasurer of the board of commissioners of swamp and overflowed lands to W. A. Fox in favor of complainant, or refund to complainant \$150, the purchase money for same, with 6 per cent. interest thereon. The Pearl River Lumber Company denies that any grant of such lands was made by the state under the laws of 1852; it denies that the counties Marion, Lawrence, Copiah, Pike, and the other counties named in said act, elected commissioners, as required by said act, to meet in Monticello on July 5, 1852; denies that there were any such appointments by the boards of police of said counties; denies that there was any organization under it, in the town of Monticello, on said date; denies the election of Hiram Bonner as treasurer; denies that he gave bond; it denies that complainant has any title at all to the lands it bought, and that Fox ever purchased the same from the state; and denies that complainant has any title at all to said land. It admitted that the lands in sections 23, 25, and 26 aforesaid were swamp lands donated to the state of Mississippi by act of congress of September 23, 1850. Complainant contends that the state of Mississippi granted all of said lands to the swamp land commissioners for the Southern district of Mississippi, of Pearl River, by the act approved March 12, 1852; that Hiram Bonner was its treasurer, and sold the land to W. A. Fox, who in turn mortgaged same to complainant, and that complainant purchased at the foreclosure sale under said mortgage. In support of this claim, he introduced in evidence a certificate of purchase as issued by Hiram Bonner to W. A. Fox, signed "Hiram Bonner, treasurer of the swamp land commissioners for the Eastern district of Pearl River." He then introduced

the trust deed to himself by Fox, and the commissioners' deed to himself under the foreclosure proceeding. Other testimony was introduced tending to show that Fox had been in actual possession and occupation of the land for 50 or more years, and some evidence to prove that Hiram Bonner acted as treasurer of the swamp land commissioners for the Southern district of Pearl River, and was treated by the public as such, and held himself out to the public as such. From a decree dismissing complainant's bill, he appeals. The opinion states such other facts as are necessary for an understanding of the case.

P. Z. Jones, for appellant. R. N. Sexton, for appellees.

CALHOON, J. Complainant fails to show cause for relief against the land commissioner, who, in fact, was never a proper party to the contention.

As to the 40 acres, to which Fox, under whom complainant claims, held no paper title whatever, but claimed by prescription, the county surveyor and some of the witnesses testified to facts showing that for more than 50 years the homestead had been occupied by the Foxes, and that it was on this land. The occupancy of the family residence for that period is not disputed; but there was abundant proof, including the testimony of another surveyor, that the homestead, the old family residence, was not in section 26 at all, but in section 25, on land not claimed by the Pearl River Lumber Company. Counsel for appellant admits that "the two surveyors are hopelessly at variance as to whether the residence was on this forty." He insists that "the court should have ordered another survey to ascertain exactly where it was located." Undertaking to show his superior title, it was incumbent upon the appellant to satisfy the court that the residence was on this 40-acre tract, and, in the absence of such satisfactory showing, the court properly found the facts against complainant's contention. There was no obligation resting upon the court to order a third survey.

As to the other 80 acres, the certificate of sale, dated September 4, 1868, signed by "Hiram Bonner, treasurer of board of commissioners of the Eastern district of Pearl river," is not sufficient of itself, and it is not pretended that a patent was issued upon this certificate by the secretary of state, as was required by chapter 34 of the Laws of 1852, providing for the organization of the Southern district of Pearl river. It appears that there was no authority in law for the organization or existence of an Eastern district. It is not shown that there was in point of fact an Eastern district organized. Under the specific denials of the answer, and especially in view of the trust nature of the holding of these lands by the state and by the commissioners, it devolved upon the complainant

to show that the requirement of the statutes, which formed indispensable links in his chain of title, were, at least substantially, complied with. He did not do that. The testimony wholly failed to establish title by prescription.

The complainant has no legal demand to have refunded to him the money paid into the state treasury in 1891 for the lands, described in the bill, not claimed by the Pearl River Lumber Company. He is not entitled to it, under chapter 73 of the Laws of 1894, because it is not shown that this land had been permitted, through mistake, to be sold to the state for taxes, and purchased afterwards from the state to protect the title. He is not entitled to it, under chapter 46 of the Laws of 1896, because it is not shown, by judgment or decree of any court, that his title had failed. There has been no cancellation of any patent issued by the state. No cause is shown the land commissioner for refunding, as provided by chapter 76 of the Laws of 1900, amended by chapter 74 of the Laws of 1902. It has not been shown that any patent was issued by the secretary of state upon the certificates of purchase issued by the commissioners of the Pearl River district to Chas. H. Fox in 1855, and to W. A. Fox in 1868. Even if the claim to title based upon these certificates, or patents issued thereon, has failed, there is no law authorizing the land commissioner to refund the purchase money because of such failure; on the other hand, chapter 29 of the Laws of 1902 expressly prohibits the use of any of the appropriation therein made to refund money "paid on account of any land obtained, or claim for money paid, under any patent or certificate heretofore issued by any secretary of state of Mississippi."

Affirmed.

MOORE v. SOMERVILLE et al.

(Supreme Court of Mississippi. June 9, 1902.)
PARTITION — VOID DECREE — INSUFFICIENT
SERVICE — SETTING ASIDE SALE — EF-
FECT — PARTIES TO BILL.

1. Code, § 3118, provides that, if any tenant in common shall be absent from or reside out of the state at the time partition is made, he shall be entitled to a new partition at any time within one year after the first partition, if the premises have not been sold for division, if he shall present his petition to the court which decreed partition, and show that the first partition was unfair, and that he received no notice of the bill for partition, etc., and, if the premises are purchased by any of the tenants in common, the nonresident or absent tenant shall be entitled to set aside such sale at any time within one year, if it can be shown to have been unfairly made, and fraudulent as to him. Held, that where in partition against heirs by one claiming the interest of an heir under execution on a void judgment, it appeared that one of the other heirs had no notice, in fact or law of the partition proceedings, such latter heir could open the partition decree for all.

2. Where a plaintiff in partition against heirs claims under a judgment sale of an heir's interest, and the heirs file a bill to set aside the

partition sale on the ground that the partition plaintiff had no title, the heir under whom the partition plaintiff claims is a proper party to the bill.

On suggestion of error. Suggestion denied.

For former opinion, see 31 South. 793.

Boothe & Boothe and Miller & Miller, attorneys for appellant, filed a lengthy suggestion of error, making the following points:

The affidavit required by section 3421 of the Code is not essential to confer jurisdiction. It is only necessary to enable the clerk to make legal publication in vacation, but, when the order of publication is made by the court, the presumption is that the order was made on sufficient showing, no matter what reason may be assigned in the order. The authorities cited in our brief sustain this view, and we call the court's attention particularly to *Cason v. Cason*, 31 Miss. 578. We quote from the opinion of the court: "There was no affidavit or sworn bill that the defendant was a nonresident, or had her post office at Chicago, Illinois. In fact, she did not live there at all, but in Nebraska, and never heard of the suit until after final decree of partition. The partition was therefore void as to her, and, being void as to her, was, under the facts in the case, void as to the other heirs, defendants." It is true there was no affidavit or sworn bill that the defendant was a nonresident and had her post office at Chicago, but the fact is, such was her residence and post office address, and application was made, on the order of the court, setting forth the fact, and a copy of the notice was duly mailed to her. This is not controverted, but is admitted. In any case, whether the publication, as to Alice Somerville, may be held good or bad, the fact that she never heard of the case until after the final decree is irrelevant. We insist that under the rule laid down in *Cason v. Cason*, 31 Miss. 591, which has never been questioned or overruled, the publication made by order of the court for Alice Somerville was good, and the decree against her was valid and binding. But if it is deemed wisest by the court to overrule that case, and hold that the affidavit is a jurisdictional fact, without which there can be no valid order and publication of notice to a nonresident in any proceeding whatever, then we insist that it does not follow that, because the sale for division was void as to Alice Somerville, it is void as to the other defendants. The case relied on by counsel for appellees does not support this view. The case of *Cox v. Kyle*, 75 Miss. 669, 23 South. 518, is correctly decided, but it does not affect the question raised here. *Winston v. McLendon*, 43 Miss. 258, was an insolvent proceeding in probate court for sale of land to pay debts, and service according to law was necessary to give jurisdiction. That does not militate against the rule insisted on here. *Burks v. Burks*, 66 Miss.

494, 6 South. 244, only prescribes what the affidavit should contain. *Hamilton v. Lockhart*, 41 Miss. 460, decides that an administrator's sale of land by order of probate court is void if the parties in interest have no notice, and *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456, only affirms the rule in the probate court. *Wels v. Aaron*, 75 Miss. 138, 21 South. 763, 65 Am. St. Rep. 594, is not applicable, because that was a judgment at law, and was an entirety. The case of *Drysdale v. Canning Co.*, 67 Miss. 534, 7 South. 541, was an attachment proceeding, and the judgment was held void for want of notice. The case of *Hamilton v. Lockhart*, supra, is not authority for the contention that a sale being void as to one party is void as to all, and, so far as it applies to this case, has been overruled by *Rule v. Broach*, 58 Miss. 552, and *Moody v. McDuff*, Id. 751, to which we call the attention of the court. Sale may be set aside as to some parties in interest, and confirmed as to others, and a decree for the sale of land for division is not, therefore, an entirety. *Allen v. Martin*, 61 Miss. 78; *Rule v. Broach*, supra; *Moody v. McDuff*, supra; *Henderson v. Wallace*, 72 N. C. 451; *Williams v. Westcott*, 77 Iowa, 332, 42 N. W. 314, 14 Am. St. Rep. 287; *Neville v. Kenney*, 125 Ala. 149, 28 South. 452, 82 Am. St. Rep. 230; *Lyons v. Hammer*, 84 Ala. 197, 4 South. 26, 5 Am. St. Rep. 363. The bill filed by Moore was not for partition, but for sale for division. No partition was asked for, and the decree was for sale, and the parties in court are concluded by the sale and confirmation. Evidently a different rule would govern in strictly partition suits, where land is partitioned in kind. In that event no part of the decree could stand unless all parties in interest were in court. No such rule prevails where there has been a sale, and there is no reason for such rule. If the purchaser is satisfied, no one else can complain.

We earnestly insist that the court was misled in holding that, because the partition was void as to Alice Somerville, it was void as to the other heirs, by authorities cited by counsel for appellees, viz.: 17 Am. & Eng. Enc. Law (1st Ed.) 810, where it stated that "a decree for partition is a unit, and, if bad in part, is bad in whole," and to sustain which the case of *Corwithe v. Griffing*, 21 Barb. 9, is cited in note, which was in fact not a sale of land for division, but simply a division in kind, wholly different from the case at bar. Different rules apply in such cases, for obvious reasons. Our court has sufficiently adjudicated that a decree of sale is not a "unity" or entirety, and may be valid and binding as to some of the defendants, while it is not as to others. "The rule that a judgment is an entire thing, and, if reversed as to one, must be reversed as to all, is only applicable to judgments at law." *Voorhis v. Gamble*, 6 Mo. App. 1; *Dickerson v. Chrisman*, 28 Mo. 134. And which rule

our supreme court clearly recognizes and adopts in *Moody v. McDuff*, supra, where the doctrine in *Hamilton v. Lockhart* is expressly repudiated, on that point. It is immaterial to Alice Somerville whether she remains tenant in common with those who were her co-owners, or becomes tenant in common with the purchaser.

CALHOON, J. Counsel have thanks for correcting the statement in the opinion that Alice Somerville did not live in Chicago, but in Nebraska. This was an error by inadvertence from confusing her with another party to this suit, and the opinion is changed to conform, though it is not perceived how it in any way affects conclusions. That she, because of defects in the constructive notice sought to be fixed on her by publication, may reopen the case and have a rehearing, is plain under Code 1892, § 519, and this even if she knew of the proceedings. *Jacks v. Bridewell*, 51 Miss. 881. That the minors may reopen the case is hardly within the range of discussion. Code, § 596. Nothing in the code chapter on partition varies the rights of Somerville or the minors. The technical name of the bill is immaterial. It is of no moment whether or not it is an independent bill, a bill of review, or a bill in the nature of a bill of review, or a supplemental bill, or a supplemental bill in the nature of a bill of review. We adhere to the ruling that in this case, the sale having been made, and the proceeds not distributed, the decree, being void as to some or any of the co-tenants, is void as to all. See authorities cited in brief of counsel for appellees and 17 Am. & Eng. Enc. Law (1st Ed.) p. 811, note 1; *Freem. Co-Ten.* § 483; *Hull v. Cavanaugh*, 6 Mo. App. 147; *Holloway v. McIlhenny Co.*, 77 Tex. 650, 660, 14 S. W. 240; *Succession of Poree*, 27 La. Ann. 463.

It seems to us the only question to be dealt with in this record is whether the demurrer to the bill was good because William Cannon was made a party. If he was a proper party, the controversy is ended. It is necessary here to give a history of the whole matter. The ground first broken in this litigation was the filing of a bill for partition by C. Q. Moore, the appellant here. He filed his bill January 16, 1898, against Harriet Cannon, the widow of G. B. Cannon, deceased, and the following named heirs of G. B. Cannon, namely: Alice Somerville, Jennie Cannon, Jimmie Cannon, all adults, and Fannie Cannon, Ella Cannon, and Green Cannon, minors. It must be noted that he does not make William Cannon, who is also one of the heirs of G. B. Cannon, a party to his bill of complaint. His bill avers the death of G. B. Cannon in 1896, seised and possessed of the land in controversy, describing it, and that he is the owner of the undivided interest of said William Cannon in the land by purchasing the same at execution sale under writs of execution against said

William Cannon, and that the land is incapable of division in kind, and that the interest of all parties would be best promoted by a sale for division. This is the whole bill of C. Q. Moore, substantially, and under it the prayer is that defendants may be made parties, and a decree of sale made, after setting aside the homestead exemption of the widow, of the remainder of the land, and for general relief. It must be noted in reference to this bill that Alice Somerville was never made a party by service of process or valid publication of notice. It must be further noted that nowhere appears in that record any exhibit or evidence whatever showing the proceedings of any court terminating in any judgment under which Mr. Moore purchased; the only averment being, as aforesaid, that he was the owner of William Cannon's undivided interest in the land, "having purchased the same under execution." There appears in that record no deposition or recital of any oral statement by any witness in the cause. A pro confesso was taken against the adult defendants. Thereupon three freeholders were appointed to set apart the homestead, who duly made report, and then appears a notice that complainant desired to have witnesses examined in open court. The commissioners to set apart the homestead made report, which was confirmed, and the final decree, February 20, 1899, in that record, purports to have been rendered on the bill pro confesso of the adults, and proofs, and recites that, it appearing to the court "on proofs submitted" that a just and equal division could not be made, and that a sale would better promote the interest of all the co-tenants, it provides for the sale of the land by a commissioner. The sale was made April 3, 1899, and C. Q. Moore was the purchaser for the sum of \$600, and the commissioner duly reported the sale, which was confirmed August 21, 1899, and a distribution of the purchase money decreed to be made, with allowance to complainant's attorney of \$60 and costs and expenses, amounting to \$59.54 more, and providing that the shares of the minors should be paid to their mother, Harriet Cannon; and a writ of possession was ordered to put Mr. Moore into possession of the whole property, which was executed by the sheriff January 17, 1900. An attack was made on this record by a bill filed on November 29, 1899,—less than one year after final decree, and before Moore was put into possession,—which bill and the proceedings under it are the matters now for consideration by this court. This bill was filed by Alice Somerville, William Cannon, and Jennie Cannon, adults, and the minors Fannie Cannon, Ella Cannon, and Green Cannon, suing by their next friend, Jennie Cannon, and the defendants to this bill are C. Q. Moore and Jimmie Cannon. This bill charges the death of the ancestor, G. B. Cannon, his ownership of the land, and the title in his children by descent as tenants in common, and that on February 16, 1898, C.

Q. Moore filed his bill, which is the bill hereinafter abstracted. It further sets forth that a decree of sale in that cause was rendered, and that the land was sold under it on April 3, 1899, at which said Moore was the purchaser for \$600, and the confirmation of that sale. The bill then undertakes to show that the whole proceeding was a nullity because not based on anything, by averring that C. Q. Moore had no claim of title whatever to the undivided interest of William Cannon, because, it avers, that it is predicated of the purchase by said Moore under execution issued in two causes by a justice of the peace, which judgments, it is charged, were void, because as to one of them the judgment was rendered by a mayor of a town as to land in another district of the county, in which latter district there was a justice of the peace, and because there was no service of process, nor publication, nor posting of notice to make William Cannon a party to the proceeding. As to the other judgment the averment is that it is void because no valid levy was made on the land, and because there was no actual or constructive notice to William Cannon, who was a nonresident of this state. It further charges that there never has been any enrollment of the judgment in the circuit clerk's office, and no entry on the lis pendens docket, and that no certified transcript was filed with the conveyance of the sheriff to said Moore. Of the complainants, William Cannon and Alice Somerville aver that they knew nothing whatever of the proceedings by Moore to sell the land for partition, to which proceeding the said William Cannon was not a party. It states that the facts in the record show that this proceeding was a nullity as to Alice Somerville for want of proper publication of notice. The bill further shows that the common ancestor had made advancements to William Cannon intending them as a charge upon his interest in his estate, and says that he is not entitled to any share until those advancements, evidenced by four promissory notes, aggregating \$510, should be paid, with interest, and that in fact the said William has no interest, having received more than his share; and, further, that said William recognized this, and on July 31, 1897, executed a trust deed covering his interest to secure Harriet Cannon, his mother, in this \$510 and interest; and that this trust deed was filed for record August 4, 1897, and duly recorded; and that this was before the sale under the justice's judgment at which said Moore bought; and that the trust deed was then still unsatisfied, and still remains so, although it is charged that an entry of satisfaction appears on the margin of the record of the trust deed, signed by the mother, Harriet, but without the knowledge or consent of complainants, and without any actual satisfaction. The bill then states that in January, 1899, said William Cannon attempted to convey his interest to Jimmie Cannon

for the recited consideration of \$510 and interest, the said Jimmie agreeing with William to pay his indebtedness to the other heirs, all of which was unknown to complainants, except William Cannon himself, and that this whole proceeding was void. The bill charges that the purchase by Moore at the partition sale was for \$600,—a grossly inadequate sum, the property being worth at least four times that amount,—and it charges, on information and belief, and the decree of sale of land for partition was granted without proof that it was incapable of being partitioned in kind, and states that it could easily have been divided in kind so as to give each one of the heirs 80 acres, and it points out the fact that the decree was rendered without any appointment of a guardian ad litem for the minors, and avers that none of the parties except said C. Q. Moore was present at any part of the proceedings, nor at the sale, nor at the court, and that none of them have had any of the proceeds of the sale, but have been notified by the commissioner that he has for each the sum of \$60 in full payment, and which they refused to receive. It is also charged that the writ of possession had issued to put Moore in possession, and the bill prays for injunction against disturbing the possession, and the prayer is that the proceedings for partition be reviewed, the decree of sale and of confirmation and of the proceedings thereunder be annulled, and for leave to complainants to answer the bill of C. Q. Moore for partition, and make defense to that, and for general relief.

Defendant, Moore, moved to dissolve the injunction because the bill showed no equity, and was not supported by oath or evidence, and that Moore had been put into possession when the writ of injunction was issued and served on him. Upon this, the chancellor dissolved the injunction so far as it commanded the sheriff to restore possession, but retained it in so far as it restrained Moore from disposing of the property until further orders from the court. On February 14, 1900, an amended bill was filed by Alice Somerville, William Cannon, Harriet Cannon, Jennie Cannon, and Jimmie Cannon, adults, and Fannie Cannon, Ella Cannon, and Green Cannon, minors, by next friend, as complainants, against C. Q. Moore alone, as defendant; and this last bill shows, first, the full record of all the proceedings in the suit for partition filed by C. Q. Moore, which is hereinbefore fully abstracted, and it then refers to the original bill by all the complainants except Harriet Cannon and Jimmie Cannon, and that that bill has not been answered, and that Harriet Cannon and Jimmie Cannon, defendants with C. Q. Moore to that, desire to join with complainants in the bill to which this is an amendment, as a supplement and amendment, which is done "by leave of the chancellor given in vacation." The complainants then represent that the whole proceedings in the cause for sale for

partition of the land are erroneous, and ought to be reviewed, reversed, and set aside, because they say that the order for publication for Alice Somerville is void; and that William Cannon's interest is not set out or stated, and that he was not made a party to the bill; and no showing is made of the justice's proceedings under which Moore purchased, and that no valid title passed to him, and that he had never received any conveyance of the land; and that no showing is made of the interest of any of the parties in the land; and that the order for setting apart the homestead of the widow was void. They then denominate this bill as their bill of review, but they reaffirm and reiterate "the allegations in the original bill herein filed, and make this a part thereof." They then pray that all the decrees in the original proceedings be "reviewed, reversed, and set aside," and for leave to them to answer the original bill of Moore, and make all their defenses to the same; and they tender with this bill the answer which they propose to file upon leave given; and they pray that, pending their defense, they be restored to possession of the land, and for general relief. To this bill, so amended, C. Q. Moore demurred on the grounds that William Cannon was an improper party, the bill showing that he had no interest, and that the bill does not show errors or sufficient grounds for the relief prayed for, and that the bill shows that the proceedings were valid, and the sale legal, and that the publication for Alice Somerville was legal, and that the bill shows that complainants are concluded by the proceedings they seek to review. This demurrer the chancellor overruled; and C. Q. Moore declined to plead or answer further; and the court decreed that the proceedings are reviewed, and the order and decrees are reversed and set aside, and the defendants in that proceeding for partition are given leave to answer the bill therein (which answer is tendered with the bill of review, in which William Cannon is given leave to join), and that Moore restore the possession of the premises to the complainants, and that the commissioner refund to Moore the purchase money paid on the partition sale. The answer of complainants to the bill of Moore for partition then appears, setting up practically what their bills set up, and then it appears that C. Q. Moore came by his solicitors, and moved the court to strike out of the answer the names of all parties in it except that of Alice Somerville, because all except her are precluded by the former decree of the court, and have no interest therein; which motion the chancellor overruled, and rendered a final decree dismissing Moore's bill at his costs. To Moore's bill, Alice was not a party by notice actual or constructive. At the sale under it, the land purchased by Moore was not "purchased by any of the tenants in common" because his decree was a nullity, and Alice could

reopen for all. Code 1892, § 3118. See, also, authorities in brief of counsel for appellees, and those cited hereinbefore. The first part of Code, § 3118, refers to cases where there was no notice in fact, though there might have been proper publication, as in attachment cases. No statute of ours avoids the rule, "Void as to any, void as to all," in a case like this. At a valid sale, the price bid might have been an approximation of the real value. Moore's decree was a nullity because of the undenied averment that William had no notice of the proceedings before the justice of the peace. William was a proper party to the proceeding to review. Though not a party to Moore's bill, he was interested in its results. Moore predicated his right to a sale for partition on the asserted fact that he was cotenant with the other heirs by reason of a purchase of William's interest at execution sale. He got a decree of sale for partition, and bought the whole tract, including William's interest. But William says there was no notice to him, either actual or constructive, of the proceedings which ripened into judgments against him, under executions on which Moore bought. Surely, he might have filed for himself an independent bill to vacate, and, therefore, might join those claiming under him in a bill of review. A bill by the other heirs to do so would require that he be a party. A stranger to a decree whose interests are affected by it, or who is in privity with the parties to it, may file a bill of review. 2 Am. & Eng. Enc. Law (1st Ed.) pp. 263, 264; 17 Am. & Eng. Enc. Law (1st Ed.) p. 717; Story, Eq. Pl. § 424; Id. 338; Freem. Coten. § 463; Shields v. Barrow, 17 How. 180, 15 L. Ed. 158. If all the heirs but William, or any of them, had filed the bill, he was a proper party to prevent him from again litigating about the land or his alleged conveyance of his undivided interest, and to show that Moore's proceedings had no foundation to rest on. Without him, complete justice between all the parties to this litigation could not be had, and other litigation would be inevitable. *Patty v. Williams*, 71 Miss. 837, 15 South. 43.

Suggestion of error denied.

WEST v. STATE.

(Supreme Court of Mississippi. June 9, 1902.)
CRIMINAL LAW—SPECIAL VENIRE—JURORS—
SUMMONS—CHALLENGES—INSTRUCTIONS.

1. On a criminal prosecution, there being no names in the jury box, the clerk was directed to issue a special venire facias for 35 jurors; the writ was given the sheriff, who selected 7 names from each supervisor's district. The sheriff and his deputy, who assisted him, disclaimed any bad purpose in so selecting the names, and it appeared that his purpose was to avoid summoning jurors disqualified by reason of not having registered or paid the poll tax before February 1st. *Held*, that there was no prejudicial error in the selection of the names.

2. Where on a criminal prosecution, there

being no names in the jury box, a special venire facias is issued, a notification of the jurors by mail, instead of by personal service of summons, does not affect the legality of the proceeding.

3. Code 1892, § 4370, provides that a judgment in a criminal case shall not be reversed because of error unless the error complained of was made ground of special exception in that court. On a criminal prosecution, defendant being asked whether he would accept the panel, his counsel stated that two of the jurors on their voir dire had disqualified themselves,—one by saying he was not a registered voter, and the other by not having paid his poll tax before February 1st,—whereupon the court stated that, if counsel would challenge the juror for cause, he would sustain it. Defendant made no reply, but excepted. *Held*, that, if defendant objected to the jurors, he should have challenged them, and, not having done so, he could not complain.

4. On a prosecution for murder, an instruction that the jury, being unable to fix the punishment at imprisonment for life, should return a verdict of guilty, if from the evidence, beyond all reasonable doubt, they believed him so to be, was correct.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Steve West was convicted of murder, and he appeals. Affirmed.

J. A. Ramsey, for appellant. W. L. Easterling, Asst. Atty. Gen., for the State.

TERRAL, J. Steve West was convicted in the circuit court of Warren county of the murder of Minnie Fisher, and sentenced to be hanged. From the judgment this appeal is taken. He assigns several errors in the proceedings before the trial court:

1. There being no names in the jury box, the court directed the clerk to issue a special venire facias for 35 jurors. This writ being placed in the hands of the sheriff, he, with the aid of his deputy, and by the examination of the registration books of the county and the personal assessment roll, selected seven names from each supervisor's district, and gave them to his bailiffs, to be summoned as jurors in the case. Whether these persons were in fact summoned at all does not appear. There is a notice in the record as if they were severally written to by mail, but that is only a subject of conjecture. The contention is, as we understand it: (1) That unless a summons was actually served upon a juror the proceeding is void; (2) the selection by the sheriff of the seven names from each supervisor's district infected the proceeding with fatal error. It is not alleged that the sheriff or his deputy was moved by any motive of prejudice against appellant in selecting the seven jurors from the five districts of the county. Upon oath they disclaim any bad purpose, and it is perfectly manifest that the object in making the selection was to avoid the summoning of jurors disqualified by reason of not having registered or of not having paid a poll tax before February 1st. The motive of the sheriff was a good one, and his action could not possibly do a prejudice to appellant. It was the duty of the sheriff to have 35 jurors before the court at the day appoint-

ed, according to the command of the writ in his hands. The method of notifying them to appear is unimportant and immaterial, and does not affect the legality of the proceedings.

2. The court, upon an examination of the jurors on voir dire, placed 12 men in the jury box, and they were accepted by the state, when the defendant was asked whether he would accept the panel or not. His counsel replied that two of the jurors then in the box on their voir dire had disqualified themselves,—one by saying that he was not a registered voter, and the other by not having paid his poll tax before February 1st. The court said to him, "If you challenge the two jurors for cause, I will sustain the challenge," to which the defendant said nothing, "and then and there excepted." Section 4370, Code 1892, says: "A judgment in a criminal case shall not be reversed because of any error in the case in the court below unless the record shows that the error complained of was made ground of special exception in that court." If the defendant desired to object to the jurors for the cause stated, he should have challenged them therefor. That was the proper and orderly way of making the objection, and, not having pursued the rules of law on the subject, he is not entitled to complain.

3. The objection to the instruction that the jury, being unable to fix the punishment at imprisonment for life, should return a verdict of guilty, if from the evidence, beyond all reasonable doubt, they believed him so to be, is frivolous. It is in exact conformity with the statute, which covers the whole law of the case.

Affirmed, and Tuesday, the 22d day of July, 1902, fixed for the day of execution of the sentence of the court.

STANTON v. BAIRD LUMBER CO.

(Supreme Court of Alabama. June 19, 1902.)
CORPORATIONS—DECLARATIONS OF OFFICERS
—COMPLAINT—VARIANCE—MONEY LENT.

1. In an action against a corporation, declarations made by a stockholder and an officer in regard to the existence of a loan, when not acting for it in connection with the transactions concerning which the declarations were made, were inadmissible.

2. Where the complaint in an action against a corporation claimed for money loaned, recovery could not be had upon proof that the money was paid as an assessment on stock.

3. In an action to recover from a corporation money loaned with the understanding that it should be refunded after all its debts had been paid off, the plaintiff, in order to make out a prima facie case, was required to show that the corporation's debts had been paid.

Appeal from circuit court, Mobile county; Wm. S. Anderson, Judge.

Action by Charles W. Stanton against the Baird Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The only evidence offered as to the existence of the loan having been made by Fuller-

ton, the alleged transferror of the plaintiff, was the testimony of said Fullerton, who was a stockholder in the defendant corporation, and one Baird, who was the treasurer of said corporation. These declarations were admitted in evidence against the objection and exception of the defendant. There was other evidence introduced by the plaintiff which tended to show that the \$1,250 which was sued for was an assessment made by the defendant corporation upon the stock of said company, and other testimony introduced for the plaintiffs tending to show that the stockholders of the Baird Lumber Company had mutually agreed to contribute \$1,200 to the fund of the company, with the understanding that it should be refunded to them after all the various debts of the company had been paid off, and that said \$1,250 sued for was contributed by Fullerton under such agreement. It was further shown that the various debts of the company had not been paid off. The defendant introduced no evidence, and, upon the introduction of all the evidence by the plaintiff, the defendant made a motion to exclude all of such evidence upon the ground that it was irrelevant and immaterial, and did not make out a prima facie case. Upon the court announcing that he would grant said motion, the plaintiff took a nonsuit, with bill of exceptions.

McIntosh & Rich, for appellant. Gregory L. & H. T. Smith, for appellee.

DOWDELL, J. The complaint contained four counts, but no effort was made by the plaintiff to prove either of the last three. The only evidence offered was directed to the first count, which claimed for money loaned by Fullerton to the defendant, and alleged to have been transferred to the plaintiff. The defendant offered no evidence, and upon the conclusion of the plaintiff's evidence, on motion of the defendant, the court excluded all of the evidence, on account of which ruling the plaintiff was forced to take a nonsuit.

There is but one assignment of error, and that goes to the action of the court in excluding the plaintiff's evidence, and this presents the question as to whether a prima facie case had been made on the evidence. In the first instance the court admitted certain portions of evidence offered by the plaintiff over the defendant's objection, which was subject to the objections made, and was the duty of the court to have ruled out,—such, for instance, as the declarations of Fullerton and of Baird, the treasurer of defendant, which were made at a time when not acting for the defendant in connection with the transactions concerning which the declarations were made. *Danner Land & Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184. In this case it was said: "It is not within the scope of an agent's authority to bind his principal by admissions and declarations having reference to bygone transactions. Such declarations, to be admissible,

must have been made while the agent was in the discharge of his duties as agent, and be so clearly connected with the main transaction which is sought to be elucidated or explained by them as to constitute a part of the res gestæ of such transaction." Whether the \$1,250 was paid as an assessment on stock under a common agreement of all stockholders to provide for the indebtedness of the defendant corporation, or was a loan made, to be refunded when the indebtedness of the concern was paid off, is immaterial; and under the evidence it was one or the other, as in either event the plaintiff failed to make a prima facie case. The complaint claimed for a loan made by Fullerton, and, if the money was paid as an assessment on stock, certainly it could not be recovered as a loan. If it was intended as a loan, and to be paid back when all of the debts of the corporation had first been paid off and satisfied, then no right of action to recover the loan as a debt could arise until the happening of the conditions. *Garner v. Hall*, 122 Ala. 221, 25 South. 187. The burden of proof was on the plaintiff to show that the agreement upon which the loan was made had been completed, and the debt had matured. There was no evidence of this, and for the want of it no prima facie right to recover was shown on the theory of a loan; and the court committed no reversible error in the exclusion of the evidence. Affirmed.

SOUTHERN RY. CO. v. BRANTLEY.

(Supreme Court of Alabama. June 19, 1902.)

WITNESSES—CROSS-EXAMINATION—DISCRETION OF COURT.

1. Plaintiff in an action for the negligent killing of a horse testified that the horse was worth \$100, and had been purchased of G., but defendant was not allowed to ask on cross-examination what he paid for the horse, if its value at the time it was killed was different than at the time of its purchase, nor whether G. had any other horses at the time of the purchase, nor the value of a roan horse shown to have been traded for the horse in question. Nor was defendant allowed to ask G., who testified that the horse was worth \$100, as to the price at which the horse had been offered for sale, nor as to the value of the roan horse, nor the difference in value between the horses. *Held* not error; the extent of allowing a witness to be cross-examined on immaterial facts, as testing his credibility or accuracy, being largely within the discretion of the trial court.

Appeal from circuit court, Hall county; John Moore, Judge.

Action by John Brantley against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action brought by the appellee against the appellant, the Southern Railway Company, to recover damages for the alleged negligent killing of a horse, the property of the plaintiff. The plaintiff, as a witness in

his own behalf, testified that he had purchased the horse killed from a Mr. Grubbs, and that the value of the horse was \$100. Upon the cross-examination of the plaintiff by the defendant, he was asked the following questions: "What did you pay for the mare? Was there any difference in the value of the mare at the time she was killed and her value at the time you bought her? How many horses did Mr. Grubb have for sale at the time that you bought the mare? Did he have any horses, except the one you bought? What was the value of the roan horse?" The plaintiff separately objected to each of these questions, the court sustained each of the objections as interposed, and to each of these rulings the defendant separately excepted. A. N. Grubbs was introduced as a witness for the plaintiff, and testified that the plaintiff got the horse which was killed from him; that the plaintiff traded him a roan horse for the one which was killed; that the horse which he traded to the plaintiff was worth \$100. On the cross-examination of this witness, he was asked by the defendant the following questions: "What did you price the mare at in Eutaw?" "At what did you value the roan horse for which you traded?" "Was the roan horse worth as much in the market as the mare?" "Was there any difference in the market value of the roan horse and the market value of the mare, and, if so, what?" "Did you consider the market value of the roan horse as much as that of the mare?" The plaintiff separately objected to each of these questions, the court sustained each of such objections, and to each of these rulings the defendant separately excepted. There were verdict and judgment for the plaintiff, assessing his damages at \$92.14. The defendant appeals, and assigns as error the rulings of the court upon the evidence.

F. L. Pettus and A. M. Tunstall, for appellant. Thos. E. Knight, for appellee.

SHARPE, J. On the subject of recoverable damages the material inquiry was as to the market value of the mare at the time she was killed, and to that inquiry the matters called for by defendant's questions to plaintiff and Grubbs, and disallowed by the court, were each irrelevant. How far cross-examination may extend into irrelevant facts for the purpose of testing the credibility of a witness or the accuracy of his statements is a matter resting largely in the trial court's discretion. *Tobias v. Triest*, 103 Ala. 664, 15 South. 914; *Noblin v. State*, 100 Ala. 13, 14 South. 767. Allowing due scope to such discretion, it cannot be held that there was reversible error in sustaining the objections made to those questions.

Other matters assigned as error have not been argued or insisted on in appellant's brief, and are therefore taken as waived.

Affirmed.

MCGHEE et al. v. WILLIS.

(Supreme Court of Alabama. June 17, 1902.)

MASTER AND SERVANT — NEGLIGENCE KILLING — DISCOVERED PERIL — CONTRIBUTORY NEGLIGENCE — EVIDENCE — QUESTION FOR JURY — INSTRUCTIONS — ADMINISTRATOR — APPOINTMENT — COLLATERAL ATTACK — ACTION AGAINST RECEIVER — EFFECT OF DISCHARGE.

1. The validity of plaintiff's appointment as administrator, on the ground that decedent was not a resident of, and left no property in, the county of the appointment, is not subject to collateral attack in an action for wrongful death.

2. That receivers of a railroad have been discharged, their bonds surrendered, and the assets of the railroad turned over to a purchaser, is a defense to an action against the receivers, as such, commenced prior to their discharge, for the wrongful killing of a servant in their employ while they operated the road, caused by the negligence of other servants, and not by the personal negligence of the receivers.

3. It cannot be said, as a matter of law, in an action for the wrongful killing of a yard master while coupling cars, that an allegation in the complaint that coupling such cars was a part of his duties is false.

4. It should be shown in an action against the receivers of a railroad company for the killing of a servant by the negligence of another employé, that such servants were in the employ of the receivers, as distinguished from the railroad company.

5. It cannot be said, as a matter of law, in an action for the killing of a yard master in charge of a switching train, by being caught between car bumpers by the backing of the engine, that he was guilty of negligence in being between the cars when his presence there was uncalled for.

6. Where a locomotive engineer backs his engine and cars attached thereto without a signal, for the purpose of making a coupling, though he has seen the yard master in charge of the train go between the cars, and the latter is killed thereby, it is a question for the jury whether the engineer was not guilty of such negligence in so doing with knowledge of the position of the yard master, and that he had a right to assume that the engine would remain stationary, as would render the company liable, even though the yard master was negligent in going between the cars.

7. A judgment for \$2,000 for the negligent killing of a railroad yard master 34 years old, able-bodied and in good health, is not excessive.

8. A requested instruction, in an action for the negligent killing of a yard master in charge of a switching train, by being caught between cars by the engineer backing without signal, that it was the duty of deceased to have gotten out of the way, if he could have seen the approaching cars and could have done so, is erroneous, in omitting to submit the question as to his right to assume that the engine would remain stationary.

Appeal from circuit court, Jackson county; J. A. Bilbra, Judge.

Action by L. W. Willis, as administrator of J. W. Legg, deceased, against C. M. McGhee and another, as receivers of the Memphis & Charleston Railroad Company, for the negligent killing of an employé. From a judgment for plaintiff, defendants appeal. Reversed.

This was a suit, under the employers' liability act, to recover for the alleged wrongful

killing of plaintiff's intestate at Stevenson, Ala., on December 13, 1894; it being alleged in the complaint that the plaintiff's intestate was the yard master in the defendant's employment at that time, and that his death was caused by reason of the negligence of the engineer in charge of the engine operated by the defendants as such receivers. The complaint, as amended, contained six counts. The third, fourth, fifth, and sixth counts were eliminated by the court giving the general affirmative charge in favor of the defendant, and the withdrawal of the others by the plaintiff. In the counts of the complaint upon which the cause was tried, the plaintiff sued in his representative capacity as the administrator of the estate of John W. Legg, deceased, and claimed damages from the defendants as receivers of the Memphis & Charleston Railroad, and averred their regular appointment as receivers of said railroad company by orders of the circuit court of the United States for the Western district of Tennessee and the Northern district of Alabama, and that at the time of the injury complained of they were operating said railroad, and engaged in the business of transporting freight and passengers over said line of railroad, and were using locomotives and cars for such purpose. It was further averred in said counts of the complaint that John W. Legg, the plaintiff's intestate, was employed by the defendants as yard master at Stevenson, and was required, in connection with other duties, to couple and uncouple the cars run and operated on said road by the defendants; that on December 13, 1894, while the defendants, through their agents and servants, were engaged in putting cars loaded with coal upon a side track at a coal chute upon said road, the plaintiff's intestate, in the discharge of his duty, went between two of said cars to uncouple them, and that, after having uncoupled said cars, the engineer (one Jasper Potts) in charge of said engine pulled said cars apart, and thereupon, while plaintiff's intestate was still between said cars in the performance of his duty, the said engineer negligently or carelessly drove or pushed said cars, which had been so uncoupled, together, and intestate's foot was caught between them, and he was so injured that he died from the effects thereof. It was then averred that the cause of the death of the plaintiff's intestate was the negligence of the engineer, Potts, in driving said cars together upon the plaintiff's intestate. The defendants pleaded the general issue, and set up by special pleas the contributory negligence of the plaintiff's intestate. The defendants also pleaded the following special pleas: "(4) For further special plea, defendants say: Said J. W. Legg at the time of his death, which occurred in Jackson county, Alabama, was not an inhabitant of said county, and left no assets in said county at the time of his death, and none were afterwards brought into said county prior to the

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 179.

grant of administration. Said letters of administration upon his estate, if granted at all, were granted by the probate court of Jackson county, Alabama, which had no jurisdiction to grant the same, wherefore said grant of administration to L. W. Willis is void, and he is not the administrator of the estate of said Lee, deceased. (5) For further plea and answer to the complaint, and each count thereof separately, defendants say that since the institution of this suit the defendants have been fully and finally discharged from their receivership by the court which appointed them, namely, the circuit court of the United States for the Western district of the state of Tennessee, and the circuit court of the United States for the Northern division of the Northern district of Alabama, and have turned over to the Southern Railway Company, their successors, all property which they held as such receivers. Defendants hereto attach certified copies of said orders discharging them, marking the same 'Exhibits A and B,' and ask that the same be taken in connection with, and as a part of, this plea. (6) For further plea to each count of the complaint, separately, defendants say that plaintiff's intestate at the time of the injury which caused his death was not in discharge of his duties as yard master, but was performing the duties of a brakeman, in coupling or uncoupling cars, and he thus proximately contributed to cause his death." The plaintiff demurred to the defendants' fourth plea upon the following grounds: "(1) Said plea does not allege facts which show that plaintiff's letters of administration are void for want of jurisdiction in the court that granted the same. (2) Said plea does not allege that plaintiff's intestate was a resident of the state of Alabama at the time of his death. (3) Said plea seeks to show that the grant of letters of administration to plaintiff upon the estate of his intestate was void for want of jurisdiction, and does not allege or admit that any such letters were granted." To the fifth plea the plaintiff demurred upon the following ground: "Said plea sets up as a defense the final settlement of the trust and discharge of defendants from the receivership, and does not allege that the matters in controversy in this case were adjusted in any way, and it does not allege that plaintiff's claim against defendants has been paid or in any other way settled." To the sixth plea the plaintiff demurred upon the following ground: "(1) The plea is no answer to the complaint, in this: that the complaint alleges that some of the duties of the yard master were to couple and uncouple cars, and that plaintiff's intestate was in the discharge of his duties as yard master when he uncoupled said cars." This demurrer was sustained. The cause was tried upon issue joined upon the plea of the general issue and the several pleas of contributory negligence.

The evidence in the case showed that de-

ceased at the time of his death was 34 years old, stout, able-bodied, and in good health, prior to the injury. He was a single man. He was making at the time of his death \$54 a month. He had been known by his brother to contribute a portion of his wages on one or two occasions to his parents. The evidence does not show how much of the monthly income he saved, or that he saved any, nor how much he spent on himself. The evidence is undisputed that deceased at the time of his death was yard master for the Memphis & Charleston Railroad Company, and there is no evidence that he was in the employment of these appellants. Nor is there any evidence that the engineer to whose negligence the killing is ascribed was defendant's employé; the evidence tending, rather, to show that he was in the employment of the company. As to the circumstances attending the injury, the evidence shows the following: On the morning of the injury and death, Potts, the engineer or hostler, brought his engine, with nine cars loaded with coal, to the coal chute about one mile west of Stevenson, in order to put the cars on the chute. The engine was pushing the cars, being attached to the car next to it by means of a push bar; the front of the engine being next to the cars, and the tender being toward the east. After the engine and cars reached the coal chute these cars were pushed down on the main track opposite the chute track, and beyond the switch which went up to the chute or bin. The engine was then detached, and went upon the chute track, and brought the empty cars down, and, by means of a running switch, threw them east of the switch, towards Stevenson. The engine was then coupled to the nine loaded cars by means of the push bar,—a heavy piece of iron, about five feet long, which, when not in use, hung down and rested on the pilot. The three cars next to the engine were then detached from the other six, and were carried east to the switch, and then pushed by the engine upon the chute track. They were uncoupled by Legg, and he went with them on the chute track. The engine then came down, and Legg also came down, to get three more cars. The rule or custom was to carry three cars up at a time. The engine then went in on the main track, and was coupled to the remaining six cars. These six cars were up grade from the engine. After the engine was recoupled to these six cars, Legg went in between two of the cars; the evidence being in conflict as to whether they were the third and fourth or the second and third cars from the engine. He uncoupled these two cars, came out, and motioned the engine ahead, or gave the signal to "slack off," as some of the witnesses express it. The engineer then moved off in the direction of Stevenson, and stopped his engine when the two cars which Legg had uncoupled were from three to seven feet apart. The engineer says Legg gave the sig-

nal to stop, and the other witnesses say the same thing. After the engine and cars attached stopped, Legg went in between the cars which he had uncoupled, for some purpose which does not clearly appear, and while there the cars which he had uncoupled came together, causing injuries from which he died a few hours afterwards. He told the witness Jacobs on his way to town, immediately after the injury, that he went in between these two cars to remove the pins and link and couple the cars another way,—with the automatic coupling apparatus and Janney coupler. One of the witnesses says he stooped down just after he got between the cars and picked up something, and witness then heard him striking something, but the cars prevented witness from seeing him or what he was doing. Some witnesses say Legg went between the third and fourth cars from the engine, and that these cars coming together after he had uncoupled them caused the injury. The engineer, Potts, and other witnesses say he went between the second and third cars. Some of the witnesses testify that after Legg went between the cars the second time the engineer worked his lever, and pushed or drove the cars attached to the engine back towards the remaining cars, west. Other witnesses did not see the engine move, and ascribe the injury to the moving or rolling of the detached cars at the west end down to and against those which were attached to the engine. The cars between which Legg was injured were equipped with double buffers or bumpers, and also with an automatic or patent coupling apparatus known as the "Janney coupler." They could also be coupled with the link and pin, and when they were carried to the chute they were coupled with the link and pin. In order to remove them to the chute, it was not necessary to uncouple them, as thus coupled, and recouple them by means of the Janney coupling. The space between the cars was sufficient for a man to stand between the cars, even when they were coupled. He could stand in between them with safety when the cars came together, provided he did not get his body between the coupling apparatus itself, or the bumpers on either side. The bruises or wounds on Legg's body showed that he was injured by the coupling apparatus of the cars,—a wound corresponding to the size of the bumpers being on each side of the center of his back. The draw-head was between the bumpers. If it became necessary to loosen a pin which had gotten tight, this could be done by reaching over the bumpers, or by reaching under from this space and striking up. The engineer saw him go between the cars after they were uncoupled and those attached to the engine had been moved a few feet east, but did not know whether he stopped between the cars, or went on through to the other side of the track, or, if he stopped, at what place between them he did stop, or for what purpose

he went between them. The deceased gave no signal to the engineer to move the engine after he signaled to stop. The engineer was subject to his order, and guided by his signals. It was the engineer's duty after he received the signal to stop and remain standing until he received a signal to move.

Among the charges requested by the defendant, to the court's refusal to give each of which the defendant separately excepted, were the following: "(11) There is no evidence in this case that either the pin with which the cars were coupled was bent or difficult to get out, or that the intestate was trying to get such pin out when he was injured. (12) If you believe from the evidence that Legg, from his position on the track, could have seen the cars attached to the engine coming towards him, and gotten out of their way before the bumpers came together, it was his duty to do so." It is unnecessary to set out the many other charges requested by the defendant and refused by the court.

There were verdict and judgment for the plaintiff, assessing his damages at \$2,000. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Humes, Shaffey & Speake, for appellant.

MCLELLAN, C. J. The integrity of plaintiff's appointment as administrator of Legg could not be collaterally questioned in this suit on the ground that the decedent was not a resident of, and left no estate in, Jackson county, as was attempted to be done by the fourth plea. The demurrer to the plea was properly sustained.

The fifth plea presented a good defense to the further prosecution of the action against McGhee and Fink, the sole defendants. They were sued, as receivers of the Memphis & Charleston Railroad Company, for damages occasioned by fatal injuries to plaintiff's intestate, alleged to have been negligently inflicted by the servants of the defendants in the operation of the railroad by them as such receivers. The plea was that since the commencement of this suit the defendants had been fully and finally discharged from their receivership by the courts which appointed them,—said courts being named,—and had turned over to the Southern Railway Company, their successors, all property which they held as such receivers. By exhibits which are made part of the plea, it is made to appear that the Southern Railway Company had become the purchaser of all property which defendants held as receivers at a sale, duly confirmed, made in the case in which they were appointed receivers, and that they had been discharged from all duties and liabilities as such receivers, and their bonds as such surrendered to them. The action being against them solely in their official capacity as receivers,—no personal fault or lia-

bility being laid against them,—no judgment could be rendered against them in this action. The court erred in sustaining the demurrer to this plea. *Bond v. State*, 68 Miss. 648, 9 South. 353, and authorities there cited; *Beach*, Rec. §§ 725, 802; *High*, Rec. §§ 268, 398b; 6 *Rap. & M. Ry. Dig.* pp. 1224, 1225; *Farmers' Loan & Trust Co. v. Central R. R. of Iowa*, 7 Fed. 537, 2 *McCrary*, 181; *Reynolds v. Stockton*, 140 U. S. 254, 271, 272, 11 Sup. Ct. 773, 35 L. Ed. 464.

The complaint avers that Legg, the intestate, was employed by defendants as yard master at Stevenson, and that he was required, in connection with other duties, to couple and uncouple cars, etc. As we are unable to say, as matter of law, that one who is yard master may not have the duty of coupling and uncoupling cars imposed upon him, and that the averments of the complaint in this connection are false, we cannot appreciate the argument made in support of the sixth plea. It was palpably a bad plea.

Upon another trial the fact that the intestate and the engineer or hostler, Potts, were in the employment of the receivers, as distinguished from the railroad company of which they were receivers, should be made to appear.

In no aspect of the case would it have been proper to give the affirmative charge requested by defendant on the theory of contributory negligence proved. If Legg at the time of his injuries was between the third and fourth cars, there is no ground for saying that his presence there was uncalled for and negligent. And being in control of the train and of the operations of it then going forward, it was, to say the least, a question for the jury whether his presence between the second and third cars, if they found he ever was there, was negligence on his part. Moreover, whether he was at the one place or the other, and though he may be, for the argument, conceded to have been negligent in being between the cars at all, or at the particular spot, with reference to the drawheads and bumpers, which he did occupy, yet it was still open to the jury to find that the engineer was guilty of such negligence in moving his engine, or allowing it to be moved, so as to bring the two parts of the train together, knowing that Legg was between them, and that he had a right to assume that the engine would remain stationary while he was between them as would impose a liability upon his employers notwithstanding any negligence on the part of Legg in being where he was. *Railway Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Tanner's Ex'r v. Railroad Co.*, 60 Ala. 621; *Louisville & N. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *Railway Co. v. Lamb*, 124 Ala. 172, 26 South. 969.

This is not a case of dependent relations of the deceased, but one in which the jury, from a consideration of the life expectancy, health, strength, earning capacity, etc., of the intestate, are to say what the life, if not un-

timely cut off in its fullness and fruition, would have been worth to distributees of his estate when death should finally come in the course of nature. The amount is not capable of definite or even approximate statement in evidence, but is to be found by the jury as best they may from all the circumstances, capacities, and characteristics of the life as it existed up to the mortal injury. The evidence adduced in this case was properly submitted to the jury as supplying requisite data for the estimation of damages by them, and surely no sum awarded within that claimed in the complaint—\$2,000—could be said, on the evidence, to be excessive.

We deem it unnecessary to discuss the several charges refused to defendant in this case in detail. We find no error in the rulings of the court. Most of these charges have reference to the supposed contributory negligence of Legg, and their refusal was justified by considerations adverted to above. They take no account of the evidence going to show that the injury resulted from Potts' negligence operating upon a condition, merely, that may have been produced by negligence of Legg, nor of the law that in such case the negligence of the injured person does not cause or contribute to the injury. Such of the refused charges as are not of the character just referred to are faulty in affirming the absence of evidence on a given point when there was evidence on it (the eleventh charge, for instance), or in declaring it to have been Legg's duty to watch for the running back on him of the engine and cars, when it was open to the jury to find that he had a right to assume that the engine and cars would remain stationary (the twelfth charge, for instance), or are abstract in respect of some fact assumed, etc.

For the error committed in sustaining the demurrer to defendants' fifth plea, the judgment must be reversed. The cause is remanded. Reversed and remanded.

GUTTERY v. BOSHELL.

(Supreme Court of Alabama. June 17, 1902.)
COSTS—ACTION FOR TORT—APPEAL—DISPOSITION OF CAUSE.

1. Code, § 1826, provides that, in actions for torts, plaintiff shall recover no more costs than damages, where such damages do not exceed \$20, unless the presiding judge certifies that greater damages should have been awarded; and, on failure to so certify, judgment must be rendered against plaintiff for such residue. *Held*, that it could not be presumed on appeal that a certificate to the effect that greater damages should have been awarded was made, in the absence of an express recital of such fact in the record.

2. Where plaintiff recovers not more than \$20 damages in an action for tort, and the judge fails to certify that more damages should have been awarded, a judgment for plaintiff for more costs than damages is reversible error.

3. On appeal in such a case, the appellate court will correct the error by rendering judgment in conformity with the statute.

Appeal from circuit court, Walker county; A. H. Alston, Judge.

Action between F. D. Guttery and J. M. Boshell. From a judgment for plaintiff, defendant appeals. Reversed.

T. L. Sowell, for appellant. Coleman & Bankherd, for appellee.

HARALSON, J. The action was for \$250, claimed of defendant as damages for trespass on land of the plaintiff. On trial, the jury found for the plaintiff and assessed the damages at \$15, and judgment was rendered for that amount against the defendant together with the costs of the case. There was no bill of exceptions, and the appeal is taken by defendant on a transcript of the record. The error assigned is in the rendition of the judgment set out, and the ground of error insisted on is, that the recovery was for less than \$20; that the presiding judge did not certify that greater damages should have been awarded, and in the absence of such a certificate, the costs to be taxed against the defendant should have been limited by the judgment, to a recovery therefor, to not more than the damages assessed.

Section 1326 of the Code provides, that "In all actions to recover damages for torts, the plaintiff recovers no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue."

In the absence of express recital of the fact in the record that the certificate of the judge was made, it cannot be presumed on error that one was made. *Iron Co. v. Mangum*, 67 Ala. 247.

It has long been held, that such a judgment is erroneous and must be reversed. *Galle v. Lynch*, 21 Ala. 579; *Raid v. Gordon*, 2 Stew. 469; *Tippins v. Peters*, 103 Ala. 193, 15 South. 564. It is held, however, that on appeal in such cases, the judgment will be here rendered in conformity with the statute.

Let the judgment below be reversed, and one here rendered against the appellant, the defendant below, for the sum of \$15, the damages assessed against him by the jury, together with costs in the court below, not to exceed that sum. The appellee will pay the costs of the appeal.

Reversed and rendered.

MARTIN MACH. WORKS v. MILLER.

(Supreme Court of Alabama. June 17, 1902.)

APPEAL—FAILURE TO FILE TRANSCRIPT—MOTION TO DISMISS—NOTICE TO APPELLEE—EVIDENCE OF CORPORATE ACTS—HEARSAY—DETINUE—AFFIRMATIVE CHARGE—ERROR.

1. Under Sup. Ct. Rule 45 (8 South. vi), providing that, for default in filing a transcript as therein required, the appeal "may, in the discretion of the court, be dismissed on motion of

appellee, if made not later than the next Thursday," an appeal will not be dismissed because the transcript was not filed within the time prescribed, where the motion to dismiss was not made on or before the next Thursday after the default in filing.

2. Where an appeal bond was given within the year allowed, and it did not appear that the delay in giving notice of the appeal was due to appellant's fault, or to cause other than the failure of the officers to perform their duties, the appeal will not be dismissed on account of such delay.

3. Where a witness had testified to the execution of an instrument purporting to be a transfer of the property and assets of a corporation, it was error to exclude, as not the best evidence, his testimony that its officers were duly authorized by vote to execute such transfer, as neither the statement itself, nor the other evidence, showed that there was in existence written evidence of the vote referred to.

4. Where, in detinue, there was evidence to show plaintiff's purchase of the property, its right to possession, and defendant's refusal to deliver on demand, and the evidence on defendant's special plea was conflicting, it was error to give the general affirmative charge for defendant.

Appeal from circuit court, Choctaw county; Gesner Williams, Special Judge.

Action by the Martin Machine Works against F. J. Miller. From a judgment for defendant, plaintiff appeals. Reversed.

This was a statutory action of detinue, brought by the appellant, the Martin Machine Works, against the appellee, F. J. Miller, to recover the possession of an engine, boiler, and fixtures. The defendant pleaded non detinet, and by special plea set up that, after the purchase of the machinery sued for, the plaintiff and the defendant rescinded the contract of sale, and plaintiff agreed to surrender to the defendant the notes given for the purchase of said machinery and to take back the machinery, but that, when plaintiff demanded the machinery, it refused to surrender the defendant's notes. It was shown by the evidence introduced that the Progress Manufacturing Company sold to the defendant the machinery involved in this suit, and for the purchase price thereof took two notes executed by the defendant, each of which recited that it was given for the purchase price of the machinery, and stipulated that the title to said machinery remained in the Progress Manufacturing Company until the notes were fully paid, and that said notes were not paid. It was further shown by the evidence that the Progress Manufacturing Company had sold and conveyed all of its rights, franchises, property, and assets, including accounts, etc., to the plaintiff, the Martin Machine Works, and that the notes executed by the defendant were indorsed by the Progress Manufacturing Company to the Martin Machine Works. The other facts adduced in evidence necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative

¶ 3. See Evidence, vol. 20, Cent. Dig. §§ 461, 512.

charge in its behalf, to the giving of which charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. The trial of this case was had on March 21, 1900. The bill of exceptions was signed, as recited, "in open court in term time," on March 28, 1900. The appeal bond was given on July 9, 1900. The citation of appeal was issued on May 6, 1901, and was executed on the same day. The certificate of appeal was signed by the clerk of the court on May 6, 1901. The transcript was filed in the office of the clerk of the supreme court May 11, 1901. The cause was submitted in the supreme court upon the merits, and on the motions to dismiss the appeal, and to strike out all the assignments of error upon the following grounds: (1) That the judgment was rendered more than two months before the appeal was taken. (2) That the transcript was not filed in the proper time. (3) Because the judgment was rendered by the circuit court in this cause on March 21, 1900, the citation of appeal was served on May 6, 1900, the appeal bond was approved on July 9, 1900, and yet the transcript was not filed in the supreme court until May 11, 1901,—more than 12 months after the appeal was taken.

W. F. Glover, for appellant. Taylor & Elmore and C. R. Gavin, for appellee.

SHARPE, J. This appeal was taken in vacation to the supreme court term next following. The transcript was not filed within the time prescribed by law, but was filed before the expiration of the term. The motion to dismiss the appeal was not made on or before the next Thursday after the default in filing, and therefore is not within the provision of rule 45 of supreme court practice (8 South. vi.), which is to effect that for default in filing a transcript as therein required the appeal "may, in the discretion of the court, be dismissed on motion of appellee, if made not later than the next Thursday." *Street v. Street*, 113 Ala. 333, 21 South. 138. The giving of the appeal bond effected the appeal within the year allowed for appealing, and it not appearing that the delay which occurred in giving notice of the appeal was due to appellant's fault, or to a cause other than the failure of the officers to perform the duties required by the statute, such delay will not be treated as a ground for dismissing the appeal or for striking out the assignments of error. *Kimbrell v. Rogers*, 90 Ala. 330, 7 South. 241.

Plaintiff claimed to have obtained title to the machinery sued for from the Progress Manufacturing Company, a private corporation. It was proven by the deposition of a witness, and without dispute, that the latter corporation had made a conditional sale of the machinery to defendant; the transaction being evidenced by defendant's notes for pur-

chase money, wherein there was an express reservation to the vendor of title, together with the right to take possession of the property in case of default, and that the notes were not paid. In the deposition is the following, among other statements of the witness: "The Progress Mfg. Co. is no longer in existence. It has been succeeded by the Martin Machine Works, which concern bought out all the property and assets of every kind owned by the Progress Manufacturing Company. It still owns all the assets of the Progress Mfg. Co." There was exhibited in and introduced as part of the deposition a writing purporting to be a transfer to the plaintiff from the Progress Manufacturing Company; and the witness, after testifying to the execution of that instrument by officers of the corporation, deposed further that "said officers were duly authorized to execute said conveyance by a vote of said corporation in a meeting called for that purpose." This latter statement was excluded on motion based upon the ground that the statement was not the best evidence of the matter stated. This ruling was erroneous, for the reason that there is nothing in the statement itself nor in any of the evidence which suggests or raises any presumption that there was in existence written evidence of the vote referred to. In the absence of any charter prohibition, a vote of a private corporation to confer authority on an agent to execute a conveyance of personal property may or may not be evidenced by writing, and, when not shown to be so evidenced, may be proved orally. *Morrill v. Manufacturing Co.*, 32 Hun, 543; *Moss v. Averell*, 10 N. Y. 454; *Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Preston v. Lead Co.*, 51 Mo. 43. See, also, *Cook, Stockh.* § 714.

But apart from the evidence excluded, there was in the remainder of the deposition evidence introduced without objection, tending to prove plaintiff's purchase of the property, its right to possession of the same, and of defendant's refusal to deliver it on demand made prior to commencement of the suit; and as to matters set up in the special pleas there was conflict in the evidence. Under such conditions, the charge given at defendant's request invaded the jury's province.

It will be ordered that the motion to dismiss the appeal and to strike assignments of error be overruled, that the judgment be reversed, and that the cause be remanded.

OKLAHOMA VINEGAR CO. v. HAMILTON et al.

(Supreme Court of Alabama. June 12, 1902.)
SALES—DELAY IN DELIVERING—OPPORTUNITY TO INVESTIGATE PURCHASER'S SOLVENCY—INSTRUCTION.

1. Where, in an action for the price of goods, the evidence showed that delivery was to be made at once; that the goods were not shipped

for more than two weeks after ordered; and that when received, a week later, too late for the purpose of the purchasers, communicated to the agent of the vendor at the time the order was given, acceptance was refused,—an instruction that the vendor had such reasonable time for shipment as would admit of its instituting and completing an investigation as to the purchaser's insolvency, etc., was properly refused, as misleading, without defining what time would have been reasonable in reference to the expedition demanded by the order.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by the Oklahoma Vinegar Company against Hamilton & Bunkley. From a judgment for defendants, plaintiff appeals. Affirmed.

The appellant, the Oklahoma Vinegar Company, brought the present suit against the appellees, Hamilton & Bunkley, upon a verified account, to recover the purchase price of phosphates sold by the plaintiff to the defendants. The purchase was made through a traveling salesman of the plaintiff, to whom the defendants gave a written order for the goods. The defendants pleaded: First, the general issue; second, the rescission of the contract; and, third, the breach of contract by the plaintiff. The other facts of the case are sufficiently shown in the opinion. Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they must find for the plaintiff." "(3) The words in the contract or order in evidence, 'at once,' mean, in law, 'within a reasonable time'; and, if you believe from the evidence that the goods were shipped to the defendants as soon as plaintiff in the case could get satisfactory recommendation as to the solvency and financial standing of defendants, then such shipment would have been within a reasonable time, under the meaning of the contract, and you should find for plaintiff. (4) I charge you, gentlemen, that if the order was given on November 3d, and plaintiff delivered goods to railroad for shipment to defendant on November 19th, then the goods would have been shipped within a reasonable time, and you should find for plaintiff." There were verdict and judgment for the defendants. The plaintiff appeals, and assigns as error the refusal of the court to give the several charges requested by it.

Worthy & Gardner, for appellant. E. R. Brannen, for appellees.

McCLELLAN, C. J. The evidence goes to show that the time within which delivery of the goods defendants ordered from plaintiff's agent was to be made, was of the essence of the contract of sale, and the written order signed by the defendants expressly stipulates that the goods were to be shipped

"at once" from Montgomery to the defendants at Troy, Ala. It is also shown that the goods were not shipped at once, but more than two weeks after the order was given, and after the occasion for which defendants wanted the goods had passed; that they were not shipped from Montgomery at all, but from Atlanta, Ga.; and that they arrived at Troy more than three weeks later than they were to have been delivered there according to the contract between defendants and plaintiff's agent, and entirely too late for the purposes of defendants, communicated to the agent at the time the order was given. It is also shown that defendants promptly declined to receive the goods, and repudiated the transaction, on the ground of the unwarranted delay in delivery. It is not and could not be even plausibly insisted on these facts that the vinegar company, in this suit for the price of the goods, was entitled to the affirmative charge, though that direction was requested by plaintiff on the trial. It is insisted, however, that notwithstanding the exigent nature of defendants' use for the goods, communicated to plaintiff's agent, and notwithstanding the written order itself calls for shipment of them "at once" from a near-by station, the plaintiff had such reasonable time for shipment as would admit of its instituting and completing an investigation as to defendants' solvency, etc., and that charges requested to that effect should have been given. We do not think so. The doctrine is that, when no time is specified for shipment or delivery, the shipment and delivery are well made in such time as would be reasonable under all the circumstances; and it is true, too, doubtless, that some appreciable time must elapse on an order for shipment "at once," and such necessarily lapsing time would be a reasonable time in a sense referable to the urgent words of the order; but in this latter case (the case here) it would be palpably misleading to instruct the jury that plaintiff had a reasonable time to ship and deliver, without defining the time that would be reasonable by a reference to the urgency of defendants' occasion, and the expedition demanded by the terms of the order. Especially would such charges have been misleading and prejudicial here, in view of the long delay which supervened, and the asserted purposes of that delay,—to inquire far and near into the commercial standing of defendants. It was clearly the contemplation of defendants and the agreement of the agent that the goods should be shipped at once from Montgomery, and no longer delay in shipment was authorized than was necessary to consult the persons referred to in the order, and who lived in Montgomery, as to defendants' solvency, etc., and thereafter to deliver the goods at a seasonable hour to the carrier. The charges asked by plaintiff were properly refused.

Affirmed.

EDSON v. STATE.

(Supreme Court of Alabama. June 12, 1902.)

STATUTES—REPEAL—JURORS—SELECTION—PREJUDICIAL ERROR—INDICTMENT—MOTION TO QUASH—EVIDENCE TO SUPPORT GROUNDS.

1. Act Feb. 21, 1887 (Acts 1886-87, p. 190), providing that members of the board of revenue shall constitute a board of jury commissioners for the selection of jurors, was repealed by Act March 2, 1901 (Acts 1900-1901, p. 1904), providing that the judges of the city court, judge of probate, sheriff, and clerk shall constitute such board, although such was not expressly provided, as, the two being conflicting, and the latter an affirmative statute revising the subject-matter of the former, it was evidently intended as a substitute for it.

2. On a criminal prosecution it was prejudicial error to draw names to complete the jury, after the venire was exhausted, from a box prepared by the board of revenue, instead of from the box prepared by the board of jury commissioners, as provided by Act March 2, 1901 (Acts 1900-1901, p. 1904).

3. A motion to quash an indictment on the ground that it was found upon illegal and incompetent evidence, and that the witnesses were not sworn according to law, was properly overruled where no evidence was offered to sustain such allegations.

Appeal from city court of Montgomery; William H. Thomas, Judge.

George Edson was convicted of murder in the first degree, and appeals. Reversed.

The indictment preferred in this case was signed, "Terry Richardson, Special Solicitor for the County of Montgomery." The defendant moved the court to quash the indictment upon the following grounds: "(1) Because said indictment was found upon illegal and incompetent evidence. (2) Because the witnesses before the grand jury which found and returned said indictment were not sworn according to law. (3) Because the witnesses before the grand jury were sworn by one Terry Richardson, who was not the solicitor authorized by law to administer the oath to said witnesses. (4) That said Terry Richardson was not duly and legally authorized and appointed to act as such solicitor. (5) That the records of this court fail to show that at the time of the appointment of said Richardson there was any necessity therefor, and this the defendant hereby offers to prove by the records of this court, and the defendant prays judgment. (6) The defendant further moves to quash said indictment because the said Terry Richardson was appointed to serve as special solicitor during the absence of the Honorable Tennent Lomax. Defendant avers that from the time of the organization of said grand jury unto the returning of said indictment the said Tennent Lomax was not absent, but was present in the city of Montgomery, wherein this honorable court sits. And this the defendant is ready to prove, and prays judgment hereon." The minute entry reciting the appointment of said Richardson as special solicitor was in words and figures as follows: Minutes. City Court of Mont-

gomery. State Cases. July Term, 1901. Hon. Tennent Lomax, the solicitor, being absent, Terry Richardson, Esq., a competent attorney, was appointed by the court to act as special solicitor in the solicitor's place, and during his absence, and was duly sworn according to law as such solicitor, and thereupon entered upon the discharge of his duties as special solicitor." The bill of exceptions contains the following recital in reference to this motion: "The defendant offered no evidence to sustain any or either of the grounds of said motions, or either of them, and made no proof of the averments thereof. The court overruled the motion of the defendant to quash said indictment." The only other ruling presented to the court on the present appeal is sufficiently shown in the opinion.

Bibb Graves and W. T. Seibels, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. A cursory comparison of the act approved February 21, 1887 (Acts 1886-87, p. 190), with the act approved March 2, 1901 (Acts 1900-1901, p. 1904), will show that they cannot and were not intended to be operative at the same time. Both of them relate to and deal with the same subject-matter, and some of their provisions are directly in conflict. Manifestly the purpose of the latter was to take from the board of revenue, constituting the board of jury commissioners, the power and authority conferred upon them by the former, and to confer that power and authority upon a board composed of the judge and associate judge of the city court, and the probate judge, sheriff, and clerk of the circuit court of the county. It is entirely clear from the general policy of the two acts, gathered from the purposes and objects sought to be attained, that it was not the intention of the legislature to have two legal jury boxes for the county at one and the same time,—one prepared by the board of revenue as a board of jury commissioners, and the other by the judges of the city court, judge of probate, sheriff, and clerk,—to say nothing of the conflicting provisions of the two, and the confusion that would follow if such were the case. The fact that the lawmakers immediately, following the repealing clause in the later act, made provision for the legality of juries drawn by the board of revenue for the year 1901, clearly evinces that they understood that the later act repealed the former. Furthermore, the last act is an affirmative statute revising the entire subject-matter of the former, and was evidently intended as a substitute for it. This being true, it had the effect of repealing the former, although containing no express words to that effect. 3 Brick. Dig. p. 750, § 49.

On the trial of this defendant a jury was not obtained from those persons who were upon the venire, summoned and appearing. It therefore became the duty of the pre-

¶ 3. See Indictment and Information, vol. 27, Cent. Dig. § 475.

siding judge, under section 10 of the act approved March 2, 1901, to draw from the jury box a sufficient number of names to complete the jury. Against the objection of defendant, the judge drew the names to complete the jury from the box prepared by the board of revenue, and not from the box prepared by the board of jury commissioners under the act of 1901. In this there was error. The defendant was entitled to have the names drawn from the legal jury box, and the action of the court in drawing them from another box was clearly violative of the provisions of the act, and can no more be upheld than could his direction to the sheriff, had he given it, to summon a sufficient number of persons to complete the jury from the citizenship of the county, or had he drawn the names from the legal box before the venire was exhausted, or, for that matter, any other disobedience of the mandate of the statute. *Ezell v. State*, 102 Ala. 101, 15 South. 810; *Linehan v. State*, 113 Ala. 70, 21 South. 497.

There is no merit in those grounds of the motion to quash the indictment predicated upon the appointment of Richardson by the court to act in the solicitor's place. *Or. Code*, § 5522. No evidence was offered in support of the other grounds. For this reason, if for no other, they were properly overruled.

For the error pointed out, the judgment of conviction must be reversed, and the cause remanded.

ILLINOIS CENT. R. CO. v. HARRIS.

(Supreme Court of Mississippi. Dec. 8, 1902.)

CARRIERS—THROUGH TRAINS—STOPPING AT DESTINATION—TICKETS—VARIATION BY PAROL—AGREEMENTS WITHOUT CONSIDERATION.

1. Where a round-trip railroad ticket is sold, good only for one day, it is good for a return trip on the only train returning that day, though such train is not scheduled to stop at the station of purchase.

2. A conversation at the time of the sale of a ticket calling for a return passage on a certain train, in which the agent notified the passenger that he might have difficulty in returning on the train, and the passenger replied that he would take his chance, did not deprive the passenger of his rights under the terms of the ticket.

3. The right of a passenger, under his ticket, to travel to his destination on a certain train, was not affected by a conversation with a flagman, in which, after informing the passenger that the train did not stop at his destination, the flagman permitted him to remain on the train on condition that he get off at some other station.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

"To be officially reported."

Action by Joseph Harris against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

Mayes & Harris, for appellant. Alexander & Alexander, for appellee.

TERRAL, J. Appellee on Sunday evening, the 3d day of March, 1901, bought of the agent of appellant at Ridgeland an excursion ticket to Jackson and return, good for that day only. Late at night on the same day he boarded train No. 26, which was the only train upon which he could return; and after passing Tugaloo, and before reaching Ridgeland, he was, according to the evidence made on his side of the case, ejected from the train with insult and violence. He sued the company, recovered judgment for \$75, and the company appeals.

The trial court instructed the jury that, if train No. 26 was the only train upon which appellee could return to Ridgeland that day, his expulsion therefrom was wrongful. The company insists that the instruction was error, and cites *Railroad Co. v. Rodgers*, 31 South. 581, 80 Miss. 200, as being opposed to this view of the law. But in that case Rodgers returned home the next day on his excursion ticket, and could have returned by one or more trains on the day he was refused passage on No. 6,—a fast train, not stopping at Egremont,—if he had desired to do so; yet, declining to return on trains that would have placed him at home that day, he complained that a fast train, not scheduled for Egremont, excluded him from passage on it. In reply to repeated offers to bribe him. Conductor Howard made a slighting or insulting remark to Rodgers, but that incident was not a factor in the case. Having had opportunity to return to Egremont on the very day that he was refused passage by Conductor Howard, and having yet two days more for a return to Egremont, he insisted on returning to Egremont by the only train that never stopped at that point. That case was quite different from the one before us. It was, however, shown here, for the railroad company, that train No. 26 was not scheduled to stop at Ridgeland, and that the agent at Ridgeland, when selling the round-trip ticket to Harris, told him that if No. 26 should be late, or behind its scheduled time, he would find difficulty in returning upon it, and that Harris replied he would take the chance. It showed, also, that Harris, upon boarding the train at Jackson, was warned by the flagman that the train did not stop at Ridgeland, and that he said he would get off at Tugaloo, or go on to Madison, and that the flagman permitted him to remain on the train upon that condition. It is evident that what passed between the flagman and Harris at Jackson was of no consequence, because the rights and duties of the parties were fixed by the ticket held by Harris. *Wells v. Railroad Co.*, 67 Miss. 24, 6 South. 737. We further think the right of Harris to return on 26 was not affected by the statement of the agent at Ridgeland that, if the train was behind its scheduled time, he would experience difficulty in returning upon it; for he could not in that manner curtail or diminish the rights eviden-

ced by the ticket which he was writing for the company. The uncontradicted proof was that No. 26 was on time, but, if it had not been on time, it would not have affected the merits of the controversy. Harris had a ticket for returning that day to Ridgeland, he entered the only train that could put him there on that day, and he was not a trespasser, but was rightfully thereon. *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. To sell Harris a coupon ticket to return on that day, and then to deny him the right to passage upon its only train that could return him to his destination, would have operated as a palpable fraud upon him. We think his ticket gave him a right of passage upon No. 26, and that his ejection was wrongful, and the instruction of the learned judge was not error.

The punitive damages imposed by the jury were not inflicted in consequence of the putting Harris off the train, but for insult and violence in so doing; and the question relating thereto was fairly submitted to the jury, and we do not understand counsel to challenge the instruction of the court or the finding of the jury in this respect.

The refusal of the court to grant to defendant its ninth and thirteenth requests for instruction to the jury is earnestly argued as matter of error; but, if the views expressed in the first part of this opinion are correct, their refusal was not error.

Affirmed.

WESTERN UNION TEL. CO. v. PALLOTTA.

(Supreme Court of Mississippi. Dec. 8, 1902.)

TELEGRAPHS—MESSAGES—DELAY—EVIDENCE—STATUTORY DAMAGES—SPECIAL DAMAGES.

1. Where a telegram was delivered for transmission on October 8, 1901, and the agent on that day informed the sender that the message had been sent, but the agent at the place of destination stated on the next day that the message had not been received, and it was not delivered until October 10, 1901, and on its face bore evidence that it was received at its destination on the 9th, a finding that the message was not seasonably delivered, entitling plaintiff to statutory damages, was proper.

2. Where plaintiff claimed damages for the loss of work by delay in the delivery of a telegram, but failed to prove the character or extent of the work lost, or for what time it would have continued, or that the work was lost as the result of the negligence of the telegraph company, a finding of special damages for such loss was erroneous.

Appeal from circuit court, Rankin county; Jno. R. Enochs, Judge.

"To be officially reported."

Action by Willie Pallotta against the Western Union Telegraph Company. From a judg-

ment in favor of plaintiff, defendant appeals. Affirmed conditionally.

Mayes & Harris, for appellant. Wm. Buchanan, for appellee.

TERRAL, J. Willie Pallotta sued the Western Union Telegraph Company in the sum of \$25 for statutory damages, and for the further sum of \$100 for special damages, for failure to deliver within a reasonable time a message sent by him from Vicksburg to Mamie Pallotta, at Star, Miss. He claimed special or actual damages because of loss of a job at Vicksburg, and the jury assessed his entire damages at \$70. It was in evidence that the telegram was delivered for transmission at the appellant's office at Vicksburg on Monday, the 8th day of October, 1901, and upon that day the agent there informed Pallotta that the message had been sent; but, receiving no answer, he took the train that evening, and arrived in Star on the 9th of October, when the agent there said his telegram had not been received. On the 10th of October the message was delivered in Star, and on its face bore evidence that it had been received at Star on the 9th of October. It must be obvious, therefore, that the message was not seasonably delivered, or if the time of its reception at Star be, upon the evidence, uncertain, yet the finding of the jury has settled that point in favor of the appellee. The finding of the jury therefore supports the contention of the appellee as to the \$25 statutory damages sued for.

The plaintiff below testified he was a carpenter by trade, and had on the 8th of October secured a job in Vicksburg; but the character or extent of the job, or for what time it was to continue, is not shown. There is nothing in the record to show what damages he had suffered by the loss of the job. That, upon the evidence, would be a matter of mere conjecture; and conjecture, it has often been said, cannot support a verdict. It does not appear from the evidence in the case that Pallotta would have lost his job with Cane & Patrick at Vicksburg if he had returned thereon the night of the 9th of October, as he well could have done. His only excuse for not returning appears to have been that he had no money upon which to return. That, however, was the personal misfortune of the appellee, and not the fault of the appellant. We find no evidence in the record to support the finding of the jury for any special damages.

If the excess of \$25 for statutory damages be remitted, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial.

STEVENS v. YAZOO & M. V. R. CO.

(Supreme Court of Mississippi. Dec. 8, 1902.)

RAILROADS—INJURY AT CROSSING—QUESTION FOR JURY—WILLFUL INJURY—ILLEGAL SPEED—SIGNALS.

1. In an action for injuries to a pedestrian while crossing railroad tracks in a city, evidence held to require a submission of the case to the jury.

2. Where plaintiff was struck, in a much frequented part of a city, by a railroad train approaching from the rear at a rate of speed highly in excess of the statutory limit, and without giving any signals, the company was guilty of recklessness amounting to willfulness, without regard to whether plaintiff was entitled to be where he was struck.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

Action by John D. Stevens against the Yazoo & Mississippi Valley Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Harper & Potter, for appellant. Mayes & Harris, for appellee.

CALHOUN, J. The cause went off below on a peremptory charge of the learned circuit judge to the jury to find for defendant on the testimony for plaintiff. It follows that, in our view of it, we are to be controlled by a solution of the question whether a verdict for the plaintiff on that testimony would be permitted to stand. On that the jury would have been warranted in believing the following: The Union Passenger Railroad Depot of the city of Jackson is situated just north of Capitol street, which runs east and west, and crossing the railroad. The next street south is Pearl, and the next south of that is Pascagoula, and the next south of that is South street. These streets are 320 feet apart. The main track of the Illinois Central Railroad runs straight north and south, crossing all these streets. The Yazoo & Mississippi Valley Railroad Company habitually used this main track going south until it arrived at a point about midway between Pearl and Pascagoula streets, at which point, by a switch arrangement, its passenger trains left the main track, and went on its own separate track, running thence due south to a point about halfway between Pascagoula and South streets, when it diverged to the southwest on its way to Natchez. Divers railroad tracks and switch tracks, running north and south, cross Pascagoula street, and, just south of Pascagoula street, and between that and South street, the ground is practically gridironed with switch tracks; and all this is in a populous and much-frequented quarter of the city, and much used by pedestrians, and has been so used for 20 years, to the knowledge of the railroad company. Early in the afternoon, Mr. Stevens was on his way to a factory. He had come from the eastern part of the city, going west on Pascagoula street. When he reached the railroad crossing, his

route led south and a little west of south to the factory, which was the point of his destination. On reaching the main line of the Illinois Central Railroad where it crosses that street, Mr. Stevens looked up the line, and saw a passenger train moving south, which he took to be what is ordinarily known as the "Cannon Ball" train of the Illinois Central Railroad Company. When he saw it, it was just at Pearl street, 320 feet north of where he was. He walked across that main track of the Illinois Central Railroad Company, and, of course, believed himself to be, and was, absolutely out of all danger from that train if it had continued down the main line. When he got across that main line, he was immediately disturbed by the movements of switch engines and cars in the switch yards south of him, in which direction he was going, and, to avoid danger from them, he was on the alert to watch their movements. He had thought that the point of deflection from the Illinois Central main line into the Yazoo & Mississippi Valley line was to his south at a point about midway between Pascagoula and South streets, which was a mistake. Now, while watching the switch engines in his front, he pursued his course a little west of south, fronting the switch engines, from which only there seemed to him any possible danger, and got to the eastern side, at the cross-ties of the railroad track of the Yazoo & Mississippi Valley Railroad Company. If he had stopped in the space between the two tracks, he would have been perfectly safe, but, observing the instinct of men when a train is coming down a track, he got as far away from the Illinois Central main line as possible, and was, as we have said, at the eastern end of the cross-ties on the Yazoo & Mississippi Valley track. He was watchful and alert, to the best of his judgment, all the time, to avoid danger. His back was towards the north—towards the depot, from which the train was coming—when the Yazoo & Mississippi Valley train, without ringing a bell or blowing a whistle, ran on him, and inflicted injuries which will greatly impair, if not destroy, his usefulness through life. One sharp blow of the whistle would, no doubt, have prevented any casualty. The speed of this train which struck him is put by one witness at the rate of from 10 to 15 miles an hour; another, at 12 miles an hour; and a fair deduction from the testimony of the plaintiff himself would put it at from 20 to 22 miles an hour; and this, as we have said, in a very populous neighborhood, in the heart of the city, in a place much frequented by the people. If the train which did the damage to this man had been going at the lawful rate of speed of six miles an hour, it is plain that the catastrophe would not have occurred, because, by the time the train could have gotten to him, he would have been at an entirely safe place. He had the right to suppose, and did suppose, that the

south-bound train was not traveling faster than the limit prescribed by law, in which case he was in no sort of danger. But if he had not supposed so, the fact remained that the speed was at least twice that of the lawful limit. As soon as he got his bearings as to danger from the switch engines in his front to the south,—and he says in a second,—he would have looked back north for any danger from any train from that quarter, it being the time of day for trains to move out from the depot. While the writer dissented from the conclusion of the court in *Bell v. Railroad Co.*, 30 South. 821, he and the whole court subscribed then, and subscribe now, to the language of Chief Justice Whitfield in that case, that: "So many questions are integrated usually into the solution of the question of negligence—it is so necessary to examine all the circumstances making up the situation in each case—that it must be a rare case of negligence that the court will take from a jury." A judge at his desk, whose duties seclude him very much, and train him to habits of careful deliberation, is not nearly so competent to determine what a man of the usual and ordinary prudence might do under given circumstances as a jury from the body of the people. Contributory negligence, as a defense, must be quite obvious to all reasonable minds to warrant its announcement as matter of law. This is very thoroughly established by the authorities cited in the brief of counsel for appellant. Especially note 2 *Shear. & R. Neg.* (5th Ed.) p. 830, § 477, bearing on situations like that disclosed in this record,—of confusion by noises of many engines and numbers of tracks and trains. Under such circumstances it may be that a man of great prudence might err in judgment, though using his utmost and most wary attention. But the statute prohibiting the running of trains more than six miles an hour in cities, etc., was enacted to protect against "the known imprudence of the many who need protection against themselves." *Railroad Co. v. McGowan*, 62 Miss. 698, 52 Am. Rep. 205; *Railway Co. v. Carter*, 77 Miss. 517, 27 South. 993. This in no way impinges on the doctrine that contributory negligence may, in palpable cases, defeat recovery, and defeat it as matter of law. The question now is as to what may be taken from the province of the jury. Much stronger cases have been held to be within the exclusive province of that constitutional body. *Downing v. Steamship Co.* (La.) 29 South. 207; *Lampkin v. McCormick* (La.) 29 South. 953, 83 Am. St. Rep. 245; *Law v. Railway Co.* (Tex. Civ. App.) 67 S. W. 1025. The case of *Railroad Co. v. Crockett*, 78 Miss. 412, 29 South. 162, in no degree militates against this view. There the railroad was in no fault, and plaintiff's gross negligence was palpable. We hold this now: That, regardless of whether this plaintiff was a trespasser or a licensee, or properly

where he was, it was recklessness tantamount to willfulness for a railroad company running its train in flagrant violation of law as to speed and as to signals to run, in open daytime, on a man with his back to the engineer, in the heart of a city, and in a much frequented part of it. *Railway Co. v. Carter*, 77 Miss. 511, 27 South. 993; *Railroad Co. v. Van Steinburg*, 17 Mich. 117; *Morgan v. Railroad Co.* (Mo. Sup.) 60 S. W. 195; *Railway Co. v. Lee*, 92 Ala. 271, 9 South. 230; *Railroad Co. v. Brown*, 77 Miss. 342, 28 South. 949. In such situations there should be a careful lookout and close observance of all the precautions.

Reversed and remanded.

COOK et al. v. STATE.

(Supreme Court of Mississippi. Dec. 1, 1902.)

STATE — BOUNDARY — MIDDLE OF RIVER — COURTS—TERRITORIAL JURISDICTION—LIQUOR PROSECUTION—EVIDENCE—WAIVER OF OBJECTIONS.

1. Code, § 361, establishing the boundary of Coahoma county "to the river," and Laws 1892, p. 365, § 2, fixing the western boundary of the First judicial district of that county "between said given line and the Mississippi river," and Code, § 347, giving counties jurisdiction "to the western boundary of the state," must all be read in pari materia with section 345, fixing the boundary of the state as "beginning on the Mississippi river, meaning thereby the center of said river or thread of the stream," etc., and the middle line of the Mississippi river marks the jurisdiction of the courts of the counties and judicial districts of counties situate thereon.

2. Courts take judicial cognizance that offenses between the middle line of the Mississippi river and the Mississippi shore are within the jurisdiction of the courts of the districts on the margin east of the place of the offense.

3. In a prosecution for unlawfully selling liquor on a ferryboat, where the evidence showed that the sale was made in February, 1901, it was error to permit a witness to testify that in April, 1902, he was on the boat, and found whisky in a box, etc.

4. The contents of a United States liquor license to defendants could not be shown by the state by parol evidence, in the absence of notice to produce.

5. Evidence that the general character and reputation of the boat was that of a whisky-boat was inadmissible.

6. In a prosecution for selling liquor on a ferryboat in the Mississippi river and on the Mississippi side, it was error to permit the state to show other sales made on the Arkansas side.

7. Admission of incompetent evidence over objection and exception is not cured by the fact that afterwards evidence is given along the same lines without objection.

Appeal from circuit court, Coahoma county; Sam C. Cook, Judge.

R. B. Cook and Jersey Woods were convicted of violation of the liquor law, and appeal. Reversed.

R. B. Cook and Jersey Woods owned and operated a steam launch boat in the Mississippi river, and did a ferry business across

the river from the Mississippi side to the Arkansas side. At the April term, 1902, of the circuit court of the First district of Coahoma county, Miss., they were indicted for unlawfully selling "vinous, malt, and intoxicating liquors in less quantities than one gallon" in the said district. The evidence for the state was to the effect that the sale was made far east of the thread or middle of the Mississippi river, as it now is. It is urged by counsel for appellants that the true boundary of the state is not the shifting boundary that follows the thread of the stream as the river changes its course from year to year, but that section 1, p. 47, of the Code of 1857, fixes the boundary line between the two states the same as it was between this territory when owned by France and Great Britain, which was established as the middle of the stream as it existed in 1763, when it was fixed by these powers. It is insisted that the state must prove that the sale was east of the thread of the stream as it existed in 1763, beyond a reasonable doubt. Both the defendants were convicted and sentenced, and both appeal. The opinion of the court contains a further statement of the facts as to other questions involved.

D. A. Scott and J. A. Glover, for appellants. Wm. Williams, Asst. Dist. Atty., for the State.

CALHOON, J. The evidence sufficiently shows venue. Section 861 of the Code, establishing the boundary of Coahoma county "to the river," and section 2, p. 365, Laws 1892, fixing the western boundary of the First judicial district of that county "between said given line and the Mississippi river," and Code, § 847, giving counties jurisdiction "to the western boundary of the state," must all be read in pari materia with section 345, fixing the boundary of the state as "beginning on the Mississippi river, meaning thereby the center of said river or thread of the stream," etc. The middle line of that river marks the jurisdiction of the court of the counties and judicial districts of counties on that river, and courts take judicial cognizance that offenses between that line and our shore are in the jurisdiction of the courts of the districts on the margin east of the place of the crime or misdemeanor. *Sanders v. Anchor Line* (Mo. Sup.) 10 S. W. 595, 3 L. R. A. 390; *Buck v. Ellenbolt* (Iowa) 51 N. W. 22, 15 L. R. A. 187. Medium flum aquæ certainly remains the jurisdictional boundary, regardless of any changes in the bed of the stream by gradual accretion and recession. *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. And we are not required now to decide what would be the effect upon jurisdiction of a sudden avulsion. If such had occurred, the defendants must show it; the state having brought evidence that the occurrence was far east of the

middle of the line of the river, and in front of the proper district.

The indictment in this case is specifically for the sale of liquor, and is under Code, § 1574, as modified by the local election sections of the chapter on dramshops, and does not charge the new offense of keeping for sale, created by Laws 1900, p. 141, c. 104, but this is not material to the points to be considered. The indictment is perfectly valid.

The evidence showed that the sale was made in February, 1901, and yet the witness Wilkerson was permitted to testify that more than a year afterwards, in April, 1902, he was on the boat of defendants, which was operating under a federal and state coasting and ferry license, and found then on it whisky in a box, and some patent corkscrews, and a federal United States license to defendants. This was too long after the sale, and the contents of the United States license could not be shown by parol without previous notice to produce. *Snyder v. State*, 78 Miss. 866, 29 South. 78; *Clark v. Adams*, 81 South. 746. It is true that we affirmed *Clark v. Adams*, supra, notwithstanding the error of admitting the parol evidence of the license; but that was a civil action, and the proof of liability was overwhelming and uncontradicted. Here the proof of the sale was seriously contradicted, and it is questionable if conviction would have resulted but for this and other incompetent evidence noted. Based on this evidence, the court charged the jury, at the instance of the state, as follows: "(2) The court instructs the jury that if they believe from the evidence, beyond every reasonable doubt, that the defendants have posted in or about their place of business in this state a license stamp showing payment of a special tax for the sale of intoxicating liquors, levied under the laws of the United States, or that they had such license, or had paid such tax, or if they were in this state in possession of appliances adapted to unlawful retailing, it is presumptive evidence that they were engaged in selling intoxicating liquors contrary to law." This charge burnt into the minds of the jury the incompetent evidence, and fails to fix it at or about the time of the sale.

Evidence was allowed that the general character and reputation of the boat was that of a whiskyboat, which was clearly inadmissible. Moreover, it was permitted to the state to show other sales than that charged, and on the Arkansas side at that. This was error; the very point being whether, on a ferryboat plying between the two banks of the Mississippi river, a sale was made on the side of this state. *King v. State*, 68 Miss. 502, 6 South. 188.

We cannot agree with counsel for the state that because, after objection and exception to all the foregoing incompetent testimony,

further evidence was given without objection on the same lines, the error was cured. Where a principle of admissibility is once decided, counsel need not annoy the presiding judge and his opposing counsel by interrupting with continual objections. He need only be concerned to be sure that it is exactly the same principle. *Herrin v. Daly* (Miss.) 81 South. 790.

Reversed and remanded.

EXCHANGE NAT. BANK OF LITTLE ROCK, ARK., v. RUSSELL.

SAME v. SEARLS et al.

(Supreme Court of Mississippi. Dec. 12, 1902.)

SALES — BILL OF LADING — ASSIGNMENT TO BANK — PAYMENT OF DRAFTS — DEFECTS IN QUALITY AND QUANTITY — BREACH OF CONTRACT BY SELLER.

1. Where a bank purchased drafts with bills of lading attached for grain shipped, and the consignees paid the drafts, the bank, though liable for damages for defects in quality and shortage in quantity of the grain covered by such bills of lading, was not liable for damages for the consignor's failure to ship other grain to the consignees under different contracts.

Appeal from chancery court, Warren county; W. P. S. Ventress, Chancellor.

Actions by Searls Bros. and by A. G. Russell against the Exchange National Bank of Little Rock, Ark. From a judgment in favor of plaintiff in each case, defendant appeals. Reversed.

This is a suit in attachment in the chancery court of Warren county by appellees against appellant, under section 486, Code 1892, to recover damages for breaches of several contracts for the purchase of grain by appellees from the Smith Grain Company, of Little Rock, Ark. Two separate suits were brought by appellees. The nature of the damages sought to be recovered in each suit was of two distinct characters. The Smith Grain Company had sold to appellees grain, and drew drafts on them, and attached the bills of lading to the drafts, which were purchased from it by the Exchange National Bank of Little Rock. These drafts were paid by appellees, and the proceeds of them were in local banks in Warren county when the attachments were sued out. They seek in this bill to recover damages to them for the defective quality of this grain, and for shortage in the quantity of same. They also seek to recover in this same suit damages for the failure of the Smith Grain Company to ship to them other grain under different contracts. There was a decree in the lower court for all the damages sought to be recovered. From that decree the Exchange National Bank appeals. These cases were once before in the supreme court.

Catchings & Catchings, for appellant. McLaurin, Armistead & Brien, for appellees.

WHITFIELD, C. J. The decree of the court below went too far. This arose, doubtless, from misapprehension on the part of the learned chancellor of the opinions in these cases in 80 Miss. —, 32 South. 287. Whatever damage the appellees in these two cases have sustained by reason of defective quality in the grain, or by reason of any shortage in the grain delivered to appellees covered by the bills of lading, they may recover, but they cannot recover from this appellant any damage which they may have sustained by reason of the failure of the Smith Grain Company to ship grain which it had contracted to ship. That failure on the part of the Smith Grain Company to deliver to these appellees other shipments of grain than those covered by the bills of lading in these two specific cases, purchased by the appellant, is a breach of the contract between the appellees and the Smith Grain Company, but is no breach of contract on the part of the appellant. The appellant simply had nothing to do with those contracts. It is in no way connected with the breach of those contracts by the Smith Grain Company. The ground on which recovery is allowed against appellant for defective quality and shortage in quantity of the particular grain covered by the bills of lading bought by the appellant is that as to such grain the appellant has been contractually substituted as the vendor of all such grain in place of the Smith Grain Company, and, of course, must answer as any other vendor would answer for defects in quality and for shortage in quantity. But there is no contractual relation whatever between the appellant bank and either of the appellees or the Smith Grain Company as to any other grain than such grain as the appellant bought the bills of lading for. The appellant has no concern with the failure of the Smith Grain Company to carry out its contracts to ship indefinitely other car loads of grain which it may have contracted with the appellees to ship. The distinction is plain (*Miller v. Bank* [Miss.] 23 South. 439), and the cases from Texas, Missouri, and North Carolina cited by us in the former opinion show what we mean. They are all cases in which the bank had become, by purchase of the bills of lading, the substituted vendor of the grain covered by such bills of lading, and that is the whole extent of our former opinions.

Reversed and remanded.

STATE ex rel. BARRON, Dist. Atty., v. COLE, Auditor.

(Supreme Court of Mississippi. Dec. 1, 1902.)

STATES—TRUST FUNDS—INTEREST—CONSTITUTIONAL PROVISIONS—APPROPRIATION—NECESSITY.

1. Const. § 212, fixing the rate of interest on trust funds held by the state at 6 per cent., and requiring the semiannual distribution of

interest on such funds, is not self-executing, so as to require the state auditor to pay interest on a fund arising from the sale of timber on lands granted by the United States to the Industrial Institute and College for Girls by Acts Cong. vol. 28, p. 815, c. 184, without an appropriation having been made by the legislature therefor.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

"To be officially reported."

Mandamus by the state, on the relation of J. W. Barron, district attorney, against W. Q. Cole, state auditor. Judgment for defendant, and the relator appeals. Affirmed.

The Industrial Institute and College of Columbus was incorporated and established by the act of March 12, 1884. By the acts of congress (chapter 184, p. 815, vol. 28) approved March 2, 1895, it was provided that the governor of Mississippi should be authorized to select lands of the United States amounting to one township in quantity, and that patents should issue therefor to the state, provided the proceeds of said lands, when sold or leased, should forever remain a fund for the use of the Industrial Institute and College for Girls. The legislature of the state of Mississippi passed an act in 1898 (Acts 1898, c. 45) accepting the grant, and authorized the sale or lease thereof, or to sell the timber on it. Acting under the authority of this act, the board of trustees of said institution proceeded to procure patents to the land from the United States, and sold the timber from the lands, and the proceeds of the sale to the amount of \$156,495.05 was paid into the state treasury and credited to the Industrial Institute and College as required by law; the payments being made on the 18th and 17th days of August, 1901. This is a petition for a writ of mandamus filed in the name of the state by the district attorney in the district where the school is located to compel W. Q. Cole, auditor, to issue a warrant to pay the interest on this money to the said Industrial Institute and College. The court below sustained a demurrer to this petition, and complainant appeals.

Mayes & Harris, for appellant. Monroe McClurg, Atty. Gen., for appellee.

TERRAL, J. There are in our constitution many provisions that are self-executing, and not requiring legislative action to make them effective; but they are unmistakable from their terms, and manifestly section 212 is not one of this character. It does no more than fix the rate of interest on trust funds held by the state at 6 per cent., and to direct its semiannual distribution, leaving to the legislature the carrying into effect of the sovereign will as thus expressed. Who is to make the distribution, and to whom, and out of what funds, and in what manner? The means of payment and all the details are for

the legislature to provide. What means has the state for payment, except by taxation? It devolves on the legislature to provide by taxation for the maintenance of the state government in all its departments and the discharge of all its obligations. The state has no means of existence except by the exercise of the sovereign power of taxation. The constitution does not impose any taxes, except the poll tax by section 243, and must be held to have left the discharge of the obligation declared by section 212 to be by the legislature, on which it devolves to provide ways and means for the discharge of all obligations of the state. There is no just ground for the supposition that the framers of the constitution intended to dispense with legislative action as to the payment of interest on trust funds, and to require it as to maintaining the existence of the state government, which cannot live without money, and cannot get money without legislative action. Not an officer of the state can be paid his salary except with money raised by taxation, and after appropriation therefor by the legislature. The members of the legislature are dependent upon the same provisions for their pay. No money can come into the treasury or go out of it lawfully except as directed by legislative act. Collection and disbursement of public money belong to the legislature, and must be done as it directs. A state treasurer and an auditor are provided for by section 134 of the constitution, but it was left to legislation to prescribe their duties, and the provisions of the Code of 1880 as to these were continued in force as provided by section 274 of the constitution. These were brought forward in the Code of 1892, and among them is section 230, prohibiting the auditor from drawing "warrants without or in excess of appropriations of money for the purpose, *except in these cases specifically provided for by law.*" The clause italicised, entirely proper in the Code of 1880, under the constitution of 1869, which allowed permanent or standing appropriations, has no place under the constitution of 1890, which, by section 63, forbids any appropriation which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury, while section 64 prohibits any appropriation of money out of the state treasury from continuing in force longer than six months after the meeting of the legislature at its next regular session; and also requires the votes of a majority of all members elected to each house of the legislature to pass an appropriation bill. Thus the constitution has placed the whole matter of obtaining money by taxation (except as to the poll tax mentioned) and of disbursing it in the hands of the legislature, guarded and restricted as stated. There cannot be such appropriations from the state treasury, under the constitution of 1890, as were allowable by that of 1869, and with reference to which

the last clause of section 230 was appropriate. Now, as already said, no salary or other obligation of the state can be lawfully paid, except out of an appropriation therefor by the legislature definitely fixing the maximum sum which may be drawn on that account. And although there are in the Code several provisions directing the auditor to issue warrants, he cannot lawfully issue any except to pay out of an appropriation therefor fixing definitely the maximum sum which may be drawn, and also not continuing beyond six months after the meeting of the legislature at its next session. It seems to us perfectly clear that the auditor rightly refused to issue his warrant in this case, and the judgment of the circuit court is therefore affirmed.

WHITFIELD, C. J., takes no part in the decision of this case.

ADVANCE GIN & MILL CO. v. THOMAS.
(Supreme Court of Mississippi. Dec. 8, 1902.)
HIGHWAYS—NEGLIGENCE—PUBLIC NUISANCE—EVIDENCE—ADMISSIBILITY—APPEAL—HARMLESS ERROR.

1. An action for personal injuries caused by the alleged negligent action of defendant in letting steam escape from the blow-off pipe of his mill and gin upon plaintiff, who was upon the sidewalk, was one of specific negligence, to which the law of public nuisance was not pertinent, and therefore the refusal of testimony showing that the neighborhood was devoted to manufacturing enterprises was not error.

2. Where it is evident that the verdict in favor of plaintiff would not have been influenced by the introduction of certain evidence for the purpose of contradicting one of plaintiff's witnesses, its rejection was not reversible error.

Appeal from circuit court, Warren county; George Anderson, Judge.

Action by Joe Thomas against Advance Gin & Mill Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This suit was brought to recover damages for a personal injury. Appellee's evidence was to the effect that plaintiff, in June, 1899, was walking along in the middle of the sidewalk of a public and much traveled street in Vicksburg, when, without any warning, appellant suddenly began cleaning out its large boilers, and from its open-ended blow-off pipe blew out steam and boiling water over plaintiff, which confused, frightened, and blinded him, and in struggling to get out of it plaintiff stepped into an open gutter, where boiling water was running from appellant's mill and gin. The suit is brought to recover damages for injuries he received. The contention of appellant's counsel is that the rules governing public nuisances apply in this case. Defendant offered to prove by Tom Morrissey that the street on which defendant's gin and mill was located is a man-

ufacturing street mainly, and that a number of large plants run by steam were located on it, and several railroad tracks on which trains were constantly running were also on said street. This evidence was offered to show that what might be a nuisance in some other part of the city would not be such in the locality where defendant's mill was located. On objection by plaintiff this evidence was excluded by the court. In order to contradict Clendenen, plaintiff in rebuttal introduced over defendant's objection a subpoena for him in a suit brought by plaintiff against the city of Vicksburg for damages for the same injury. From a verdict and judgment for plaintiff for \$500, defendant appeals.

S. S. Hudson, for appellant. Henry, Sander & Mulligan, for appellee.

CALHOON, J. We cannot concur with counsel that the general law as to public nuisances has any pertinency to this case, which is an action for damages for a specific injury, caused by a specific act of negligence. The jury found for plaintiff, and it is not conceivable that their verdict could have been affected whether the action of the court in reference to Morrissey's testimony or the Clendenen subpoena was right or wrong. In the instructions given for defendant it got the benefit of every principle the evidence entitled it to.

Affirmed.

PERKINS v. PANOLA COUNTY.
(Supreme Court of Mississippi. Dec. 8, 1902.)
COUNTY HEALTH OFFICER—ACTION FOR SALARY—VERDICT—CONSTRUCTION.

1. In an action by a physician to recover \$300 per annum for his services as county health officer, to which office he had been appointed after a reduction in the salary by the board of supervisors to \$50 per annum, a verdict against him was a finding that the reduction was not void as an attempted abolition of the office by the fixing of an unreasonably low salary.

Appeal from circuit court, Panola county; Z. M. Stephens, judge.

"To be officially reported."

Action by K. P. Perkins against Panola county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

At its March term, 1897, the board of supervisors of Panola county passed an order fixing the salary of county health officer at \$50 per annum. Prior to this, this officer received \$300. After this date, appellant, Dr. Perkins, was appointed county health officer for Panola county. He had a conference immediately with the board of supervisors in regard to his salary, and notified them that he would not serve at the price fixed by them, and afterwards resigned, but the state board of health declined to accept his resignation. Plaintiff continued to exercise the du-

ties of the office, but protested that he would not accept the salary fixed by the board of supervisors and notified them that he would sue for a reasonable salary at the end of his term. Dr. Perkins presented his claim for salary of \$300 per annum to the board of supervisors, and it was disallowed. He brought this suit to recover same. From a verdict and judgment for defendant, plaintiff appeals.

P. H. Lowry, for appellant. Pearson & Lamb, for appellee.

WHITFIELD, C. J. Learned counsel on both sides discussed at some length the true interpretation of chapter 38 of the Laws of 1894 (Laws 1894, p. 33). This is a little remarkable, in view of the fact that said chapter 38 was repealed by section 8 of chapter 68 of the Laws of 1896 (Laws 1896, p. 79) more than a year before the appointment of the appellant as county health officer. His term began in May, 1897. The said chapter 38 having been so repealed, any discussion of its interpretation is wholly beside the case. Whatever it meant, it was repealed. The verdict of the jury is a finding, on the whole evidence, that the reduction of the salary from \$300 to \$50 per annum was not, under the circumstances of this case, an abolition of the office. This salary was fixed in advance, as the law requires. The appellant was not appointed until after this. He acted in full view of the whole situation. This case is wholly unlike Westbrook's Case, 64 Miss. 312, 1 South. 750. We think, on the facts in this record, no other proper result could have been reached than that arrived at by the jury.

Affirmed.

WYATT v. WYATT et al.

(Supreme Court of Mississippi, Dec. 8, 1902.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—VALIDITY BETWEEN PARTIES—STATUTORY PROVISIONS—REMOVAL OF DISABILITIES—STATUTE OF LIMITATIONS—CO-TENANTS—PURCHASE AT FORCED SALE.

1. Where a husband, being surety on a sheriff's official bond, deeded property to his wife, to avoid his obligation as such surety, the contract, as between the husband and wife, was unaffected by such purpose, so that, on the wife's death intestate, the husband took only his proportionate share of the property as an heir.

2. Where a father and his children were cotenants of a certain estate, and the father secured a foreclosure of a deed of trust thereon, and became the purchaser at the sale, he thereby secured no greater interest than he previously had, and his wife at his death would take only her proportionate share of his share.

3. Under the provisions of the Code of 1880, the constitution of 1890, and the Code of 1892, the statute of limitations will bar a debt owed by a husband to a wife; and where a claim owed by a husband to a wife was, at the time of their separation, older than the statutory period, and at that time, in consideration of two notes executed to her, she released all her interest in her husband's estate, the notes were a consideration for such release by her.

4. Where the amount received by a wife in consideration of the release by her of all claims on her husband's estate was probably greater than what she would have received as an heir, the agreement was based on a sufficient consideration.

5. Under the provisions of the Code of 1880, the constitution of 1890, and the Code of 1892, effecting the emancipation of married women, a contract will be enforced wherein, for a sufficient consideration, the wife releases all claims on her husband's estate.

Appeal from chancery court, Holmes county; Stone Deavors, Chancellor.

"To be officially reported."

Suit for partition by G. S. Wyatt against J. R. Wyatt and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. L. Dyer, for appellant. Noel & Pepper and H. H. Elmore, for appellees.

TERRAL, J. In January, 1889, F. A. Wyatt deceased intestate, leaving real estate, the title to which was in his own name, aggregating about 1,700 acres of land, known as "Oregon Plantation"; leaving also, as his heirs, his widow (appellant), and four children by a former wife. Appellant brought suit in the nature of a proceeding against appellees for the partition of said plantation, and appellees set up in bar of her recovery of any part of said plantation a renunciation and waiver of any claim thereto executed by her to her husband in consideration of two promissory notes made by him to her, aggregating \$1,698.66, bearing 10 per cent., the contents of which had been duly paid to her. The chancellor, after hearing all the proofs in the case, decided the issue in favor of appellees.

The record discloses that in April, 1882, the deceased, F. A. Wyatt, conveyed the Oregon plantation to his then wife, Mrs. Lydia A. Wyatt, which was then under deed of trust to Hooker to secure Dr. Davis a large sum of money. Shortly thereafter Mrs. Lydia Wyatt departed this life intestate, leaving her husband and her four children, the heirs of her estate. In 1887 F. A. Wyatt, for the purpose, it seems, of becoming a qualified bondsman of his brother, who had been elected sheriff of Holmes county, secured a foreclosure of said deed of trust, and at the sale became the purchaser, and the title was made to him, and it so remained at his death. Mrs. G. S. Wyatt was married to F. A. Wyatt in January, 1889, and soon thereafter he received of her estate about the sum of \$1,168.66, which he never paid to her, and which in June, 1898, was due much more than six years. On the 20th of June, 1898, Wyatt and his wife agreed to separate; and in consideration of the execution by him to her of his two promissory notes for the sum of \$849.33 each, bearing date January 20th preceding, with 10 per cent. interest from that date, she executed her release of all her right and interest in and to the property owned by said F. A.

Wyatt, or which he might own at his death.

That Mrs. Wyatt, if her release was void, is entitled only to the one-fifth interest in the one-fifth interest of her husband in the Oregon plantation, is, we think, clear from a statement of the facts. The legal title to the Oregon plantation at the death of Lydia Wyatt was in her, and upon her death it descended to her husband and children in equal parts, and they became co-tenants thereof. For, though a question was attempted to be made that her title to the plantation was bad, because it was alleged that Wyatt at the time of its execution was a surety on the bond of the sheriff of Holmes county, and made the deed to avoid the effect of his suretyship, yet it is obvious that the conveyance, as between Mr. and Mrs. Wyatt, was unaffected by such purpose, and was unimpeachable between them. The state of Mississippi, and it only, might have had ground of complaint, so far as it affected her rights in the matter. The purchase, therefore, of the Oregon plantation by F. A. Wyatt, one of the co-tenants, at the sale of it under the trust deed, did not give him a greater right or interest in it than he had before the purchase. *Smith v. McWhorter*, 74 Miss. 400, 20 South. 870.

It must also be obvious that whatever debt F. A. Wyatt owed his wife G. S. Wyatt was in July, 1898, barred by the statute of limitations, because the wife is not excepted from its operations by any express provision of the Code, and courts are not at liberty to ingraft any exceptions upon it. *Dowser v. Ellis*, 28 Miss. 780; *Massey v. Rimmer*, 60 Miss. 667, 13 South. 832. If the legislation on this subject was now as it was when *Thomson v. Hester*, 55 Miss. 656, was decided, the statute of limitations would not bar the claim of the wife; but since then a great revolution on this subject has been effected here by the Code of 1880, the constitution of 1890, and the Code of 1892.

It must therefore follow that the two notes, for \$849.33 each, given by F. A. Wyatt to Mrs. Wyatt, if in fact they were a fair and adequate consideration for the release of her interest in his estate, were also sufficient to support the release executed by her. For though Mrs. Wyatt claims that the money represented by the notes was paid her in discharge of her claim against her husband, yet it is perfectly manifest that Wyatt regarded and treated them as a consideration of her release of all claim to any part of his estate; and, being barred by limitation, he had a right so to regard them, and the law justified him in that conclusion. That a family settlement or other similar arrangement like the one before us is valid, when based upon an adequate and fair consideration, is supported, we think, by authorities. 2 Pom. Eq. Jur. § 953; *Garver v. Miller*, 16 Ohio St. 527; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Switzer v. Switzer*, 26 Grat. 574. And we see no ground to question the find-

ing and decision of the chancellor in this regard; for the sum paid Mrs. Wyatt, upon the evidence contained in this record, is probably greater than what she would have received as an heir of Wyatt's estate.

Since the adoption of the Code of 1880, the constitution of 1890, and the Code of 1892, effecting the complete emancipation of married women, and authorizing every character of suit between husband and wife, the validity of a contract between them cannot be questioned in judicial tribunals of this state; and such contracts may be enforced by one against the other. *McGregor v. McGregor*, 20 Q. B. Div. 529; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Besant v. Wood*, 12 Ch. Div. 605. The unrestricted right of the wife to sue the husband, secured to her by the constitution and Code, would be lame and ineffectual unless she could make all contracts, of whatever kind, with her husband.

Affirmed.

ALLEN v. STATE.

(Supreme Court of Alabama. June 12, 1902.)
LARCENY — JURY — CHALLENGE — WAIVER —
INDICTMENT — LAYING OWNERSHIP IN BAILEE
— EVIDENCE — CROSS-EXAMINATION.

1. Where, on a criminal prosecution, the state challenged one of the 12 jurors, leaving 11, it was not error to refuse to have the jury filled to 12 men before requiring defendant to pass on any of them.

2. On a criminal prosecution, one of the jurors drawn on the panel made known to the court that he was employed by prosecutor, and the court told him to stand aside. Defendant excepted, whereupon the court stated that if defendant objected the juror might remain, and told the juror to be seated, and defendant then offered to challenge the juror for cause in that he was employed by prosecutor. *Held*, that defendant had waived his objection.

3. On a prosecution for stealing three caddies of tobacco, a witness testified that he saw defendant (a negro) come out of the warehouse where tobacco was stored with three boxes of tobacco under his arm, and that, when defendant returned, he had a flask of whisky. The state then introduced a witness who testified that, on the day the tobacco was taken, witness bought three caddies of tobacco from a negro, paying him in money and a flask of whisky. *Held*, that there was no reversible error in the testimony as to defendant having whisky, since, if prima facie irrelevant when called for, its relevancy appeared from the other evidence.

4. On a prosecution for larceny of tobacco, a witness for the state testified to a fact tending to show defendant's guilt. Defendant, on cross-examination, asked him if a third party, who was witness' foreman at the time, told him that, if he would swear defendant took the tobacco, witness could have a job under "J." Witness replied in the negative, but stated that his foreman told him that he was going to quit working for "J." Solicitor for the state then asked what the foreman said in that conversation as to his reasons for quitting. *Held*, that an objection to the question for illegality and immateriality was properly overruled; the question calling for the balance of the conversation, part of which had been brought out by defendant.

5. On a prosecution for stealing tobacco, there was evidence that defendant was seen leaving the warehouse where the tobacco was stored, and shortly afterwards was seen in the

possession of a flask of whisky, and a witness testified to purchasing three caddies of tobacco and giving him a flask of whisky. *Held* proper to refuse to allow defendant to ask a witness if he and defendant were not in the habit, about the time of the larceny, of going to a certain bar after whisky.

6. Where a railroad is in possession of property as a bailee, holding it for the consignee at the time it is stolen, an indictment for the crime properly lays ownership in the railroad.

7. On a criminal prosecution, it was proper to refuse to charge that, if the jury would not be willing to act on the evidence if it were in relation to matters of the most solemn importance to their own interest, they must find defendant not guilty.

Appeal from city court of Montgomery; William H. Thomas, Judge.

Richard Allen was convicted of larceny, and appeals. Affirmed.

The indictment under which the appellant in this case was tried and convicted was in the following words: "The grand jury of said county charge that before the finding of this indictment Richard Allen feloniously took and carried away from a warehouse three caddies of tobacco of the value of ten dollars, the personal property of the Western Railway of Alabama, a corporation under the laws of the state of Alabama, against the peace and dignity of the state of Alabama."

On the trial of the case it was shown by the evidence for the state that upon the day the defendant was arrested under the charge of larceny, three boxes or caddies of tobacco were taken from the warehouse of the Western Railway of Alabama; that this tobacco was shipped to Schloss & Kahn and was in the warehouse for delivery to them.

William Easterly one of the witnesses for the plaintiff testified that on the morning of that day, he saw the defendant and one Asberry Roberson in the warehouse together; that after remaining therein for about a half hour, the defendant came out with three boxes of tobacco under his arm, and went in an easterly direction; that he saw him when he returned, and that he did not bring the boxes back with him. The solicitor for the state then asked the witness the following question: "When the defendant came back did you see him with any whisky?" The defendant objected to this question upon the ground that it called for irrelevant, immaterial and incompetent evidence. The court overruled the objection and the defendant duly excepted. The witness answered that he did, and that said whisky was in a flask.

The state then introduced one Trentham, who testified that on the morning of the day the defendant was arrested for stealing the tobacco, the witness bought three caddies of tobacco from a negro and paid him therefor \$4 and gave him a flask of whisky. The facts pertaining to the other rulings of the court upon the evidence, to which the defendant excepted, are sufficiently shown in the opinion. There was other evidence introdu-

ced tending to show that the defendant was guilty as charged.

The defendant as a witness in his own behalf testified that he did not take the tobacco, and that he knew nothing about it.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe that the tobacco described in the indictment belonged to Schloss & Kahn, and not to the Western Railway of Alabama, then they must find the defendant not guilty." (2) "If the jury would not be willing to act upon the evidence in this case, if it was in relation to matters of the most solemn importance to your own interest, you must find the defendant not guilty." (3) "If the jury believe the evidence they must find the defendant not guilty."

Hill & Hill, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. 1. The state challenged one of the 12 men on the jury, leaving 11. The court then instructed defendant to pass on the 11 remaining, as to whether he was satisfied with them or not. The defendant objected to this, and moved the court to have the jury filled to 12 men before he was required to pass on any of them. The court overruled the motion, and in this there was no error. *Wilson v. State*, 31 Ala. 371; *Barker v. Bell*, 49 Ala. 284; *Schleffelin v. Schleffelin*, 127 Ala. 14, 28 South. 687.

2. After the defendant had challenged two of the jurors, leaving ten on the panel, one of the ten made known to the court that he was employed by the Western Railway of Alabama, the alleged owner of the property charged to have been stolen by defendant. The court, thereupon, told the juror to stand aside. The defendant objected, and excepted to the ruling. The court then replied: "If you object, I will let him remain on the jury," and told the juror to take his seat, which he did, the state having previously announced its satisfaction with the juror. The defendant then offered to challenge the juror, because he was employed by the Western Railway of Alabama, and the court refused to allow him to challenge him for this cause. The defendant by his objection to the excusing of the juror waived objection to him for this cause, and could not, afterwards, complain for not being allowed to challenge him for the same cause. His objection to the juror being excused by the court, was the expression of a willingness and desire for him to remain on the jury, and he could not, afterwards, put the court in error for having done what he requested, no new cause, or other reason for challenge, having been brought to light.

3. The witness, Easterly, for the state, testified that he saw Asberry Roberson and defendant, on the day the tobacco is said to

¶ 4. See *Larceny*, vol. 32, Cent. Dig. § 85.

have been stolen, go together into the warehouse where it was stored, and in about a half an hour, the defendant came out with three boxes of tobacco under his arm, and went in an easterly direction. He was asked by the solicitor: "When the defendant came back, did you see him with any whisky?" The defendant objected for illegality and immateriality. If the evidence sought was prima facie irrelevant, at the time the question called for it, this was not revisable error, if its relevancy was made to appear from its connection with evidence subsequently introduced, which was done. *Lawson v. State*, 20 Ala. 66, 56 Am. Dec. 182; *Scott v. State*, 30 Ala. 503.

4. The witness for the state, Seals, testified to a fact tending to show defendant's guilt. The defendant, on the cross, asked him: "Is it not a fact, that Asberry Roberson, who was your foreman at the time, told you, that if you would swear that the defendant took the tobacco, that you could have a job under Mr. Jones?" The witness replied, that he did not, but that Roberson told him, that he was going to quit working for Mr. Jones. The solicitor then asked: "What did Asberry Roberson say in that same conversation was the reason he was going to quit?" Objection was interposed by defendant, for illegality and immateriality. The court overruled it, upon the ground that the question called for the balance of a conversation, a part of which had been brought out by the defendant. In this there was no error. The state had a right to all that was said at the time by Roberson, a part of it having been brought out and appropriated by defendant. *McLean v. State*, 16 Ala. 672, 677.

5. The defendant asked the witness, Roberson, if it was not a fact that he and defendant went to Kelly's bar that day after the whisky and bought a bottle of it there, and the witness answered, that they did not. Defendant then asked him, "Is it not a fact that you and defendant, about the time you were working for Mr. Jones in November, 1901, often went to Kelly's bar after whisky?" The purpose of the question as stated by counsel was, "to show that the whisky that defendant had on that day was bought at Kelly's bar in the presence of Asberry Roberson, and that it was the habit and custom of defendant and Roberson to do." This evidence, if allowed, did not tend to show that this whisky was bought from Kelly.

6. Charge 1 requested by defendant was properly refused. The railway company, as the proof showed, was in actual possession of the property as bailee, at the time of the larceny, and Schloss & Kahn, its consignees, were not, and had never been in possession of it. Ownership was properly laid in the company. *Jones v. State*, 13 Ala. 153; *Fowler v. State*, 100 Ala. 96, 14 South. 860.

Charge 2 was likewise properly refused. *Amos v. State*, 123 Ala. 51, 26 South. 524.

Affirmed.

WHITE v. STATE.

(Supreme Court of Alabama. June 12, 1902.)

CRIMINAL LAW — APPEAL — SUSPENSION OF SENTENCE — HABEAS CORPUS — DEFENSE — STATUTE — RE-ENACTMENT — PRIOR CONSTRUCTIONS.

1. Where a statute is re-enacted after its interpretation by the courts, the re-enactment will be construed as an express legislative affirmation of such interpretation.

2. Under Code, § 4318, providing that, when any question of law is reserved in a case where a defendant has been convicted of a penitentiary offense, judgment must be rendered against defendant, but the execution thereof suspended for at least 60 days after the commencement of the next term of the supreme court, and providing that sentence shall be suspended only on it being made known to the court that defendant desires to appeal, an appeal from a judgment of conviction for felony does not operate to suspend the execution of the sentence till the determination of the appeal, without an order of the court to such effect; and especially is such construction warranted in view of section 4324, speaking of an appeal without suspension; section 4226, providing that the dismissal of an appeal shall terminate any suspension of sentence; section 4468, authorizing the taking of a convict from the penitentiary on the reversal of a judgment of conviction; and section 5430, providing that a death sentence should be executed on the day fixed by the court, unless suspended by the court.

3. A sheriff illegally confining a prisoner in the county jail after his conviction of a felony, instead of sending him to the penitentiary, cannot justify on habeas corpus by showing that the person was retained in jail at his own wish.

4. A defendant convicted of a felony, whose sentence is not suspended, is not entitled to an absolute release on habeas corpus because he is wrongfully confined in the jail instead of the penitentiary, but he will be ordered confined in the latter place.

Appeal from order of chancellor, Northern division.

Sam White petitions for habeas corpus to discharge him from custody. From an order denying his petition, said petitioner appeals. Reversed.

Tate & Walker, for petitioner. Chas. G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. Sam White, the appellant, was tried at the spring term, 1901, of the Jackson circuit court, on an indictment charging him with the murder of Mary Williams, was convicted of murder in the first degree (March 28, 1901), and sentenced (March 30, 1901) to imprisonment in the penitentiary for life, in accordance with the verdict of the jury. Questions of law were reserved on the trial by the defendant for the consideration of the supreme court, and upon his conviction it was made known to the circuit court that he desired to take an appeal to the supreme court, and his counsel moved said circuit court to suspend the execution of the judgment and sentence against him pending said appeal. The presiding judge, in response to said motion, informally signified his purpose to grant the same, but failed to enter upon the docket any direction to the clerk for the entry of an order of sus-

pension, and no order, or memorandum for such order, was made or entered on the docket or in the minutes of the court; in short, no order suspending said judgment was entered or made. The defendant in due time presented his bill of exceptions to and had it signed by the presiding judge, filed the same in the office of the clerk of the trial court, and in all things duly perfected his appeal to this court, and on and prior to May 8, 1902, the same was pending in this court, the transcript of the record of the court below and of the bill of exceptions having theretofore been made out by the clerk of the circuit court, and transmitted to the clerk of this court, and filed in this court. On said day—May 8, 1902—the defendant, said Sam White, presented a petition to Hon. Wm. H. Simpson, chancellor of the Northern division, wherein he set forth the facts of his indictment, trial, and conviction as above stated, and whereto he attached as exhibits copies of the judgment and sentence of the circuit court, and made the following additional averments: "The petitioner, having reserved questions of law for the consideration of the supreme court, appealed the case to the supreme court of Alabama, and the case is now pending in said court. The sentence of the petitioner to the penitentiary was never suspended by an order of the Jackson county circuit court, and the petitioner has been ever since said sentence confined in the jail of Jackson county, Alabama; and petitioner alleges that such detention is unlawful, as he is informed and believes." Wherefore he prayed for the issuance of the writ of habeas corpus to the sheriff of said county commanding him to bring the body of the petitioner before the chancellor, etc., "together with the cause of detention of petitioner." As has been indicated, there was no order suspending the execution of the sentence either in the judgment entry or the sentence exhibited to the petition, but appended to the sentence, as shown in the exhibit, is this: "It is ordered by the court that 30 days be allowed for bill of exceptions after adjournment of court." The writ issued in accordance with the prayer of the petition, and in obedience to it the sheriff produced petitioner before the chancellor, and made return to the writ setting forth that he held the petitioner under said judgment of conviction and sentence, and, the facts hereinbefore stated as to questions of law having been reserved on the trial, petitioner's motion for suspension of sentence, his filing bill of exceptions and taking appeal, the pendency of the same in the supreme court, etc., and some facts and circumstances intended to show that the prisoner had consented or was content to remain in his custody pending the appeal, instead of being imprisoned in the penitentiary under the sentence of the court. The chancellor was of opinion that the petitioner's appeal to this court suspended the sentence against him till it should be determined, and that meantime he was rightfully

in the custody of the sheriff of Jackson county, and thereupon it was ordered that petitioner be committed to such custody. From that order this appeal is prosecuted.

The main—indeed, the sole—question thus presented for review is whether the taking of an appeal from a judgment of conviction of a felony has ipso facto the effect to suspend the sentence upon such judgment while the appeal is pending in the appellate court. The question must turn upon our statutes and the construction that has been impressed upon them by decisions of this court, for the right of appeal in criminal—not to speak of civil—cases is purely the creature of statute, and the time and manner of exercising the right in a given case is prescribed by the statute, and the effect of its exercise upon the judgment appealed from must be found in statutory provisions. The first statute in Alabama authorizing appeals in criminal cases was enacted as part of the Code of 1852, having been embraced in that body of laws under the powers of the commissioners to prepare a new Code of practice. That statute, so far as it bears upon this case, was as follows:

"Sec. 3649. Any question of law arising in any of the proceedings on an indictment, may be reserved by the defendants, but not by the state, for the consideration of the supreme court.

"Sec. 3650. If such question does not distinctly appear on the record, it must be reserved by an exception taken and signed by the judge as in civil cases."

"Sec. 3652. When any question of law is reserved, the presiding judge must render judgment on the conviction; but the execution of the judgment in cases of misdemeanors, must be suspended until the next term of the court, or the defendant may give bail, with sufficient securities, to appear at such court, and abide the judgment rendered."

"Sec. 3656. In cases punishable capitally, or by imprisonment in the penitentiary, judgment must be rendered; but the execution thereof suspended for at least sixty days after the commencement of the next succeeding term of the supreme court."

It is clear, we think, that under these original sections an order of the court was necessary to effect the suspension of sentence provided for in them. It is to be noted that alternative courses in respect of the execution of the judgment, or rather its nonexecution, after appeal, are provided in section 3652; that is, the judgment was either to be suspended, or, not being suspended, the defendant was allowed, upon taking the appeal, to give bail for his appearance at the next term of the trial court, and abide the judgment rendered. It is, of course, clear, in view of those provisions, that the mere fact of reserving questions of law on the record or by bill of exceptions provided for in sections 3649 and 3650, nor the taking or pendency of the appeal, did not suspend the judgment within the meaning of section 3652, since the

suspension there provided for, after all things necessary to an appeal required to be done by the defendant had been done, might not be had at all, but instead and in lieu of any suspension, and without any such suspension as the section contemplates, the defendant might give bail for his appearance, etc., at the next term of the court. So that it follows from the provisions of this section that something more than the reservation of a question of law on the trial, and something more, even, than the perfecting of an appeal, is essential to the suspension of the judgment under it. That something more can be naught else than an order of the court suspending the judgment, and where no such order is made there can be no suspension within the provisions of this statute. In reference to section 3656 it is to be noted that the provision is not for a suspension of the judgment generally, or pending the appeal, or for any definite time whatever, but "for at least sixty days after the commencement of the next succeeding term of the supreme court." Of course, it was not intended that the sentence should be suspended forever, or for an indefinite time, but only for such time as should be necessary to prosecute the appeal. Yet if the reservation of questions of law on the trial or the perfecting of an appeal should be accorded the effect of suspending the sentence, the suspension would be without maximum limitation as to time. So that it was equally necessary here, and manifestly the statutory contemplation that the suspension should result, not from the reservation of questions of law, nor from the certification of the transcript to the supreme court, but from an order of the court suspending the execution of the sentence for some definite time, not less than 60 days from the commencement of the next term of the appellate court. These sections have been brought forward into all the Codes since that of 1852 without material amendment bearing upon the mode of suspending the execution of judgments, except that in the present Code the sections relating to that subject contain a new provision which goes to strengthen the conclusion that a suspension can only be made by an order of court. The recodifications of sections 3652 and 3656 of the Code of 1852 are embodied in sections 753 and 754 of Stone & Shepherd's Penal Code of 1866, in sections 4304 and 4305 of the Revised Code of 1867, in sections 4990 and 4981 of the Code of 1876, in sections 4511 and 4512 of the Code of 1886, and in sections 4318 and 4319 of the Code of 1896.

Prior to the last codification of these sections several decisions bearing upon their construction and interpretation in the respect under consideration had been made by this court. All of these decisions, and the opinions handed down in the cases, went more or less directly to support that construction of the sections which requires an order of the court to suspend the execution of the judgment when the defendant had reserved ques-

tions of law for the consideration of the supreme court. *State v. Lowry*, 29 Ala. 44; *Ex parte Knight*, 61 Ala. 482, 488; *Bolling v. State*, 78 Ala. 469; *Ex parte Cameron*, 81 Ala. 87, 1 South. 20; *Ex parte Goucher*, 103 Ala. 305, 15 South. 601. It would seem that these cases had, prior to the present Code, put a construction on these statutes, which, upon their re-enactment by the adoption of the present Code with an amendment which not only did not evince a legislative purpose to change such construction, but which, to the contrary, was in the nature of an express legislative affirmation of it, became a fixed construction, a part of the statutes themselves, as if it had been therein written. *Barnewall v. Murrell*, 108 Ala. 366, 567, 18 South. 831; *Railroad Co. v. Freeman*, 97 Ala. 289, 296, 11 South. 800; *Railway Co. v. Moore*, 128 Ala. 434, 29 South. 659. But leaving out of view the forms of the original sections, all their history, and all this court has decided or said bearing upon them, and considering them, or rather that one of them (section 4318) within which the present case falls, as it stands to-day, and treating its construction and interpretation as *res integra*, the conclusion to which we are driven is the same,—that nothing but an order of the court which has imposed a sentence can, for any purpose, suspend its execution. Let the section be first taken as it was before the last amendment, reading thus: "When any question of law is reserved in a case of felony, judgment must be rendered against the defendant, but the execution thereof must be suspended until the cause is decided by the supreme court." This language is inapt to provide for suspension except upon some affirmative action other than that hypothesized in the section. It carries no implication that reservation of a question of law suspends the sentence. The only other act referred to in the section is the rendition of judgment, and this is and is stated therein as antithetical to its suspension. It is not said that the reservation of a question of law suspends the judgment, nor that when any question of law is reserved the judgment is suspended, nor anything of that kind. Had that been the purpose of the legislature, it is inconceivable that they would not have used some such form of expression. But instead the expression they have used palpably implies the operation upon the judgment rendered, and, when rendered, in full force of some power or action extraneous to anything named in the section. The execution of the sentence is not said to be suspended by anything postulated in the statute; it is not said to be suspended at all; but it is said that the execution of the sentence must be suspended. Here we have a judgment rendered and a sentence imposed upon and in accordance with that judgment. That sentence is as potential and as ready for immediate execution as if no question of law had been reserved. Something, the statute con-

templates, shall be done to that sentence to prevent its execution to the emasculation of the appeal. That something is its suspension. The statute does not work its suspension. There is but one force that can suspend it. That is the court which rendered it. The command of the statute is, therefore, laid on the court. The court can act in obedience to the command only by an order of suspension. And this it is that the statute commands the court to do,—to enter an order suspending the sentence, to the end that the defendant may have the benefit of his reservation before he is put to the sentence which he challenges as unlawful, or as having been erroneously imposed. The language of the statute, in short, is most apt and adequate to impose on the court, in the contingency named, the duty to suspend the sentence in the only way the court can suspend a sentence, to wit, by an order on its minutes to that effect. It is wholly inapt and inaccurate to a suspension of the sentence in any other way. And to hold that under it the sentence is suspended, or could be by any other means, would be to do violence to its clear import.

When this section is considered with the amendment introduced in the last Code as a part of it, the conclusion is all the more evident and inevitable. That amendment is, as we have seen, to the effect that the sentence shall be suspended, when questions of law have been reserved, only in the event "it shall be made known to the court that the defendant desires to take an appeal to the supreme court." This provision makes it plain beyond cavil or doubt that it is not the reservation of questions of law upon the record or by exceptions taken that suspends the sentence, for, though questions are reserved in either or both modes, something else must be done before the sentence can be suspended. It is further necessary to the exercise of the power of suspension that defendant's desire to take an appeal "shall be made known to the court." And this information to the court manifestly does not operate the suspension, but only supplies the statutory invocation for the exercise of the court's power to suspend, the predicate for an order of suspension when questions of law have been reserved. Of course, the court always knows when a question of law has been reserved on the record, or an exception taken for embodiment in a bill of exceptions on the trial of a case; but it by no means follows that a defendant who reserves a question of law during the trial desires to take an appeal at the end of it in his conviction. He may be satisfied with the sentence, fearing a more onerous one upon another trial. Or he may conclude that there is no merit in his reservations, and prefer to enter at once upon the sentence to remaining in jail while his fruitless appeal is pending, and so avoid a useless prolongation of imprisonment. Even when, after conviction,

he has taken an order for an extension of the time for perfecting a bill of exceptions, he may not at that time desire to take an appeal, or he may never perfect a bill of exceptions, and thus lose the benefit of the reservations he has brought to the attention of the court in the progress of the trial to be perfected as of that trial by relation when the bill is signed. *Ex parte Cameron*, supra. And it was because of cases of these kinds, well known to frequently occur in practice, that the statute was amended so as not to require an order of suspension upon the reservation of questions of law unless the defendant should also make known to the court his desire to appeal. But whatever the reasons for the amendment may be, its palpable effect is to authorize suspension of sentence only in the contingency named, and to make it entirely clear that the only suspension of sentence authorized by the statute is one made by an order of the court. That this is the meaning of the statute—that neither the reservations of questions of law on the trial with a view to appeal, nor the perfecting of an appeal and lodgement of the cause in this court, operates to suspend the judgment—is further demonstrated by several other sections of the Code. Section 4324, for instance, provides that, when the execution of the judgment has been suspended as provided by the sections we have been considering, or when an appeal is taken without such suspension, the clerk shall make out and forward the transcript, etc. Section 4326 provides for the dismissal of his appeal by a defendant at any time before the transcript has been forwarded to the supreme court by filing a statement to that effect with the clerk of the trial court, and that, if the judgment has been suspended, such dismissal shall terminate the suspension. Section 4468 provides for the removal of a convict from the penitentiary upon the reversal of the judgment of conviction against him back to the county of trial. And section 5430 provides for the execution of a death sentence on the day appointed by the court, "unless such court suspends the execution, on account of the reference [reservation?] of some matter of law arising on the trial for the determination of the supreme court." Each of these sections clearly and necessarily excludes the idea that the reservation of questions of law or the taking of an appeal can in any case operate the suspension of the sentence. Thus the law is written, and it is wisely so written. Under it there will arise no difficulties in dealing with defendants after conviction. The sheriff, after adjournment of the term, has only to look to the minutes of the court for an order suspending the sentence. If he finds such order, he keeps his prisoner in the county jail. If he does not find it, he delivers him to the penitentiary authorities, or otherwise proceeds with the execution of the sentence of the law pronounced by the court. If it were the law that the reserva-

tion of questions of law or the taking of an appeal suspended the sentence, it is easy to see that many difficulties would arise. What, for example, would the sheriff do with a convict who had been granted time beyond the term to perfect his inchoate reservations of questions of law by presenting a bill of exceptions; especially as the inchoate reservations when thus perfected relate back and have effect as of the term of trial, and more especially when the convict may never perfect his inchoate reservations at all,—may never prepare a bill of exceptions? These suggestions uncover only some of the difficulties that would arise. Others will suggest themselves. The subject needs but cursory consideration to a demonstration of the wisdom of the legislature in providing for a suspension of sentence by the only regular and orderly mode the sentence of a court can be suspended,—by an order of the court which pronounced the sentence.

We attach no importance to the suggestions in the sheriff's return intended to show that the prisoner's continued confinement in the county jail after he should have been sent to the penitentiary was in accordance with his (the prisoner's) wishes. A man cannot legalize his incarceration by this sort of quasi convention between himself and the sheriff, nor estop himself to demand enlargement from illegal imprisonment by having at one time unavailingly asked the court having jurisdiction in the premises to order that he be so confined, instead of being put to the sentence which had been imposed on him, or by a personal preference for the county jail as against the state penitentiary as a place of confinement. Moreover, he was not kept in jail because of any such preference on his part, but because the sheriff supposed that the sentence against him had been suspended.

An expression of the present writer in the case of *State v. Roberts*, 126 Ala. 87, 28 South. 744, may have had something to do in leading the chancellor to the conclusion that the taking of an appeal itself suspended the sentence. It was there said that the effect of an order of this court setting aside a dismissal of an appeal and reinstating it was to suspend the judgment and sentence. This, with what was said in the same opinion in stating the position of counsel, naturally tended to the conclusion that the court entertained the view that the appeal itself suspended the sentence. But as matter of fact the sentence in that case had been suspended by a formal order of the trial court, and, having reference to that fact, the effect of the order here reinstating the appeal was also to reinstate the suspension order of the trial court, and, through that, to suspend the sentence in that court. Our conclusion upon this part of the case, therefore, is that the chancellor was in error in holding that the sentence of petitioner was suspended by the appeal, and that, consequently, he was right-

fully imprisoned by the sheriff in the county jail.

But it by no means follows that the petitioner is entitled to be discharged absolutely. He is in the custody of a person who "is not the person authorized by law to detain him"; but there are persons authorized by law to detain him,—the penitentiary authorities,—and the full measure of his right is to be relieved of the unlawful restraint, and remanded to such lawful custody, subjected to the restraint provided by the unsuspended sentence against him. The case of *State v. Roberts*, 126 Ala. 87, 28 South. 744, is an authority for this proposition. There the sentence was suspended by an order of court, and of consequence the sheriff was the defendant's lawful custodian pending the appeal. The prisoner, notwithstanding this, however, was delivered to and imprisoned by the officers of the penitentiary under the supposed authority of the suspended sentence. These persons were not—as the sheriff is not here—"authorized to detain him." The city judge discharged him on habeas corpus from the custody of the penitentiary people, but remanded him to the custody of the sheriff. This order was made on the theory that the judgment against the prisoner was void, and that the sheriff was entitled to hold him for trial in the nisi prius court; but it was affirmed on the ground that the sentence on the judgment had been suspended pending an appeal, and that because of such suspension the sheriff, and not the officers of the penitentiary, was charged with his custody. The principle upon which we proceeded in this case of *State v. Roberts* appears to have been recognized by this court in the cases of *Kirby v. State*, 62 Ala. 51; *Ex parte Pearson*, 59 Ala. 654 (which we believe was the first case of unreasonable detention by sheriff after conviction); *Ex parte Goucher*, 103 Ala. 305, 15 South. 601 (which was the last); *Ex parte Crews*, 78 Ala. 457; and *Ex parte Stewart*, 98 Ala. 66, 13 South. 660,—and the absolute discharge of the convict in each of those cases is rested upon the considerations that he had been detained by the sheriff in the county jail for an unreasonably long time after sentence to hard labor for the county, and that the commissioners' court had not provided for any place for his imprisonment under such sentence. The report of the case of *Ex parte Rand*, 99 Ala. 302, 14 South. 540, does not show whether a place of confinement at hard labor had been provided by the commissioners' court, but the record of the case does show that such provision had been made. As that case and *Ex parte Goucher*, supra, were decided by the same bench, and the opinion in each was prepared by the same judge, and as in *Goucher's Case* the fact that no such provision had been made by the commissioners' court was made one of the bases for the petitioner's absolute discharge, it is fair to assume that this consideration was inadvertently pretermitted in

Rand's Case, and we do not regard the decision in that case as being an authority against the doctrine recognized in the other cases cited, some of which were decided before and some after that decision. The consideration adverted to was not mentioned in the case of *Ex parte King*, 82 Ala. 59, 2 South. 763, but King's discharge was denied upon the ground that he had not been detained for an unreasonable time after conviction, and, of course, that case cannot be considered as at all militating against the proposition that where, in such cases, there are persons entitled to the defendant's custody under the sentence, he will not be discharged absolutely, but will be discharged from the custody of the sheriff, and committed to the lawful custody provided by the sentence. Upon our former cases, therefore, we adhere to and reaffirm the ruling in *Roberts' Case*, supra, and in line with it and them hold in this case that the petitioner was not entitled to be discharged absolutely because of his unlawful detention by the sheriff, but that his right was and is to be discharged from that custody, and committed to the custody of the board of convict inspectors, under the sentence pronounced by the court.

Accordingly, the order of the chancellor remanding the prisoner to the custody of the sheriff for confinement in the county jail will be reversed, and judgment will be here entered discharging him from that imprisonment, but remanding him to the custody of the board of convict inspectors for confinement in the penitentiary, and directing the sheriff to immediately deliver him into such custody. Reversed and rendered.

BLEDSOE et al. v. PRICE et al.

(Supreme Court of Alabama. June 17, 1902.)

QUIETING TITLE — COMPLAINT — IMMATERIAL ALLEGATIONS — EFFECT — MULTIFARIOUSNESS — SUFFICIENCY.

1. A bill to quiet title under Code, § 809 et seq., authorizing such suit, is not insufficient by reason of the inclusion of unnecessary allegations tracing plaintiff's title and describing defendant's claim.

2. A bill to quiet title under Code, § 809 et seq., authorizing such suit, is not rendered insufficient or multifarious by reason of a prayer for the cancellation of the muniment of title under which defendant claims.

3. A bill describing certain lands, and alleging plaintiff's ownership and possession thereof, and that defendant claims or is reputed to claim some right, title, or interest therein, and asking that plaintiff's title be quieted, is not bad for want of equity.

Appeal from chancery court, Marengo county; Thos. H. Smith, Chancellor.

Suit to quiet title by R. W. Price & Co. against Thomas H. Bledsoe and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

It was averred in the bill that in December, 1884, one R. P. Bledsoe, Sarah A. Bled-

soe, and J. M. Wright were tenants in common of certain lands specifically described in the complaint; R. P. Bledsoe owning an undivided two-thirds interest in said lands, and Sarah A. Bledsoe and J. M. Wright jointly owning the remaining one-third interest; that on December 30, 1884, R. P. Bledsoe, for the purpose of securing a debt, executed a mortgage to one John G. Allen upon his undivided interest in said lands; that said mortgage was transferred by said John G. Allen to Ann Allen; that in the year 1888 the lands described in the bill were voluntarily partitioned between said R. P. Bledsoe, Sarah A. Bledsoe, and J. M. Wright; that, upon default being made in the mortgage, it was foreclosed, and C. E. Allen became the purchaser at the foreclosure sale; that subsequent to said purchase C. E. Allen, J. M. Wright, and Sarah A. Bledsoe, with the intention of ratifying and confirming the partition of said lands theretofore made, partitioned the lands among themselves, and each of said parties entered into the possession of said lands set apart to them, respectively; that said partition was made in ignorance of the fact that T. H. Bledsoe would set up any claims to the lands set apart and conveyed to C. E. Allen, and that said partition would not have been made if the existence of T. H. Bledsoe's claim had been made known to said Allen; that by reason of the failure to properly index the deeds of partition between the said R. P. Bledsoe, Sarah A. Bledsoe, and J. M. Wright, the interest of said Thos. H. Bledsoe in such lands could not have been discovered by said Allen or the complainants by the exercise of due diligence, or careful examination of the general indices of the record of deeds of Marengo county, Ala.; that on October 28, 1898, the said Charles E. Allen sold and conveyed to the complainants the portion of the lands sued for and conveyed to him in said partition proceedings; that the complainants "immediately took possession of said lands, and remained in peaceable possession thereof up to the time of the filing of the bill, and have made numerous and valuable improvements thereon since their purchase, and no suit is pending to test or enforce the validity of their title, or that of any other person, to said lands." It was then averred in said bill "that Thos. H. Bledsoe claims or is reputed to claim some right, title, or interest in and to the lands so conveyed to them by C. E. Allen, under some conveyance from R. P. Bledsoe to him. But orators aver that, if in fact said T. H. Bledsoe received any conveyance from R. P. Bledsoe, that the same was purely voluntary." It was then averred that said Thos. H. Bledsoe was the son of R. P. Bledsoe, and that J. M. Wright had sold and conveyed all his interest in the lands set apart to him to Henry T. Bledsoe. The prayer of the bill was as follows: "That each of the defendants be required to set forth his or her title to said land, or any por-

tion thereof, and what part, and how and by what instrument or instruments created, and that it be decreed that Thomas H. Bledsoe has no title to the said lands adverse to your orators, and that any conveyance he may have from R. P. Bledsoe to the said lands, or any portion thereof, be ordered to be delivered to this court, and that the same be canceled and held for naught, and that the partition of said lands heretofore made be established and confirmed by this honorable court, and for such other and further orders, decrees, and relief to which orators are entitled and the practice of this court may require." To this bill the defendant Thos. H. Bledsoe demurred upon several grounds, which, for the purpose of this appeal, may be summarized as follows: (1) To so much of said bill as seeks relief as against this respondent, upon the ground that said bill is without equity; (2) there is no equity in said bill; (3) said bill, so far as the same seeks relief as against this respondent, is multifarious; (4) said bill shows that complainants bought with actual or constructive knowledge of the interest of this respondent; (5) complainant's remedy at law is unembarrassed; (6) respondent especially demurs to the prayer of said bill, for that the same is inconsistent with the scope and purpose of the bill; (7) because said prayer is not germane to the allegations of said bill; (8) because the relief prayed for seeks to have respondents suggest their titles on the records of this court, when the bill shows that the respondent has no interest in said partition, or the ratification of the same; (9) the relief prayed for is inconsistent, irrelevant, and not germane to the allegations of said bill. The defendant Thos. H. Bledsoe also made a motion to dismiss the bill for the want of equity. On the submission of the cause upon the demurrers and motion to dismiss, the chancellor rendered a decree overruling each of them. From this decree the defendants appeal, and assign the rendition thereof as error.

Canterbury & Gilder, for appellants. Wm. Cunningham, for appellees.

TYSON, J. Confessedly, the averments of the bill, in stating how, in what way, and from what source the complainants became the owners of the land, and in describing the claim of the respondent, go beyond the requirements of a bill framed under section 809 et seq. of the Code. *Association v. Stocks*, 124 Ala. 109, 27 South. 506. The fact that it contains these things, in connection with the averment that complainants are in peaceable possession of the land, does not impair its efficiency as a bill under the statute. Nor does the fact that in the prayer the cancellation of the muniment of title under which the respondent claims to own the lands in controversy is asked destroy the equity of the bill as a bill under the statute, nor render it multifarious. *Sloss-Sheffield Steel & Iron*

Co. v. Board of Trustees of University of Alabama (Ala.) 90 South. 423. The nature and character of the bill must be determined from a consideration of the facts averred in it. And if, upon the facts stated, the bill has equity, the special prayer will not destroy that equity. *McDonnell v. Finch* (Ala.) 31 South. 594. The bill under consideration was not subject to any of the grounds of demurrer interposed, whatever may have been its defects in other respects, and contains equity.

The decree of the chancellor overruling the demurrer and motion to dismiss for want of equity is affirmed.

ADAIR v. STATE.

(Supreme Court of Alabama. June 17, 1902.)
DISTURBING RELIGIOUS ASSEMBLAGE—ELEMENTS OF OFFENSE—EVIDENCE—INSTRUCTIONS—QUESTIONS FOR JURY.

1. On a prosecution for disturbing a religious assemblage in violation of Cr. Code, § 4654, it was proper to allow the state to show the conduct and declarations of defendant during the time the worship was going on, and tending to show willfulness on his part.

2. On a prosecution for disturbing a religious assemblage in violation of Cr. Code, § 4654, where the only evidence of any disturbance was of people without the meeting house, the question whether such persons were a part of the religious assemblage was for the jury.

3. Persons who have separated themselves from those within a house where a religious meeting is being held, and who are no longer participating in the meeting, though just without the house, are not a portion of such meeting, within Cr. Code, § 4654, making it an offense to disturb a religious assemblage.

4. A meeting of persons for the purpose of instruction in the singing of religious songs is not a religious assemblage, within Cr. Code, § 4654, making it an offense to disturb a religious assemblage.

5. On a prosecution under Cr. Code, § 4654, which makes it an offense to disturb a religious assemblage, it appeared that only those who were standing without the meeting house were disturbed. Held proper to refuse, as misleading, charges to the effect that the statute was not intended to protect loiterers in the vicinity of a religious assemblage, and that those without the house, who were not paying any attention to the services, were not a part of the assemblage, etc.

6. One may be guilty of violating Cr. Code, § 4654, making it an offense to disturb a religious assemblage, if the persons disturbed are a part of the assemblage, whether at the time they are taking part in the services or not.

7. On a prosecution under Cr. Code, § 4654, making it an offense to disturb a religious meeting, a charge that persons sitting on the outside of a house in which an assemblage is met for the purpose of religious worship, engaged in conversation not connected with the religious worship or loitering outside the house, are presumed not to be a part of the assemblage, was properly refused.

Appeal from circuit court, Marshall county; J. A. Bilbro, Judge.

Ben Adair was convicted of disturbing a religious assemblage, and appeals. Reversed.

The facts of the case are sufficiently stated in the opinion. In addition to the portions of the charge copied in the opinion to which

the defendant separately excepted, the defendant separately excepted to the following portions of the court's general charge: "(b) If a person retires from the meeting for purpose of his own, with the intention of returning, he continues a part of the assemblage. (c) If a person in an assemblage wants a drink of water, and goes to a convenient spring, intending to return, he continues a part of the assemblage, and a disturbance of him while out for such purpose would be a disturbance of the assemblage. (d) If any one person in an assemblage met for religious worship is disturbed, then the law says the assemblage is disturbed. (e) Disturbing a member of that congregation does not mean exciting him, but only directing his attention from the purpose of the assemblage." The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence in the case, they must find the defendant not guilty. (2) The court charges the jury that, if only the persons outside the house were disturbed, and if at the time they were not a part of the assemblage met for the purpose of religious worship, then this would not warrant the conviction of the defendant. (3) The statute against disturbing religious worship is not intended to protect loiterers in the vicinity of an assemblage met for religious worship. (4) The court charges the jury that the disturbance of one or more persons loitering about a house where an assemblage is met for purpose of religious worship would not constitute a disturbance of the assemblage. (5) Disturbance of some person or persons at or near an assemblage met for purpose of religious worship, who is not at the time taking any part in the worship, nor giving any attention thereto, would not constitute a disturbance of the assemblage. (6) Persons on the outside of the house, talking among themselves about other matters, and not about the purpose of the assemblage, and paying no attention to the assemblage, would not be a part of the assemblage, and a disturbance of such persons only would not constitute a disturbance of the assemblage. (7) Loiterers and idlers on the outside of a house in which is met an assemblage for religious worship, who are not paying any attention to the services, are no part of the assemblage. (8) The court charges the jury that the presumption in case of this character is that persons sitting on the outside of a house in which an assemblage is met for the purpose of religious worship, engaged in conversation not connected with the religious worship, are not part of the assemblage. (9) The court charges the jury that disturbing one or more persons on the outside of the house, who were loitering on the outside, and not engaging or participating in any wise in the service, would not constitute a disturbance of the assemblage. (10) The court charges the jury that persons loitering on the out-

side of a house in which is met an assemblage for the purpose of religious worship are presumed not to be any part of the assemblage, and the burden of proving such persons a part of the assemblage is on the state, and the state must prove this beyond all reasonable doubt. (11) The court charges the jury that proof of disturbance of one or more persons in the vicinity of an assemblage met for purpose of religious worship does not constitute a disturbance of the assemblage unless the evidence shows beyond all reasonable doubt that at the time such person or persons were disturbed they were a part of the assemblage, and to constitute them such the state must prove beyond all reasonable doubt that they were at the time met for the purpose of religious worship, or that they were on their way to or from the assemblage, or that they were at the time bona fide engaged in doing something connected with the purpose of the assemblage." From a judgment of conviction the defendant appeals.

Street & Isbell, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for disturbing religious worship. Section 4654, Cr. Code. The assemblage of people charged to have been disturbed, as stated in the bill of exceptions, had met "for an all-day singing and preaching"; the singing occupying the forenoon and a part of the afternoon until 8 o'clock when the preaching began, with an intermission between the singing exercises and the preaching." The state, on the trial, was permitted to show, against the objection of the defendant, the conduct and declarations of the defendant at different times covered by the time occupied in the singing exercises and preaching. Evidence tending to show willfulness on the part of the defendant in the doing of an act causing the disturbance is relevant and competent. *Price v. State*, 107 Ala. 162, 18 South. 130. There was no error in the rulings of the court, as the purpose of the evidence objected to was to show willful misconduct, and such was its tendency. There was no election made by the state as to which act of the defendant as causing the disturbance or interruption it would prosecute for; and, even if there had been, such election would not affect the question of the competency and relevancy of the evidence as tending to show willfulness in the doing of the act relied on as causing the disturbance. There was no pretense of a disturbance of any person of the assemblage within the house, where both the singing exercises and the preaching were had. The only evidence of any disturbance was of persons without the house. Whether these persons at the time of the alleged disturbance constituted a part of the assemblage met for religious worship, was a question of fact for the determination of the

jury. If the persons without the house had separated themselves from those within, who were engaged in religious worship, and no longer participated in the purposes for which the congregation had met, but had wholly disconnected themselves from the assemblage, with no intention of again participating in the purposes of the meeting, and were engaged in the discussions of other matters,—all of which being questions of fact to be determined by the jury from the whole evidence,—then the disturbance of one or more of such persons would not come within the prohibition of the statute. Charge 2 requested by the defendant, hypothesizing all of these facts, correctly stated the law, and its refusal was error. We are not to be understood as asserting that a separation or withdrawal from the congregation by one or more persons of the congregation temporarily, and for personal comforts or the like, and with the intention of returning, and, in the language of the statute, still being at or near the place of worship, would constitute such person or persons not a part of the assemblage. So long as such persons form a part of the assemblage, though temporarily separated from the congregation, being still in close proximity, they are within the protection of the statute.

The court, in its oral charge to the jury, among other things, stated "that, if the assemblage was met for the purpose of instruction as to how to be able to sing religious songs, then that was an assemblage met for religious worship, and one is a member of that assemblage if present, whether he is in the house or out of it." This was a distinct and substantive statement of a legal proposition, and is not limited or modified in any way when taken in connection with other portions of the general charge. It cannot be affirmed, as matter of law, that a meeting together of persons solely for the purpose of "instruction as to how to be able to sing religious songs" constitutes an assemblage met for the purpose of religious worship. If the purpose of the meeting be solely for instruction in the art of singing, although confined to the singing of sacred songs, this would not be an assemblage met for religious worship, within the meaning of the statute under which the indictment was preferred.

There is no merit in the exceptions reserved to other portions of the general charge. Charges 3, 4, 7, and 9 requested by the defendant were misleading. Besides, the mere fact of loitering would not necessarily disassociate the loiterer from the assemblage met for religious worship. Charge 5 misstates the law. If the persons disturbed were a part of the assemblage met for religious worship, whether at the time taking part in the service or not, it would be a violation of the statute. Charge 6 was misleading and argumentative, and was, therefore, properly refused. Charges 8 and 10 are faulty, and were properly refused. The law indulges no such presumption as that stated in the charges. Charge 11

was clearly misleading, and was properly refused. Moreover, it was not necessary that the persons disturbed should have been bona fide engaged in doing something connected with the purpose of the assemblage.

For the errors pointed out, the judgment of the court must be reversed, and the cause remanded.

(107 La.)

STATE ex rel. ALEXIS et al. v. GAUDET,
Judge, et al. (No. 14,504.)

(Supreme Court of Louisiana. June 23,
1902.)

INJUNCTION—EXECUTORY PROCESS—PRESCRIPTION OF DEBT.

1. An application for an injunction against executory process, based on the prescription of the debt to satisfy which the executory process has issued, should not be refused where the debt on the face of the proceedings is prescribed.

(Syllabus by the Court.)

Application by the state, on the relation of Eugene Alexis and A. Stewart, for writ of mandamus to Jerome L. Gaudet, judge of the Twenty-Eighth judicial district, and another. Writ granted.

James V. Chenet and Benjamin Rice Forman, for relators. Respondent judge, pro se. Respondent clerk, pro se.

PROVOSTY, J. The relators herein complain that the respondent judge and clerk of court have refused to grant them an injunction against a writ of seizure and sale, notwithstanding that their application for same has been regular, and has set forth one of the grounds on which under articles 738, 739, and 740 of the Code of Practice an injunction issues as matter of right. The clerk did not absolutely refuse to act, but merely requested that the relators should await the return of the judge, and the relators acceded to the request. Evidently, as against the clerk, this proceeding has been taken inadvisedly, and must be dismissed, at the cost of the relators. The grounds on which the injunction is asked are that the note on which the executory process issued is prescribed. The judge returns that he refused the injunction for the reason that he believed that the course of prescription on the note had been interrupted. It seems that the relators sold a part of the property on which the note bore mortgage, and that the holder of the note appeared to the act of sale, and waived the mortgage on the property sold, and that the notary paraphed the note to identify it with the act of waiver. This transaction, taken as a whole, interrupted prescription on the note, the judge thinks. Possibly it did, but whether it did or not is an issue on which the relators are entitled to a regular hearing, and to an appeal in case the decision on it goes against them; and they will be deprived of this hearing if the injunction is not granted. We think that the injunction should have been granted.

It is therefore ordered, adjudged, and decreed that the mandamus applied for herein be made peremptory; the cost of serving process on the clerk to be paid by the relators, and the other costs by the respondent judge.

(107 La.)

ABRAHAM v. MIEDING. (No. 14,452.)

(Supreme Court of Louisiana. June 21, 1902.)

AUCTION SALE—TITLE TO REALTY—VALIDITY.

1. The adjudicatee in this case is tendered a title valid upon its face, and translatable of property, strengthened by judicial proceedings, and accompanied by undisturbed possession as owner for 18 years. *Held*, that she is bound to accept it.

(Syllabus by the Court.)

Action by Henry Abraham against L. Mieding. Judgment for plaintiff was affirmed by the court of appeals, and defendant applies for certiorari or writ of review. Dismissed.

Stafford & Lambert and Frank McGloin, for applicant. Dinkelspiel & Hart, for respondent.

MONROE, J. This is an application for the review of a judgment rendered by the court of appeals for the parish of Orleans, decreeing that the applicant shall accept title to certain real estate which has been adjudicated to her at public auction. The property was acquired in indivision by the New Orleans Savings Institution and Adolphe Risler from Joseph Alfred Duflho, by act before Cuvellier, notary, August 28, 1872. Risler died in September, 1874, and title to the interest which he had acquired vested in his widow in community and children. In 1882, the savings institution sold its interest to Ferdinand Goldsmith, who filed suit for partition against the widow and heirs of Risler, and obtained judgment, agreeably to which the property was sold at auction and adjudicated to him; the adjudication being confirmed by notarial act executed by the auctioneer January 24, 1884. Goldsmith remained in undisturbed possession of the entire property until June 30, 1898, when he sold it to Henry Abraham, by whose authority it was sold at auction in November, 1900, and adjudicated to the applicant. The objections to the title are confined to the partition proceedings. The record of those proceedings has been lost, but the plaintiff, Abraham, offered the entries upon the clerk's and sheriff's docket; the judgment decreeing the partition and ordering the sale of the property, as it appears upon the minutes of the court; the proceedings of a family meeting held in the interest of the minor, Adolphe Risler; and the notarial act reciting the proceeds verbal of the auctioneer, in which the judgment mentioned is referred to as bearing date March 28, 1883, from which evidence it may safely be presumed that the judgment of partition, unquestionably rendered, executed, and acquiesced in, was duly signed.

Beyond this, it appears that Joseph Alfred Duflho, having an interest as liquidator of the firm of Lafitte & Duflho, in May, 1887, filed suit in the civil district court, in the succession of Risler, alleging, among other things, that by certain proceedings in France, whither Mrs. Risler and her children appear to have removed, she had acquired all of their interest in the Louisiana property left by their father, and praying that the general mortgage which had been inscribed against her as tutrix be canceled. For the purposes of this proceeding a curator ad hoc was appointed to represent the minors interested, and an answer was filed in their behalf, and there was judgment as prayed in the petition. Thereafter, in October, 1887, a petition was presented, also in the succession of Adolphe Risler, on behalf of the widow, containing the same allegations as those made by Duflho, and praying that she be recognized as sole owner of the Louisiana property, and put in possession thereof, and judgment to that effect was rendered and signed October 17, 1887; and upon November 5th following, Mrs. Risler, through her duly authorized agent, by notarial act, formally ratified the sale in the partition proceeding, whereby Goldsmith acquired the property here in question. Under these circumstances, and as it appears that, in the proceeding in France by which Mrs. Risler acquired the interests of her children in the property in question, the latter either acted for themselves, or were duly represented, and as they were afforded the opportunity of contesting the regularity of those proceedings in the civil district court when the issue was tendered, as has been stated, and as Goldsmith and his transferee, Abraham, have been in undisturbed possession for about 18 years, during nearly 15 years of which, assuming that the original title was defective, they have held under a title valid upon its face and translatable of property, we are of opinion that the objections urged by the applicant are not well founded.

It is therefore ordered, adjudged, and decreed that this proceeding be dismissed, and that the judgment of the court of appeals remain undisturbed.

(107 La.)

LANG v. DE LUCA et ux. (No. 14,043.)

(Supreme Court of Louisiana. June 21, 1902.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

1. In a suit for damages for malicious prosecution, if defendant had probable cause to make the affidavits, that should end the case, for it is the rule that proof of want of probable cause and proof of malice, direct or implied, must result from the evidence adduced.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

¶ 1. See *Malicious Prosecution*, vol. 33, Cent. Dig. §§ 18, 20, 21.

Action by Emile Jacques Lang against Vincent De Luca and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Armand Romain and E. Howard McCaleb, for appellant. Fenner, Henderson & Fenner, for appellees.

BLANCHARD, J. Plaintiff sues for and on behalf of his three minor children claiming damages of defendants in the sum of \$6,000 for malicious prosecution, illegal arrest and defamation of character of the children, following from certain affidavits made by Mrs. De Luca against them. One of the children was a boy about 20 years of age, the other two girls about 16 and 17 years respectively. Defendants lived in a house adjoining that of plaintiff. A fence separated the premises. At the time the trouble arose Mr. De Luca was absent from home. He is a sea captain. His wife, with five children, was in the house. One of the children was very ill and had been for weeks. The inmates of the house had long been annoyed by a species of petty vandalism, practiced after nightfall, such as repeated and violent ringing of the door bell, throwing stones and mud upon the front gallery, etc. This finally resulted in Mrs. De Luca appearing before the recorder's court in the city of New Orleans, where the parties resided, and making affidavit against Henry Lang and Emily and Viola Lang, children of the plaintiff, charging them with committing the depredations referred to on the evening of March 27, 1900. The specific charge was that the Lang children did willfully violate the city ordinance relative to malicious mischief. The parties were not taken into custody, though warrants issued for their arrest. They were merely notified to attend on the court for trial. This they did, and the proof not being sufficient to convict, they were discharged. Whereupon this suit for damages was instituted. Among other allegations it is charged that Mrs. De Luca well knew at the time she made the affidavits that the same were false. The defense was a general denial. At the trial before the judge of the district court, plaintiff's demand was rejected. He appeals.

In his reason for judgment the learned judge of the trial court held that any presumption of the want of probable cause, in preferring the charges, arising from the acquittal of plaintiff's children in the recorder's court, had been overcome by the evidence adduced before him. He was of the opinion the proof administered established probable cause for the proceeding taken against the children, and that the affidavits made were made in defense and protection of affiant and to secure her home against invasion and trespass, rather than from malicious motive. "The question," said he, "is not whether plaintiff's children were guilty of the mischief of which they were accused. I can hold them innocent, and still the case is against

the plaintiff. There can be no doubt," continued he, "that defendant's family were greatly annoyed and disturbed by somebody while one of the children was sick. The defendant (Mrs. De Luca), the physician in attendance on the sick child, the maid servant and Mr. Jardina (next door neighbor) prove this beyond dispute. The gate bell was frequently rung, and dirt, brickbats, etc., were thrown on the gallery. Somebody did it; but when any inmate of the house appeared, the mischief doer was off and out of sight. It is proved that some of these offenders ran into the plaintiff's gate and disappeared." We find these observations of the judge sustained by the evidence. Alphonsine Fattet, a young girl sustaining close companionship with the Lang girls, and who was visiting them on the evening in question, admitted she threw on defendant's gallery, on that occasion, two small pieces of brick, and that she threw them from plaintiff's yard. Besides Miss Fattet, other children of the neighborhood were assembled that night on plaintiff's premises and there is no doubt the yard was the base of operations of the mischief makers. The witness Jardina testifies to coming home that evening at 8:30 o'clock and hearing of the annoyance to which Mrs. De Luca was being subjected, instituted a watch and saw the depredation—the violent ringing of the bell—repeated by parties who came out of plaintiff's premises and then ran back again. He was quite sure he recognized Henry Lang and the two Lang girls as in the party and so informed Mrs. De Luca. She acted on the information thus imparted, and that obtained from statements made to her the next day by the Fattet girl. She consulted her lawyer, telling him what her grounds and means of knowledge were, and on his advice made the affidavits. There is here sufficient of probable cause. Defendant had the right to have the matter of invasion of her premises and rights investigated, and to appeal to the law for protection. This was done on information given, as to the supposed guilty parties, by a credible person—Jardina, her nearest neighbor on one side, who spoke as an eye witness. We agree with the district judge that if defendants had probable cause to make the affidavits that should end the case, for it is the rule that proof of want of probable cause and proof of malice, direct or by reasonably presumptive inference, must result from the evidence to support a suit for damages for malicious prosecution. *Glrot v. Graham*, 41 La. Ann. 511, 6 South. 815; *Well v. Israel*, 42 La. Ann. 955, 8 South. 826; *Sibley v. Lay*, 44 La. Ann. 936, 11 South. 581; *Garnier v. Bernard*, 45 La. Ann. 1265, 14 South. 189; *Deardmond v. St. Amant*, 40 La. Ann. 374, 4 South. 72; *Womack v. Fudikar*, 47 La. Ann. 34, 16 South. 645; *Brelet v. Mul-len*, 44 La. Ann. 194, 10 South. 865; *Enders v. Boisseau*, 52 La. Ann. 1020, 27 South. 546.

Judgment affirmed.

(107 La.)

MARX et al. v. SANDERS, Sheriff. (No. 14,363.)

(Supreme Court of Louisiana. June 16, 1902.)

EXECUTION SALE—PAYMENT IN CASH—VALIDITY—DISTRIBUTION OF PROCEEDS.

1. Although the purchase price of property sold at sheriff's sale should be paid in cash, such a sale is not null if by the consent of all the parties the purchaser is allowed to retain the purchase price pending the trial of a suit to determine who is entitled to the proceeds.

2. Where a sheriff's term of office expires pending such a condition of affairs, his successor should take the matter up and carry it on to completion.

(Syllabus by the Court.)

Certiorari to court of appeals, Fifth circuit.

Application of A. Marx and others for writ of certiorari and review to the court of appeals in a proceeding against J. B. Sanders, sheriff. Proceedings dismissed.

Weeks & Weeks and Solomon Wolff, for petitioners. Respondent judges pro se. Mentz & Borah, for defendant and intervener J. R. Todd.

BREAUX, J. Relators, claiming to have become the owners of machinery under a sheriff's adjudication, seek to have their asserted possession and ownership of this property recognized by a decree of court. They proceeded by rule against the sheriff now in office, and ask that he be ordered to deliver possession to them as transferees of Henry Kaufman, which they allege was bought by Kaufman at the sale made on the 1st of July, 1899. We are informed by the record that, in suits Nos. 10,301 and 10,302 of the docket of the district court, judgment was rendered against J. B. Alexander and in favor of Henry Kaufman, with recognition of a vendor's lien on the machinery in question. Another creditor obtained an order of seizure and sale against the debtor, Alexander, and under it the plantation on which the machinery claimed by plaintiff was at the time was sold at sheriff's sale. Execution was also issued on the judgment, in which Kaufman's vendor's privilege on the machinery in question was recognized (Nos. 10,301 and 10,302), and this machinery was also advertised to be sold on the same day the plantation was sold. The creditor who was foreclosing obtained an order of court and filed a third opposition in the two suits (Nos. 10,301 and 10,302), ordering the sheriff to hold in his hands the proceeds of the sale of the machinery. It seems that in this opposition the foreclosing creditor, Braud, challenged the sheriff's right to sell the machinery under the two writs of *fi. fa.*, and averred that by reason of his mortgage he had a right to the machinery first in rank. The sheriff on the 1st of July, 1899, as previously advertised in

foreclosure proceedings, sold the plantation to John R. Todd. The machinery in question was not included in the sale of the plantation, but was sold separately under the *fi. fa.* issued at the instance of Henry Kaufman, judgment creditor, in Nos. 10,301 and 10,302. The sheriff's return on the *fi. fa.* sets up that Kaufman, subrogee of Marx, was the highest bidder, and now asks to be placed in possession by the sheriff, although he has not deposited the price of adjudication.

John R. Todd, who bought the place, but not this machinery, became by the purchase subrogated to Braud's right as third opponent, claiming a preference over the proceeds because of a prior right. It is said by the Tidal Wave Company, purchaser of Braud's right, that in purchasing this right, as set forth in his (Braud's) third opposition, and then, with knowledge that Kaufman had been permitted to retain the price, filing proceedings to claim proceeds of the sale, he acknowledged the validity of the sale, and acquiesced in the sheriff's permitting him to retain the price, and is forever estopped; that one who subsequently to a sale files a third opposition and claims the proceeds waives the irregularities disclosed by the record. Kaufman insists that the sale is not invalidated, and that he is entitled to the property, although he has not deposited the amount to complete his bid. His contention is that with the permission of the sheriff, as shown by his return, he was permitted to retain the price until the opposition shall have been decided; that the third opponent made no objection to this, accepted a deed which recites that the machinery was sold to Kaufman, and in selling the plantation to the Tidal Wave Company, three months later, expressly excepted it. We take it that plaintiffs are the owners of the right that Kaufman had. The sheriff by whom the sale had been made had gone out of office. The sheriff now in office avers that his predecessor returned the writs, and that he, in consequence, owes no duty to plaintiffs. Considering that this was unfinished business left by the old sheriff, it devolves upon his successor to complete it, to the extent that this agency may be needed to that end. He has it in his power to call on the adjudicatee for the price and deliver the property.

Having disposed of this defense by the sheriff, we pass to a consideration of the demand for the immediate delivery of the property. In answer to this ground of demand, we can only say that it is ordinarily the duty of the sheriff, in making a sale on execution, to demand payment for property sold for cash, and, if not paid then and there, to avoid the sale in the manner required, and resell or postpone the sale in certain cases, giving notice thereof. But a sale is not null if the price be not paid and delivery is postponed in order to permit the parties to try issues as to who is entitled to the proceeds. In the recent case, without

¶ 1. See Execution, vol. 21, Cent. Dig. §§ 664, 665.

objection on the part of any one, the buyer was permitted to retain the price. It was substantially provided that in case of loss of the suit the proceeds were to be paid to whom of right they belong, and matters as relate to price and delivery of the property were to remain in abeyance for a time. We excerpt from the sheriff's return: "The purchaser being the seizing creditor, having paid in cash only the costs of court, the property sold is held on the Tidal Wave plantation until the opposition filed in this case is adjudicated by the court."

Our examination of the case has not resulted in convincing us that all litigation is at an end. Todd, the intervener, claimed a right as owner of the property, as having become immovable by destination. The court expressed the view that this intervener and his author had estopped themselves from claiming the property by claiming the proceeds. But as to whether he is estopped from claiming the proceeds is another question, with which we must decline to deal in these proceedings. He is estopped from claiming the property. It may be different as to the proceeds. As to this we express no opinion. This property will come up on the trial of the opposition, and we do not think it should be here disposed of, as it belongs to the issues on the opposition. In the present state of affairs, it only remains for the parties to settle their business differences by disposing of the opposition, and then the sale can be completed.

We agree with our learned Brothers of the court of appeals in the statement made by them as follows: "The facts in this case lead us to the inevitable conclusion that this machinery was not included in the sale of the plantation to Braud, and that he never paid anything for it; that he was never the owner of it; and that, inasmuch as John R. Todd acquired only such rights as Anatole J. Braud himself had, he (Todd) ought not to be decreed the owner of said machinery." We agree with the court of appeals in holding that the application is premature, and cannot be allowed at this time.

It is therefore ordered, adjudged, and decreed that the application for the writ of certiorari and prohibition be dismissed.

(107 La.)

STATE v. GIBSON. (No. 14,399.)¹
(Supreme Court of Louisiana. June 16, 1902.)

INDICTMENT—PLEA OF PRESCRIPTION—
FLIGHT OF ACCUSED.

1. The accused was indicted for burglary and larceny. He fled from justice and was not apprehended for over three years later. He then filed a motion to quash the indictment on legal grounds, averring its absolute nullity. This motion prevailed. He was promptly indicted a second time for the same offenses, the

indictment containing the allegations of flight from justice. Whereupon he filed the plea of prescription of one year in bar. Held—not good. Conviction sustained.
(Syllabus by the Court.)

Appeal from judicial district court, parish of Bienville; Benjamin P. Edwards, Judge.

Alexander Gibson was convicted of burglary, and appeals. Affirmed.

William U. Richardson, for appellant. Walter Gulon, Atty. Gen., and John C. Theus, Dist. Atty. (Lewis Gulon, of counsel), for the State.

BLANCHARD, J. The main defense to this prosecution is the prescription of one year. Hence it is necessary to give certain dates. On the 10th of June, 1898, an indictment against the accused for burglary and larceny was returned. The time of the commission of the offenses (for there were two counts) was laid in the indictment on the day before its finding, to wit: June 9, 1898. A bench warrant issued the day the indictment was returned. Under date of January 16, 1902, three years and seven months later, the sheriff made this return on the warrant:—"I have arrested within-named Alex. Gibson and have him in custody." On March 6, 1902, counsel for defendant filed a motion to quash the indictment on legal grounds not necessary to recite, averring it to be null and void. This motion was the same day tried and sustained—the trial court decreeing the nullity of the indictment, ordering it set aside and the prisoner discharged. The grand jury was in session at the time and they promptly returned, the next day, March 7, 1902, another indictment against the accused, charging him with burglary and larceny—two counts—being the same offenses upon which the first indictment was predicated. This last indictment cured the defects which had resulted in vacating and annulling the first indictment, and at the conclusion of each count was this averment:—"And at once on the commission of said crime said accused absconded and fled from justice." Under a warrant which immediately issued on the second indictment, the accused was rearrested. Whereupon his counsel filed a plea of prescription of one year in bar of the prosecution under the second indictment. This plea being overruled, a bill was taken, and thereafter the accused waived arraignment, pleaded not guilty, was tried by jury, convicted, on the second count, of petit larceny and sentenced at hard labor for one year. He appeals.

The trial judge gives, in the bill of exceptions, as his reasons for overruling the plea of prescription, that the first indictment was fatally defective, in that it did not charge any offense, and, hence, it did not and could not have any legal effect; that the second indictment contained the requisite allegation negating prescription; and that if the first indictment had no legal effect it is the same as though it had not existed, and since, imme-

¹ Rehearing denied June 28, 1902.

diately upon the commission of the offense, the accused fled from justice, prescription was thereby suspended, and the indictment under which he was convicted having been returned within two months of his ceasing to be a fugitive, it was timely, in the sense that it is not amenable to the prescription pleaded. These reasons are sound in law. It was declared, in *State v. Precovara*, 49 La. Ann. 593, 21 South. 724, that an indictment which has been declared a nullity is the same as though it had not been found. In *State v. Curtis*, 30 La. Ann. 1161, it was said that an illegal or void prosecution is equivalent to no prosecution and under it the accused is considered as having never been in jeopardy. So, too, a void indictment is without legal effect in favor of the state to interrupt prescription. *State v. Curtis*, 30 La. Ann. 1166; *State v. Morrison*, 31 La. Ann. 211.

The legal situation then, with respect to the case at bar, is this:—The first indictment against the accused is brushed aside by the judgment annulling it as though it had never existed. The accused having committed the offense in 1898 at once fled from justice and was not apprehended until 1902. During his flight prescription was suspended. Rev. St. § 986. On his flight ceasing by being taken into custody, he was promptly indicted, and the indictment averred the fact of flight as interrupting prescription. The parallel between this case and that of *State v. Vines*, 34 La. Ann. 1073, is complete, and that authority completely negatives the contentions of defendant herein. To secure conviction under the indictment it was necessary for the prosecution not only to prove the guilt of the accused, but the fact of flight as interrupting prescription. The result of the trial showed that both guilt and flight were proven to the satisfaction of the jury.

This case has been considered, and properly so, from the standpoint of the law and jurisprudence existing at the date of the commission of the offenses with which the accused stood charged. That date was, as we have seen, the 9th of June, 1898. A month later, to wit:—on July 11, 1898, an act of the general assembly was approved, which makes a decided change in the law relating to the effect to be given to indictments—even void indictments—in the matter of the interruption of prescription. The last paragraph of Act No. 73 of 1898 reads as follows:—

"In all criminal prosecutions for any crime or offense an indictment found, or an information filed, before prescription has from any cause accrued, shall have the effect of interrupting prescription; and if said indictment or information be quashed, annulled, or set aside, or a nolle prosequi entered, prescription shall begin to run against another indictment or another information based on the same facts, only from the time that said original information was quashed, annulled, or set aside, or a nolle prosequi entered; and the prescription and exemption herein above pro-

vided shall not apply to any conviction under said other indictment, but, on the contrary, said prescription or exemption shall not be pleadable against such offense."

A second bill of exceptions is found in the record which recites that a certain special charge to the jury (giving the same in full) was requested at the hands of the trial judge and refused. The judge assigns as reasons for the refusal that he had already, in his charge to the jury, substantially charged the matter covered by the special charge. As the charge of the court to the jury was not in writing, and as nothing in the record apprises us of its scope and tenor, it is obvious that no intelligent action can be taken on the bill of exceptions last referred to.

Judgment affirmed.

(107 La.)

BEGUÉ v. HUBERT. (No. 14,191.)

(Supreme Court of Louisiana. June 16, 1902.)

INTEREST ON DEBT.

1. A debt, carrying on its face no stipulation as to interest, payable out of a particular fund yet to be collected, like taxes, is not due (in the sense that it draws interest under the provision of law that debts bear interest from the time when they are due) until the fund is collected.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by F. Begué against Louis A. Hubert, receiver. Judgment for plaintiff, and defendant appeals. Affirmed.

Emile Pomes, for plaintiff. Charles Louque, for defendant.

BLANCHARD, J. Plaintiff sues on metropolitan police warrants, or certificates, issued for salaries due to police officers for the years prior to 1877. The aggregate of these warrants amounts to the sum of \$5,519.02. She acquired the warrants by purchase from the original holders thereof, or their assignees. Defendant is the receiver of the board of metropolitan police, a defunct corporation. See *State v. City of New Orleans*, 106 La. 469, 31 South. 55. The prayer of her petition is for judgment against the board, thus represented by the receiver, for the aggregate sum of the warrants, with 5 per cent. interest on various amounts, going to make up the sum, from various dates purporting to represent the time when the warrants, respectively, became due; and that the judgment be made payable out of the metropolitan police taxes levied prior to the year 1879. Judgment was rendered by the court a qua in accordance with the prayer, except that no interest on the warrants was allowed—the judgment being silent as to interest. Defendant appeals, and in answer to the appeal plaintiff prays amendment of the judgment so as to

¶ 1. See *Interest*, vol. 9, Cent. Dig. § 83.

allow interest as prayed for in her petition. In his brief filed in this court counsel for defendant declares the appeal was taken so as to afford the city of New Orleans an opportunity to urge whatever objections she might have to the recognition of plaintiff's claim against the funds derived from the taxes levied for account of the board of metropolitan police; that the assistant city attorney, who was present at the trial, stated he desired the case appealed. Counsel further declares he had not, himself, been able to discover error in the judgment appealed from, admitting the evidence and the law justified the decree. In the absence of any showing to the contrary by the city of New Orleans, it is assumed the city has nothing to urge in the way of error. Nothing remains but to affirm the judgment, unless plaintiff's contention as to interest is well founded. The certificates sued on are silent as to interest. Plaintiff's petition contains the allegation that the warrants declared on are payable out of the metropolitan police taxes, levied by the city of New Orleans prior to the year 1879. This is an admission that the debt is payable out of particular revenues. It is not alleged or shown that the revenues thus applicable to its payment have been collected and are in the treasury. See *Creole Steam Fire-Engine Co. v. City of New Orleans*, 39 La. Ann. 982, 3 South. 177.

This being so, interest cannot be allowed. Judgment affirmed.

(107 La.)

STATE v. BLACKMAN. (No. 14,462.)
(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—ARGUMENT OF COUNSEL.

1. The district attorney in his closing argument used this language:—"If there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on that jury." Counsel for the prisoner at the bar immediately objected to this statement as improper and prejudicial to the accused and reserved a bill. The trial judge did not interfere at the time, nor did he subsequently refer to the matter in his charge. *Held*—sufficient cause for reversal of verdict.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Concordia; J. L. Dagg, Judge.

Jake Blackman was convicted of murder, and appeals. Reversed.

John Dale, for appellant. Walter Guion, Atty. Gen., and Hugh Tullis, Dist. Atty. (Lewis Guion, of counsel), for the State.

BLANCHARD, J. Defendant was indicted for murder, tried by jury, found guilty and sentenced to death. He appeals.

In the course of his closing argument for the state, the district attorney said, in substance,

that "if there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on that jury." Counsel for the accused immediately objected to this language as improper and prejudicial to his client, and reserved a bill of exceptions against the same. Subsequently, he applied for a new trial on the ground that the language excepted to was not such as the district attorney could legally use, and that it was calculated to prejudice and did prejudice the jury against the accused. On the trial of this motion the district attorney called as a witness, admitted he had used, substantially, the language quoted, but that it was said in connection with an admonition to the jury that each of them had sworn he was not opposed to capital punishment. The motion being overruled, the bill of exceptions referred to was presented and signed. It is considered a bill taken to the language objected to, and to the court's refusal to grant the new trial applied for on that ground. After quoting the language and stating the accused's objection to it, the bill recites that the district attorney did not retract what he had said, nor tell the jury not to regard the same. Neither was the trial judge asked to instruct the jury not to regard the same, and he did not give such instruction. It is also stated that the remark of the district attorney was not provoked by anything said in argument by counsel for the accused. The bill contains nothing in the way of a statement by the judge himself.

Ruling—In prosecutions for capital crimes, juries in this state are given by the law discretion as to the punishment to be inflicted on the accused found guilty. Thus, a verdict "guilty as charged" would mean the infliction of the death penalty; while a verdict "guilty without capital punishment" would mean life imprisonment at hard labor. It is the only case—prosecutions for capital offenses—where juries are permitted to have anything to do or say with regard to the sentence to be pronounced upon persons convicted of crime. In a murder trial the jury may be convinced of the guilt of the accused, and yet there may be some mitigating circumstance, or other consideration, superinducing to the infliction of a penalty less than death. The law vests this power of mitigation in the jury and not the judge. They must be left free to its full and untrammelled exercise, under proper instructions by the court. It is not for the district attorney, prosecuting on behalf of the state, to harangue the jury as to the punishment that should be meted out to the guilty culprit, and tell them, in substance, that if they do not bring in a verdict that will hang the man, instead of sending him to the penitentiary, they are weaklings, devoid of manhood and lacking in the qualities necessary to fit them for the proper dis-

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 1677, 1691, 1693.

charge of these duties of citizenship relating to jury service. The district attorney, in this case, did not content himself with demanding of the jury that they find the accused guilty; he did not confine himself to expressing his opinion, based on the proof administered, of his guilt. He went further. He demanded, under penalty of his scorn and contempt if they did otherwise, that a verdict be brought in that would hang the man. It was a trenching on the province of the jury not permissible. The language used was intemperate and improper. It was calculated to unduly influence the jury in deciding on the punishment to be inflicted on the guilty man—something with which the prosecuting officer has nothing to do. If they do not believe he should hang, the district attorney expresses his opinion of them in advance that they are weaklings. If they should reach, in their consultations in the jury room, the conclusion he should not be consigned to the gallows, they are, in anticipation, denounced by him who represents the state as without courage or manhood and unfit to discharge one of the most ordinary of the duties of citizenship. It was an appeal to the jury not merely to reach the conclusion of guilt which was proper, but an admonition to them that they would be recreant in their duty if they returned a qualified verdict, which under the law they had the right to do, and as to which they should have been left the sole judges, unblinded by the forcible assertion of the prosecutor's opinion. A district attorney should not throw the weight of his personal influence into a case which he is conducting as a public officer by announcing his individual opinion that the accused deserved hanging. *State v. Mack*, 45 La. Ann. 1157, 14 South. 141. In *State v. Jones*, 51 La. Ann. 103, 24 South. 594, it was stated that where a prosecuting officer abuses the privilege of argument to the manifest prejudice of the accused, it is the duty of the trial judge to interfere, and if he fail to do so, and the impropriety is gross, it is good ground for reversal. We must hold the instant case comes within the rule thus announced.

Though the district attorney's statement was objected to by counsel for the accused, it does not appear that the trial judge interfered, and though the matter was by the exception reserved called specially to his attention, he did not in his charge to the jury refer to it in any way. In *State v. Thompson*, 106 La. 308, 30 South. 897, this court said:—"There is ample authority in support of the doctrine that it is reversible error for the trial judge to fail, of his own motion, to give such instructions as will efface from the minds of the jurors the impression made by statements of counsel which are unauthorized and prejudicial, and there are many cases in which it has been held the wrong done is not remedied even

by such instructions." And the court, in that case, quoted as follows from *Nelson v. Welch*, 115 Ind. 270, 16 N. E. 634, 17 N. E. 569:—"Where the party who is injured by the wrong calls for the intervention of the court, upon objections, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury." The *Thompson Case*, which was a trial for murder, is the latest expression of this court on the question we are dealing with. There the prosecuting officer, in his closing argument, referring to the widow of the deceased who had been examined as a witness for the state, said:—"I will say nothing to you of her six fatherless little children." Counsel for the accused objected and excepted on the ground that no evidence had been offered relative to such children. No action was taken by the trial judge, and he did not, either at the moment or subsequently in his charge, instruct the jury to disregard the unauthorized reference complained of. The verdict and sentence were set aside, notwithstanding no demand was made on the judge by counsel for the accused for instructions to the jury in the matter. Had the judge, in the case at bar, on objection made, interfered, and either then, or later in his charge, instructed the jury that the district attorney had no right to use the language complained of, and for them to give no heed to it, and otherwise instructed them as to their rights and duties with regard to the character of verdict the law authorized them to return, we would hold that this saved the error of the prosecuting officer from vitiating the verdict. But in the absence of such action by the judge we are constrained to remand the case.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence appealed from be set aside and that the case be remanded for further proceedings according to law.

(107 La.)

STATE ex rel. DAUPHIN v. ELLIS et al.
(No. 14,434.)¹

(Supreme Court of Louisiana. June 5, 1902.)

RECEIVER—APPOINTMENT—PROHIBITION.

1. The lawmaker having vested the district courts with jurisdiction to appoint receivers in certain specified cases, and having provided other remedies and other modes of procedure in other cases, the exercise of the jurisdiction so vested must be confined to the cases specified; and prohibition will lie to restrain further action in the matter of the ex parte appointment of a receiver in a case not included in such specification.

Blanchard, J., dissenting.
(Syllabus by the Court.)

Application of the state, on the relation of Rosa L. Dauphin, for writs of certiorari and prohibition to T. C. W. Ellis, judge, and others. Writs granted.

¹ Rehearing denied June 23, 1902.

Clegg & Quintero and Saunders & Gurley, for relatrix. Respondent judge, pro se. Lazarus & Luce, George W. Flynn, and Thomas M. Miller, for respondents Choppin and others.

On Application for Writs of Certiorari and Prohibition.

MONROE, J. The facts upon which this application is predicated are substantially as follows:

Cecilia Choppin, widow in community of M. A. Dauphin, died in 1883, but her succession was not opened. In 1887 Dauphin married Rosa Labranche, with whom he lived, also in community, until his death, in 1890. There were no children of either marriage, and the decedent, by his last will, after a legacy of 100,000 francs to his mother, and a few other legacies, named his surviving widow as his universal legatee, and appointed her and Paul Conrad his executors, and they qualified and caused an inventory of his estate to be taken. Thereafter, in 1891, the heirs of Cecilia Choppin brought suit against said executors, claiming one-half of certain property, real and personal, said to have been acquired by the decedent during the first community, and also claiming reimbursement of certain paraphernal funds of the first wife. And a few months later the mother of the decedent brought suit, claiming, as forced heir, one-third of the estate, in addition to her legacy. This latter claim was at once disposed of by the claimant's selling her interest in the succession, "as per inventory on file," to Paul Conrad, one of the executors, for \$30,500. This was followed upon May 13, 1892, by a judgment in favor of the Choppin heirs, and on June 3d by a notarial act of compromise, whereby they accepted \$40,000 in satisfaction of their claim, except as to certain property in Alsace. On June 17th the judgment mentioned was amended and recast, presumably in conformity to said compromise, and it was signed on the same day. Thereafter, on June 28, 1892, the executors filed their final account, with a petition in which they alleged, among other things, that judgment had been rendered in favor of the Choppin claimants, recognizing them "as the only legal heirs of the said Cecilia Choppin, entitled to her succession," and that certain property, securities, stocks, bonds, funds, rights, and credits enumerated in the inventory " * * * formed part of the community heretofore existing between M. A. Dauphin and his wife Cecilia Choppin," and that the said claim and judgment had been settled as per the act of compromise mentioned. The petition also set forth the settlement made with the mother of the decedent, alleged that the succession had been fully administered, and prayed that the widow, as universal legatee, be recognized as owner and placed in possession of the property belonging to the succession, "as describ-

ed in the inventory," and which was specially described in the petition, and that the petitioners be discharged and their bond canceled; and there was judgment accordingly, rendered and signed June 28, 1892. Upon April 8, 1901, the Choppin heirs again appeared in court by means of a petition filed in the matter of the succession of M. A. Dauphin, in which they allege, in substance, that at the time of the death of M. A. Dauphin there were certain negotiable stocks and bonds, which they enumerate, of the par value of \$155,000, acquired by him during the existence of the first community, at his residence, and that they were taken possession of after his death by his widow, or others acting for her, in order to prevent their appearing on the inventory of the succession, and to conceal them from the heirs of the first wife, and that said securities were omitted from said inventory and effectually concealed, and that the petitioners had no knowledge of their existence until within the preceding year. They allege that the judgment in their favor of June 17, 1892, was based, to the extent indicated, on fraudulent misrepresentation and suppression of evidence on the part of the widow and of those who acted in her behalf, and that it was signed prematurely, and should be annulled in so far as it undertakes to limit petitioners' interest in the estate of Cecilia Choppin Dauphin to the property included in said inventory, and that the compromise entered into by them should be similarly dealt with. They further allege that, after said compromise had been effected and said judgment rendered, the securities referred to were restored to Mrs. Rosa Labranche Dauphin, and that she converted them to her own use, and is liable for their present market value, and for interest collected thereon since December 30, 1890. And they pray for judgment annulling the compromise of June 3, and the judgment of June 17, 1892, in so far as they undertook to adjust the rights of petitioners in the succession of Cecilia Choppin Dauphin, or to determine the interest of said succession in the community which had existed between said Cecilia Choppin and Maximilian A. Dauphin, and condemning Mrs. Rosa Labranche Dauphin to account for the securities enumerated, with the revenues collected therefrom, or to pay \$155,000, or so much thereof as may be due, to the succession of Cecilia Choppin Dauphin. To this petition the defendant excepted that the succession of M. A. Dauphin had been closed, and that said petition had been improperly filed therein, and had not been allotted as required by the rules of court, and she further pleaded the prescription of one year.

Upon June 6, 1901, the plaintiffs filed a supplemental petition, alleging that securities, other than those mentioned in the original petition, to the value of \$40,000, as also current money to the amount of \$50,000, had been similarly abstracted, and not accounted

for in the inventory of the succession of M. A. Dauphin, and propounding to the defendant interrogatories on facts and articles. To this the defendant filed an exception calling on the plaintiffs to furnish the names of the persons alleged to have aided and co-operated with her in concealing the securities and money sued for; and another supplemental petition was filed, complying with that request. The answer of the defendant followed in October, 1901, and she therein, among other things, denies that any securities were abstracted as alleged, or that fraud or concealment were practiced, and alleges that the inventory filed in the succession of her deceased husband was true and correct. Thereafter, upon March 27, 1902, the trial of the case having in the meanwhile been proceeded with, the plaintiffs filed still another supplemental petition, in which they allege that the evidence taken discloses that the defendant has sold or disposed of many of the securities, and that she has converted the same, as also the current money claimed, into other securities, thereby realizing large profits, and praying that the judgment of June 17, 1892, be vacated in so far as it purports to affect any securities or money not included in the inventory, and that there be judgment decreeing to belong to the succession of M. A. Dauphin (1) the property described in the original and supplemental petitions already filed; (2) all assets fraudulently withheld from the inventory, and not accounted for; (3) all the profits accruing therefrom; (4) all assets acquired with the proceeds thereof. That in default of the recovery of the original securities, or of the assets acquired with the proceeds of the same, "the succession of Dauphin and plaintiffs have judgment" for the value thereof. This is followed by a prayer that the defendant "be made to account fully to said succession for any and all property, securities, and moneys, or the value thereof, not already accounted for"; and, this in turn, is followed by the prayer "that the judgment heretofore rendered [of June 23], in so far as it closes said succession of M. A. Dauphin, and discharges the executor and executrix, be set aside; that said succession be reopened, and a dative testamentary executor be appointed; that all property, moneys, securities, their proceeds, or the profits thereon, and acquisitions therewith, not inventoried and accounted for, be brought back into said succession, subject to be administered and distributed to the parties entitled thereto"; and finally "plaintiffs pray, as in their original and supplemental petitions, that this amendment be served, and defendant be cited to answer hereto, and for costs, and for full general and equitable relief." On the same day, certain heirs of Mrs. Barbara Fauth Dauphin, alleging her death, and making substantially the same charges as are made by the heirs of Cecilia Choppin Dauphin, filed an intervention, in which they pray for judg-

ment decreeing the defendant to be without title to the securities and money specified by them, "because of her embezzlement and concealment" of the same.

To these pleadings, exceptions were filed, and an application with reference thereto was made to this court, and it was here held that the remedy was by appeal from the final judgment to be rendered. Following this, upon the 19th of the present month (May, 1902) the plaintiffs and interveners jointly filed a petition alleging that by the evidence adduced on the trial of the case it had been established that the defendant "did abstract and embezzle from the succession of the late M. A. Dauphin the property described; * * * that she has fraudulently disposed of the same to her own use, benefit, and advantage, and, with the proceeds of the sale thereof, reinvested said moneys and funds in other securities; * * * that, * * * knowing * * * that she was about to be held accountable, * * * she did, with a view to defeating the court's process and its judgment, in the event that one should be rendered, * * * cause to be removed from the jurisdiction of this court on December 13, 1901, the movable property of said succession, either then in existence as property of said succession, or the representative of property of said succession previously disposed of and invested in other securities; * * * that, as appears by the record and the proof administered, * * * the said Rosa Labranche Dauphin had on deposit in the safety vault of the Whitney National Bank personal securities, consisting of notes, stocks, bonds, and current money, of a value exceeding \$400,000; that, on the 13th day of December, without notice either to the court or to the parties litigant, upon her order, she directed the delivery of the contents of said box to one George Michel, who, acting under her directions, removed the same from the jurisdiction of this honorable court, and, with a view to defeat its process; that by her direction and through her instrumentality said George Michel has been kept without the jurisdiction, and evades the process of this court, although he is a citizen of the state of Louisiana, and a resident of the parish of Orleans; * * * that the property, rights and credits thus removed * * * were * * * subject at all times to the jurisdiction of this court, constituting, as petitioners charge, the property of the succession of the late M. A. Dauphin; that pending the inquiry and decision in this cause as to whether the said property constitutes part of the estate of said M. A. Dauphin, and is subject to the jurisdiction of this court for administration and disposition in accordance with law, the same should be conserved, in the interest of the parties litigant, in order that their rights may be preserved, and the judgment of this court be enforced; that it is necessary, in order to further the ends of justice, and in order to prevent a miscarriage

of the same, that a receiver should be placed in charge of the property, rights, and credits and assets of the estate of the late M. A. Dauphin, and more particularly of all stocks, bonds, moneys, credits, negotiable securities, of whatever nature or kind, now in possession of Rosa Labranche Dauphin, or any one acting for her, and holding said property for her account and under her directions; a proper inventory to be taken in order to preserve the record of the property coming into the receiver's possession; said property to be held by said receiver until the hearing and determination of this cause, with the right in said receiver, when so appointed, to take such further action in this or any other jurisdiction as he may be advised is due and proper in protection of the rights of the parties litigant in this cause, and in furtherance of the ends of justice, and that the jurisdiction of this court may be safeguarded against invasion or evasion by the acts of the parties to this cause. Wherefore, the premises and annexed affidavit being considered, petitioners pray that an order be entered herein appointing a proper and discreet person receiver, with all the powers incident to the duties of a receiver, to take possession of and keep in his custody, in his capacity as receiver, all the moneys, stocks, bonds, and negotiable securities abstracted from and belonging to the succession of the late M. A. Dauphin, if existing in kind, and if converted into other stocks, bonds, securities, or money, to demand the possession from the said Mrs. Rosa Labranche Dauphin of said stocks, bonds, securities, and moneys, and to take possession thereof, and to hold in his safe custody and keeping the property coming into his possession as receiver for the further and future action of the court in the premises, with directions to said receiver, if so advised, to take such other proceedings as may be deemed proper to reduce to his possession the property of the estate of the late M. A. Dauphin which has been removed from the jurisdiction of this court." This petition is sworn to by one of the plaintiffs to the best of his knowledge and belief, and there is a further affidavit by the same party that he is informed and believes that the defendant is "disposing of her property, or converting the same into money or other evidences of indebtedness, with intent to place it beyond the reach of judicial process and the demands of your petitioners, and he is advised, informed, and believes, and so charges the fact to be, that her purpose and intention is, within the immediate future, to leave the United States and seek refuge in some foreign country, or parts unknown to your affiant. Affiant further says that if the said Mrs. Rosa Labranche Dauphin should remove her property beyond the jurisdiction of this state or of the United States, or should convert the same into money or evidences of indebtedness, as aforesaid, his interests, in common

with those of his coplaintiffs, will be endangered, and that, in the event that he should secure the relief sought, the process of the court will be ineffective, and the ends of justice defeated; that the relief prayed for by the amended petition filed herein is necessary to protect the rights of the plaintiffs; and that they are entitled to the relief therein sought, pending the investigation, as a matter *ex debito justitia*, and as a matter of right." There is also an affidavit filed by Walter J. Gex as follows, to wit: "That he is a practicing lawyer in the town of Bay St. Louis, Hancock county, Mississippi; that while in the office of the chancery clerk of said county, on the 30th day of April, 1902, he saw filed therein for record a deed from Rosa Labranche Dauphin, widow of M. A. Dauphin, purporting to convey to one Michel, whose Christian name he does not now recall, the real estate and personal property, including the residence occupied by said Mrs. Dauphin, at Waveland, in said county, the consideration recited being \$7,000. He further states that he casually mentioned this fact to his friend Mr. T. M. Miller, and at his instance, not to be disobliging, he makes this affidavit, having no concern or interest in the matter."

Thereupon, on May 2, 1902, the judge *a quo* made the following order, viz.: "Considering the averments contained in the foregoing petition, and the affidavits of Walter J. Gex and of S. D. Choppin, of May 2, 1902, and considering the issues formulated and the evidence administered in this cause, without prejudging the cause at this time, or expressing any opinion with regard to the views entertained by me either on the merits of the controversy, or on the legal propositions involved, and which have not been discussed or considered, but with a view to conserve, in the interest of all parties to this controversy, the rights of the parties, and to have subjected to the court's process, whatever may be its future action, the control of the property the subject of this controversy, it is now ordered that John J. Frawley be appointed a receiver of all the property, rights, and credits, of whatever nature or kind, claimed as belonging to the late M. A. Dauphin; the said receiver being directed to demand of Mrs. Rosa Labranche Dauphin, defendant, possession of the following stocks, bonds and negotiable instruments [here follows a list including certain bonds and \$50,000 in current money], and the dividends arising from said stocks, bonds, and securities since 1891, as well as interest upon said current money, charged to have been abstracted from, and not mentioned in, the succession of the said M. A. Dauphin; that this right to demand possession and control, and to have the custody and keeping, of said stocks, bonds, and money, as well as all stocks, bonds, and money now in the hands or under the control of said Rosa Labranche Dauphin, being the fruits or proceeds of the conversion of

funds so specified, shall be upon said Mrs. Dauphin, and those holding for her and under her directions, with the right in said receiver, if he is so advised, to invoke the aid of other jurisdictions to enable this court, primarily charged with the administration of the succession of M. A. Dauphin, to have control and direction of the property of said succession; that the said receiver shall take the oath required by law, and shall inventory the property coming into his possession, whether it be specific and in kind, or whether the items above enumerated were sold, and the proceeds reinvested in other securities; that the said Rosa Labranche Dauphin is hereby commanded to surrender the same to the said receiver upon his issuing to her his receipt therefor; said receiver to give a bond of \$100,000 for the custody and safe-keeping of the property coming into his possession as receiver under the order herein; the purpose of this order being to preserve said property pending this litigation."

Though this order appears to have been made May 2d, neither the petition upon which it was made, nor the order itself, were placed upon record at that time. And thereafter, on May 17th, the defendant, through her counsel, appeared in this court, applying for writs of certiorari and prohibition. For the purposes of this application, she recites the facts substantially as they have been herein stated; and she further alleges that the petition and affidavit mentioned, though presented to and acted on by the judge a quo some time earlier, were by his authority withheld from the archives of the court, and were not entered on the regular docket until May 16th, and that in the meanwhile the counsel for plaintiffs presented a copy of said petition and order to a chancery court in Mississippi, and, representing that a receiver had been legally appointed in Louisiana, induced said court to make a similar appointment for the state of Mississippi. She further alleges that special care was taken to conceal said proceedings; that neither she nor her counsel had any knowledge of them until May 16th, when such knowledge was accidentally acquired; and that they are illegal and void for the reason that the district court was without jurisdiction to appoint a receiver in the manner and for the purposes thereby disclosed. And she accordingly prays for certiorari and prohibition.

The judge a quo makes the following return to the order nisi issued from this court to wit: "In obedience to the order of this honorable court, I have directed that the record in the matter of the succession of M. A. Dauphin be transmitted for examination. In answer, otherwise, I submit the following as my reasons for taking the action complained of by relatrix: The evidence, oral and documentary, produced before me during the trial of the pending case of the heirs of Choppin v. relatrix, has established that the stocks, bonds, and values appearing on what is

known as the 'Poché List' formed part of the estate of M. A. Dauphin at his death; that they were never inventoried or accounted for by relatrix as executrix, nor by Paul Conrad, deceased, her coexecutor, but that relatrix has personally held the same, collecting the dividends and dealing with all this succession property for her own personal account. Knowledge of its existence was withheld from the court and from the heirs of Choppin and the heirs of Dauphin. In her answers to interrogatories, relatrix denies all knowledge of those securities. During all the time of the trial, relatrix has, on account of ill health, as is alleged and shown, been away from her domicile here, and beyond the process of the court, in the state of Mississippi. Paul Conrad, Jr., a witness, was personally summoned here, but, before an attachment could reach him, went also into the state of Mississippi. For the same reason, plaintiffs have failed to secure the attendance of young Mr. Michel and Miss Michel for examination in regard to said securities, and their removal, after suit brought, beyond the state limits. The heirs of M. A. Dauphin intervened and joined plaintiffs in claiming said securities. The heirs of Choppin claim them as acquisitions of the community between M. A. Dauphin and Cecilia Choppin, his first wife. Whether they are legally to go to the Dauphins, or to the Choppins, or to the relatrix, as widow, I do not know, and express no opinion. That they do belong to M. A. Dauphin's succession, and that they have been withheld from the inventory and administration by relatrix, personally, clandestinely, and for her own personal use, there is no doubt. When the heirs of Choppin and Dauphin applied for a receiver, I had no doubt of my duty, as probate judge, to have this abstracted property returned to the succession. Judicial sequestration seemed a remedy, but as the property was concealed, and in another state, and has to be sued for there by ancillary proceedings, to get it from relatrix, who was Dauphin's executrix, it was suggested that a receiver, with letters, would be recognized by any court of another state, while a judicial sequestrator would not. Names are nothing; substance is everything; so I concluded to appoint a receiver, finding, by examination of the authorities produced, that I had power to do so. I appointed the receiver, and ordered letters to issue upon his giving bond. I ordered, for good reasons suggested by counsel, that the clerk keep the papers relating to this matter from publicity. The petitioners feared that, if notified, the relatrix would place the property and herself beyond pursuit. On the same principle, indictments are kept on secret files until the accused can be arrested. When search warrants issue, the person to be searched is not notified in advance, nor is the defendant whose goods are to be attached. Considering that relatrix had placed herself beyond the state limits, and had removed the succession property there, and that she denied

its existence, and conceals it, if plaintiffs' evidence, allegations, and affidavits be true, I felt it my duty to take all necessary measures to vindicate my jurisdiction as probate judge over said property, and to cause its return for administration and disposal for whom of right. To this end I appointed a receiver, whose bond and letters would give him standing in our sister state, that by ancillary proceedings he might recover and bring back to this jurisdiction the concealed and abstracted property; and I directed that the matter should be kept from publicity until he should be in a position to act effectively, and no longer, and this was done as directed. I accept service of relatrix's petition, and waive all notice and delays, and will render faithful obedience to whatever may be the further orders of this honorable court, whose sole desire, I well know, as is my own, is to see justice done, and that the law shall not prove weak and shrinking where justice requires that it shall be strong and firm."

Opinion.

An order for the appointment of a receiver is more comprehensive in its effects than either an attachment, a sequestration, or an injunction, or in fact than all of those writs combined, and is said to reverse the ordinary course of procedure in the administration of justice, by levying a species of execution, and determining afterwards who is entitled to the benefits. Until recently, no specific authority had been conferred on the courts of this state for the making of such appointments, and under the early jurisprudence there were but few cases in which its exercise was permitted. In *Frazier v. Willcox*, 4 Rob. 525, where, by consent of all parties interested, the plaintiffs had been appointed receivers, this court said: "In deciding that the plaintiffs can maintain the present action, we are not to be understood as giving our sanction to an opinion, sometimes expressed, that the judges of the inferior courts, without the assent of the parties to a suit, or with the consent of only one of them, can exercise the powers of a chancellor, and appoint, of their own accord, receivers, for the purpose of collecting and keeping the funds attached, or that may be the subject of the litigation. Our opinion is that the capacity of the plaintiffs is derived entirely from the consent of the parties who were interested at the time they were appointed. We do not believe that the assent of the judge added to their powers in the slightest degree, but it may be a security to the parties to have the conduct of their agents under their supervision, and that of the tribunal before which their case is pending. The fact that the appointment of the plaintiffs is entered on the records of the commercial court gives them no powers not conferred by the terms of their procuration and the laws." Two years later, in 1845, in the case of *U. S. v. Bank of U. S.*, 11 Rob. 177, it was said: "It appears to us that the

judge of the commercial court labors under a misapprehension as to the power and control he has over the agents appointed by parties to superintend their interests in the tribunal over which he presides. We have more than once said that he has no right to appoint receivers and trustees, of his own accord and will, to take charge of money or property, unless in the cases pointed out by law. The law designates who the judicial sequestrator is, and the judge cannot name another unless the parties agree to his doing so." In 1848 a case was presented in which the plaintiff, having obtained judgment against a corporation, issued execution and garnished a stockholder with respect to his subscription. He was met with the objection that the corporation itself had gone out of business and had ceased to exist by reason of its failure to elect officers, and that no valid execution could be issued against it. This court said: "A corporation can never dissolve itself so as to defeat any of the just rights of its creditors. In this case the officers once appointed are required by the charter to continue in office until the others are elected, and if they should die, absent themselves, or refuse to act, and it was made to appear that the stockholders neglected to appoint others, to the injury of the creditors, we would, on a proper case being made out, feel ourselves authorized to order the appointment of a manager in the interim for the purpose of winding up and putting an end to the concern. This appointment would in no wise differ from that of a receiver, which our courts frequently make to settle the affairs of insolvent banks and partnerships." And after citing an English case in which the lord chancellor had stated that such an appointment might be made, the court went on to say: "Under the equity powers vested in our courts, and the imperative command of the law that in cases not provided for the judge shall proceed and decide according to equity, they might adopt a similar course if it became necessary to prevent the failure of justice." *Brown v. Insurance Co.*, 3 La. Ann. 177. This was followed in 1850 by a case in which it appeared that there was a corporation owing large sums, and having large sums due it, and which, though in process of liquidation, was without a legal representative. The district court had appointed a receiver, but had subsequently held that the appointment was unauthorized. On the appeal to this court it was said: "We consider that there can be no question as to the power of the court, in view of the condition of the affairs of the company, as exhibited by the proceedings before it, to appoint a receiver for the preservation of the interests of all concerned. The court, *ex proprio motu*, was bound to prevent the confusion and dilapidation consequent upon the abandonment of its affairs produced by the inefficiency of the law under which Stark had taken possession of, and continued to hold, the records, papers,

and assets of the company. The proceeding for the forfeiture of the charter of the company, as far as it had progressed, being before the Fifth district court, we think that court properly exercised its authority in making the appointment." Citing *Brown v. Insurance Co.*, 3 La. Ann. 177; *Stark v. Burke*, 5 La. Ann. 740. And the doctrine of these cases was affirmed in *Gaslight Co. v. Bennett*, 6 La. Ann. 456, and *Follett v. Field*, 30 La. Ann. 161.

In *Baker v. Railroad Co.*, 34 La. Ann. 755, it was said that in this state "courts have no jurisdiction to appoint receivers for corporations in absence of express statutory authority," and that "this court recognizes no exception to this rule, unless it be where corporate property is abandoned, or where there are no persons to take charge of or to conduct its affairs." In *re Louisiana Sav. Bank & Safe Deposit Co.*, 35 La. Ann. 196 (being a case in which receivers had been selected by the parties in interest, and the court was merely asked to confirm the selection), the doctrine as enunciated in the case last above cited was modified or explained in the following language, to wit: "Where, in the case of *Baker v. Railroad Co.*, 34 La. Ann. 754, we laid down the general rule that 'courts have no jurisdiction to appoint receivers for corporations in absence of express statutory authority,' the word 'jurisdiction' was perhaps inaccurately used. The exception which we maintained in that case was not one to the jurisdiction of the court, but one of no cause of action. Certainly we did not mean to impute to the courts such defect of jurisdiction, *ratione materiæ*, as could not be supplied by consent, and as would render their judgments in the premises absolute nullities. We rather meant to lay down a rule of judicial action than a canon of jurisdiction,—a limitation of judicial right, rather than of judicial power. That rule is founded upon the respect and protection due to the rights of a corporation in common with those of other persons. As we said in that case: 'A corporation is a person whose possession and control of its own property and affairs must be respected like the similar rights of individual persons. They cannot be interfered with in preliminary proceedings and in advance of judgment, except in cases specially provided by law, and on strict compliance with the requirements thereof.' " In the meanwhile (that is to say, as far back as 1847) the appointment of a receiver for a partnership had been sanctioned in the following language, to wit: "We consider the power of the court to appoint a receiver in a case of this kind to be necessary for the purpose of effecting the object of this suit, which is the liquidation and settlement of a partnership, and it falls within that incidental class of powers which courts have full authority to exercise. Story, Partn. § 333; Civ. Code, art. 21. Our courts are not organized with the proper machinery for the settlement of complicated partnership con-

cerns. They are still obliged to determine and conclude matters of this kind, and they have the powers necessary for the exercise of their jurisdiction, although such powers may not be expressly given them by law. Code Prac. art. 130." *Gridley v. Conner*, 2 La. Ann. 87. This was followed in 1856 by another case involving the liquidation of a partnership, in which it was said: "There is no error in appointing a receiver. It is one of those matters which must be left in a great measure to the sound discretion of the court." *Pratt v. McHatton*, 11 La. Ann. 264. In 1861 a receiver was appointed *ex parte* in a similar case, and, in reversing the judgment making the appointment, this court took occasion to refer to the decisions in *Frazier v. Willcox*, and *U. S. v. U. S. Bank*, *supra*, and to quote with approval the opinion in the case first mentioned, to the effect that the judges of the inferior courts are without authority to appoint receivers, save with the consent of the parties in interest, to which was added the following, as applicable to the case decided: "According to the law and the adjudged cases before us, there were two courses open to the plaintiff for the provisional assurance of their interests pending this litigation: The one, to have sued out a writ of sequestration, which would have necessitated the giving of a bond; the other, to have taken a rule upon the defendants to concur in the appointment of a receiver by the parties." And, upon the application for rehearing it was said: "It is contended that our decision is inconsistent with two cases decided by our predecessors (*Brown v. Insurance Co.*, 3 La. Ann. 177, and *Stark v. Burke*, 5 La. Ann. 740); also with the case of *Pratt v. McHatton*, 11 La. Ann. 260, decided by the present bench. *Brown v. Insurance Co.* and *Stark v. Burke* were cases of insolvent corporations, and the appointments were made by the court, *ex necessitate*, in the absence of parties able to appoint a liquidator or a receiver. In *Pratt v. McHatton* no objection seems to have been made to the appointment of a receiver until the case was in the supreme court on appeal, and the objects of the appointment had been accomplished by the sale of the assets of the partnership." *Martin v. Blanchin*, 16 La. Ann. 237.

As the result of the decisions thus referred to, the doctrine was established that the authority of the courts of this state to appoint receivers for corporations and partnerships was limited, where corporations were concerned, to cases in which they were without representatives, and their property was in a manner derelict, or to those in which the parties interested consented to and practically made the appointments, and asked the courts to ratify them, and, where partnerships were concerned, to cases in which the applicants called upon those as against whom the applications were made to concur in the appointments. If, during the period over which this jurisprudence extends, the ap-

pointment of a receiver was asked or sanctioned in any class of cases other than those mentioned, the fact has escaped a most careful research. There have, no doubt, been members of the bar and of the bench who were disposed to think that the authority by virtue of which receivers were appointed in the particular cases mentioned might reasonably be extended to other cases, and the interpretation placed by this court upon the law applicable to the subject had undergone some modification prior to the adoption of the present constitution. But in recognizing that fact, in a comparatively recent case, this court took occasion to say that a proper limit had been reached in the exercise of such power, and that the courts ought to go no further unless expressly authorized by legislative enactment; the language used being as follows: "Our courts, without any statutory provision upon the subject, have, in aid of their jurisdiction, and as warranted by the exigencies of cases, adopted and established the practice of appointing receivers. But this has not proceeded farther, and should not, without legislative enactment, proceed farther, than in making such appointments in cases where the parties litigant agree that it be done, or where it is necessary to the execution of a judgment of the court, or in a case where, the property in controversy being under seizure by a writ of the court and in custody, it is necessary, as a conservatory process, to care for or administer the same, or where the property of a corporation is abandoned, or there are no persons authorized to take charge of and conduct its affairs, or where it is done in aid of proceedings pending before the court for the liquidation of the affairs of a corporation, and rendered necessary for the preservation of the interests of all concerned." In *re Moss Cigar Co.*, 50 La. Ann. 793, 23 South. 544.

Upon the question of the necessity for affording a hearing to the parties interested before appointing a receiver in any case the decisions of this court have been uniform and emphatic. In *State v. City of New Orleans*, 43 La. Ann. 829, 9 South. 643, it was said (quoting from the syllabus, which is fully sustained by the text): "Courts have no power to appoint a receiver *ex parte*, without notice to, or hearing of, the parties in interest." And to the same effect are the decisions in *Ober v. Manufacturing Co.*, 44 La. Ann. 570, 10 South. 792, and *Mestier v. Pavement Co.*, 51 La. Ann. 142, 24 South. 799.

In view, no doubt, of this jurisprudence, the condition of affairs with regard to the appointment of receivers for corporations and partnerships was considered unsatisfactory, and the framers of the present constitution deemed it advisable to place the authority of the district courts for the parish of Orleans and throughout the state beyond further controversy, by distinctly vesting them

with jurisdiction to make such appointments. Article 133 of the constitution accordingly reads, in part: "The civil district court shall have * * * exclusive original civil jurisdiction * * * of all proceedings for the appointment of receivers or liquidators to corporations or partnerships." Article 109 confers like jurisdiction on the district courts throughout the state. And this was followed by the adoption of Act No. 159 of 1898, which specifically regulates the appointment of receivers for corporations. It is reasonable to suppose that the members of the convention that framed the constitution were aware of the fact that in some jurisdictions the courts have authority, recognized as inherent, or, as in most cases, conferred by express grant, to appoint receivers in other cases than those for which they thus provided, and the fact that they did not see fit to vest such authority in the courts of this state, but confined the grant to the cases specified, justifies the presumption that it is not the intention that it should be exercised in any other cases. "Where the legislature has prescribed the cases in which a receiver may be appointed and other provisional remedies granted, the specification of the cases in which a receivership may be had excludes every other case, and prohibits the appointment except as authorized." 20 Am. & Eng. Enc. Law (1st Ed.) p. 31. This rule of construction is applicable in the instant case not only to the constitutional and statutory provisions specially referred to, but to the pre-existing conditions. In *Gridley v. Conner and Brown v. Insurance Co.*, cited *supra*, it had been found that our law failed to provide for the administration of the affairs in the one case of a partnership, and in the other of a corporation; and it was therefore held, under Civ. Code, art. 21, that it was competent for the courts to proceed according to equity. In the instant case we have neither a partnership nor a corporation to deal with, but a litigation involving the right to obtain a personal judgment against an individual, and to have certain movable assets, which are beyond the limits of the state, decreed to belong to a succession which the plaintiffs seek to reopen. Whether we consider the proceeding in the one or the other of these aspects, or as a whole, it cannot be said to present a condition for which the law has made no provision, and with respect to which the courts should undertake to provide a new and untried remedy. For the purposes of an ordinary action by one individual against another, the plaintiff may call to his aid either or all of the conservatory writs authorized by the Code of Practice. But those writs are more or less harsh in their operation, are invoked at some risk, and are issued only upon a strict observance of the requirements of the law. As to the matter and manner of dealing with successions and with the property of successions, the provisions of our law are at once spe-

cific and comprehensive; the methods to be adopted by the courts and the agencies through which they are to act being regulated with the utmost particularity, and forming a system the mastery of which may be regarded as amongst the most imperative requirements of a legal education in this state. The proposition involved in the appointment of a receiver in this case is that these various provisions of the law are inadequate for the accomplishment of the particular result which the plaintiffs have in view, and that for the purposes of an ordinary suit, or, for a proceeding to reopen and administer a succession, and to secure the possession of movable property and money situated in a foreign jurisdiction, the courts of this state are to ingraft onto the legal machinery and remedies which the lawmaker has thought proper to provide, something additional, for which no law can be found. Or to state it more specifically, that to the writs of attachment, arrest, sequestration, injunction, execution, etc., and to the offices of executor, administrator, curator, judicial sequestrator, and sheriff, there shall be added by the courts a receiver, vested in this instance with authority to demand and recover property and money said to belong to the succession of M. A. Dauphin, whether found within the limits of this state, or of some other state or country, and whose course of procedure is to be governed by the advice to be given him from time to time by plaintiff's counsel. In considering this proposition the question presents itself, what would the lawmaking department of the government do with it if it were presented to that department? We know that almost at the end of a century the people of this state assembled together for the purpose of framing our fundamental law, authorized the appointment of receivers in cases of corporations and of partnerships, but that the authority to make such appointments in other cases was and has ever been withheld. If that convention were reassembled, have we any assurance that it would supply the omission, and would provide that receivers should be appointed to successions and in ordinary cases, and should be vested by the courts with authority to execute judgments thereafter to be rendered, and to go into foreign jurisdictions and there to act as they may be advised by counsel representing one or more of the parties litigant? And supposing that this question could be answered in the affirmative, would it not show that the matter is within the domain of legislative, rather than of judicial, action? And if that be true, is it not apparent that, the lawmaking power having taken such action as to it seemed proper, the judiciary would be exceeding its authority in attempting to amend the action so taken?

The case of *Schwan v. Schwan*, 52 La. Ann. 1183, 27 South. 678, which seems to be somewhat relied on to support the action here complained of, is inapplicable. In that

case there was a judicial sequestration of property within the jurisdiction of the court. The writ issued was therefore one provided by the Code of Practice. The district court had also appointed a receiver for a corporation domiciled in New Orleans, but the appointment was set aside by this court.

The only other question in the case before us is that arising from the action of the respondent in directing the clerk to withhold the application to and the order made by him from the files of the court. This was unauthorized. The law requires the clerk of the civil district court to enter upon the docket "every proceeding as the same is had." Act No. 136 of 1880, § 6. And it is not a sufficient answer to this to say that the purpose intended to be accomplished by the appointment of a receiver might be defeated if the interested party is prematurely informed of it. The same thing might be said in cases of arrest, attachment, etc.; and yet the law requires the affidavit and bond in such cases to be filed before the writs issue, and the petition the next day. Moreover, whatever may be the rule elsewhere, it is established jurisprudence here that a receiver is not to be appointed in any case without previous notice to the parties who may be interested in opposing such appointment. See *State v. City of New Orleans*, and other cases heretofore cited.

For these reasons, and whilst we fully appreciate the motives of our learned Brother of the district court, we are constrained to hold that the order appointing the receiver, and the manner of its making, were unauthorized by law. It is therefore ordered, adjudged, and decreed that the rule nisi herein issued be made absolute, and that the respondent be prohibited from further proceeding in the matter of the receivership of which the relator complains.

BREAUX, J. (concurring). The court's power under the rules of the Code of Practice is limited to issuing a judicial sequestration. As relates to a foreign state, and its recognition of a receiver, or its disregard of the writ of sequestration and its office, I only desire to say that, under the auspices of the great principles of the comity of nations, it does not seem that there is good reason to recognize the former (i. e., the receiver), and to refuse in any manner to give recognition to the latter (i. e., the writ of sequestration). At any rate, if sequestration cannot be made effective, I do not discover anywhere authority to substitute the appointment of a receiver to act in place and stead of a sequestration. The change and departure from the rules of practice in substituting the receiver in place of the sheriff to execute the writ, in order to obtain the recognition of a foreign state of proceedings here, and to act as ancillary to a suit before a court of this state, would be too great an innovation to be made and taken without ex-

pressed statutory sanction. I concur in the decree.

BLANCHARD, J. (dissenting). M. A. Dauphin married Cecilia Choppin in 1868. There were no children of this marriage. Cecilia, his wife, died in 1883 intestate. Her estate consisted of her share of the community property acquired between the time of her marriage to Dauphin and her death. Her succession was not opened. No inventory was taken or other record made of the property of the community. The husband kept possession of the property and administered the same for his personal use and advantage. In law, he was entitled to the usufruct of his dead wife's share of the community property. In 1887 Dauphin married a second time. His second wife was Rosa Labranche, who is the relatrix herein. The community of acquets and gains existed in this marriage also. No children sprang from the marriage. Dauphin died in 1890, at which time his mother, Mrs. Barbara Dauphin, was still alive, residing in Germany. He left a last will and testament which contained a few special legacies and constituted his surviving wife, Rosa Dauphin, universal legatee, and she and Paul Conrad were named as executors. The will was probated, the executors qualified and an inventory was taken. Heirs of Cecilia Dauphin, the first wife, appeared and asserted their rights to one-half of the first community, and in 1892 a judgment was rendered fixing the value of the first community and the sum which the heirs of the first wife should recover. It was a compromise settlement. Mrs. Barbara Dauphin also asserted her rights as forced heir of her deceased son, claiming that as such she was entitled to one-third of his estate in addition to the special legacy which the will bequeathed her. She then, for \$30,000, sold to Paul Conrad, one of the executors, all her right, title and interest in the succession, both as special legatee and as forced heir. Conrad, subsequently, sold to Mrs. Rosa Dauphin, the surviving second wife and his coexecutor, the interest he had thus acquired. Subsequently the executors filed their final account, which was in June, 1892, homologated, the executors discharged and Mrs. Rosa Dauphin sent into possession as universal legatee. Matters continued thus until April, 1901, when the heirs of Cecilia Dauphin, the first wife, brought suit by petition filed in the record of the succession of M. A. Dauphin, to annul, on the ground of fraud, the judgment rendered in 1892 fixing, determining and limiting their rights as heirs of the deceased first wife. They averred that their suit was brought within the year of the discovery of the fraud and ill practices of which they complain. The prayer of their petition is that the judgment which they attack be annulled and vacated in so far as it undertakes to determine the property rights belonging to the succession

of Cecilia Choppin, or the interest of her succession in the community which had existed between her and M. A. Dauphin, her husband, and that the articles of agreement and compromise between themselves and Mrs. Rosa Dauphin be decreed to be null and void and of no effect because of the same fraud and concealment which they claim vitiates the judgment; or that, if it be held the compromise is not wholly null and void, then the effect of same be limited and restricted to the purchase of their interest by Mrs. Dauphin in the property specifically enumerated in the act of settlement and compromise. The petition had set forth in what particulars there had been fraud practiced upon the petitioners and concealment made of large and valuable interests in securities, giving a list of same, aggregating more than \$100,000, asserted to belong to the first community and in which they were entitled to share as heirs of the first wife, and predicated upon this was the additional prayer that Mrs. Dauphin be condemned to account for said securities, or in default to pay the petitioners so much of their value as should be adjudged to belong to the succession of Cecilia Choppin. An amended petition was filed setting forth other securities of large value which it is asserted were concealed and never accounted for in the settlement made of M. A. Dauphin's succession, and which pertained to the community of the first marriage. Another amended petition was permitted to be filed, the prayer of which was that the judgment rendered in the succession of M. A. Dauphin in 1892, in so far as it affects or purports to affect any securities, moneys and property not inventoried and not accounted for, be annulled and vacated, and a further decree is asked adjudging to be the property of the estate of M. A. Dauphin (1) all the securities and property, or their proceeds, and the cash moneys specifically described in the original and supplemental petitions; (2) all securities, assets, property and moneys fraudulently concealed and withheld from the inventory and not accounted for; (3) all profits, accumulations and securities made or purchased with the use of the securities or their proceeds, or the cash moneys concealed or abstracted and withheld from the succession of M. A. Dauphin; (4) all securities and assets which have been exchanged for or acquired with the said abstracted cash moneys, the said abstracted securities, or their proceeds, and the profits made therewith. And it was additionally prayed that in default of the recovery of the original securities and property, and the securities, assets and property acquired therewith, the succession of M. A. Dauphin and plaintiffs have judgment against Mrs. Rosa Dauphin for the value thereof. And further that the judgment of June, 1892, in so far as it closes the succession of M. A. Dauphin and discharges the executors, be set aside; that the succession

be reopened and a dative testamentary executor be appointed; that all property, moneys, securities, their proceeds or profits, and acquisitions therewith, not inventoried and accounted for, be brought back into the succession subject to be administered, and then distributed to the parties entitled thereto.

The filing of the amended petition last referred to was vigorously contested. But whether it was or was not properly allowed is matter for appeal. We are not concerned with the ruling of the trial judge thereon in the present proceeding, further than it may be taken into account, as part of the case, in determining the legal issue here presented, viz.:—whether the trial judge has exceeded his powers in any act done or performed in the cause up to this time, warranting the issuing against him of the writ of prohibition applied for. It is well settled the writ of prohibition will not issue to cure or correct matters that may be remedied by appeal. The same is true of the writ of certiorari which has for its object inquiry into the validity of proceedings had. At or about the same time this amended petition was filed, a petition of intervention in the cause was by leave of the court filed by Jules Dauphin and others, alleging themselves to be the children and grandchildren and forced heirs of Mrs. Barbara Dauphin (deceased mother of M. A. Dauphin). They averred that their mother, Barbara Dauphin, was the sole legal and forced heir of M. A. Dauphin, when he died, for one undivided third of his estate. They referred to his will and to the legacy left his mother; to the amicable settlement and adjustment of her rights, as legatee and forced heir, that had been made in 1802, in and to the property inventoried, with Mrs. Rosa Dauphin, the universal legatee under the will; that the settlement was effected at the request of the universal legatee; and that it took the form of a sale of her rights by Mrs. Barbara Dauphin to Paul Conrad, one of the executors, but was in reality a purchase by and for account of Mrs. Rosa Dauphin, the coexecutrix, to whom Conrad, shortly after, made formal transfer. Then follow like allegations as to fraud and concealment practiced upon Mrs. Barbara Dauphin by the universal legatee and her co-executor in bringing about the alleged amicable settlement, as are set forth in the petitions filed by the heirs of Cecilia Choppin, first wife of M. A. Dauphin, and the averment of the late discovery of the same by the interveners. The prayer of this petition was for the annulment of the judgment in the succession of M. A. Dauphin rendered in June, 1802, as having been procured by the production of false records and upon false evidence; that the executrix (the coexecutor being dead) be destituted and removed from her trust as executrix; and that a dative testamentary executor be appointed with directions to recover and reduce to possession the property and assets of the estate not heretofore inventoried and accounted for, and to admin-

ister the same. There was further prayer for judgment against Mrs. Rosa Dauphin for sums averred to be due by her, etc., and otherwise the interveners prayed for the same relief that is asked by the heirs of the first wife, not inconsistent with their rights as set forth. Objection to the filing of this intervention was made by Mrs. Rosa Dauphin, but, like in the case of the filing of the amended petition heretofore referred to, the ruling of the court thereon is matter for appeal. The trial judge may or may not have erred in permitting it to be filed, but since it is filed and since his action thereon can only be determined on appeal, which can be taken only when final judgment is rendered, the intervention is *pro hac vice* part of the case and to be considered in determining the issue immediately raised.

It appears from the record as sent up by the respondent judge in obedience to the rule nisi, that the trial of the cause has been had so far as the submission of evidence is concerned, but that argument is yet to be heard before submission to the court is made. It seems taking of evidence was concluded on March 12, 1902, and the case set for argument on April 1st, but was continued to the 15th, and then to the 20th of May. Early in May affidavits were presented to the judge on behalf of the plaintiffs and interveners, making representations which, in his opinion, called for prompt and decisive action on his part. One of these is by Sherbonne G. Choppin, one of plaintiffs, who, after stating the absence from the jurisdiction of the court of his coplaintiff, deposes:—"That he is advised, informed, believes and, therefore, avers the fact to be that Mrs. Rosa Labranche Dauphin, the defendant in the case, whose acts and conduct are the subject of investigation here and against which proper relief is sought by plaintiffs, is disposing of her property, or converting the same into money or other evidences of indebtedness with intent to place it beyond the reach of judicial process and the demands of the plaintiffs; and he is further advised, informed, believes and so charges the fact to be that her purpose and intention is, within the immediate future, to leave the United States and seek refuge in some foreign country, or parts unknown to your affiant." The affidavit then goes on to say that if she should remove her property beyond the jurisdiction of the state or of the United States, or should convert the same into money or evidences of debt, affiant's interests and those of the other plaintiffs will be endangered, and that in the event he and they should obtain the relief sought, the process of the court will be ineffective and the ends of justice defeated. Another affidavit by Walter J. Gex, an attorney at Bay St. Louis, Hancock county, Mississippi, recites that on the 30th of April, 1902, there was filed for record in the office of the chancery clerk of that county a deed from Mrs. Rosa Dauphin to one Michel, conveying real estate and personal property, including the residence oc-

cupled by Mrs. Dauphin at Waveland in Hancock county, the consideration recited being \$7,000, less than its true value. At the time these affidavits were presented to the respondent judge, the plaintiffs and interveners filed a joint petition setting forth that Mrs. Rosa Dauphin, with the view of defeating the court's process and its judgment, should one be rendered against her in the pending cause, had caused to be removed from the jurisdiction of the court the movable property of the succession of M. A. Dauphin, consisting of securities and money, which had been on deposit in the vaults of the Whitney National Bank at New Orleans, of a value, it is alleged, of over \$400,000; that this removal had been effected December, 1901, without notice either to the court or the parties litigant; and that the securities and money aforesaid had by her direction been turned over to one George Michel, who, through her instrumentality, had been kept without the jurisdiction of the court, evading its process, though himself a resident of New Orleans. The petition further recites that the property and credits thus removed was the matter at issue and involved in the pending litigation and had been prior to its removal subject to the jurisdiction of the court for administration and disposition in accordance with law, and it was necessary to take steps to vindicate the jurisdiction of the court and the rights of the parties litigant in respect to same, and to this end, and in furtherance of the ends of justice, it was essential that a receiver should be placed in charge of the property, credits, rights and assets of the estate of Dauphin and more particularly of the stocks, bonds and other securities pertaining to the same—said property and securities to be held by the receiver until final hearing and determination of the cause, with the right in the receiver, when appointed and qualified, to take such further action in this and other jurisdictions as may be necessary and proper in conservation of the rights of the parties litigant and in safeguarding the jurisdiction of the court against evasion, etc. The allegations of this petition were sworn to by that one of the plaintiffs who is within the jurisdiction of the court.

The prayer of the petition is for the appointment of a receiver, with power to take possession of and keep in his custody all the moneys, stocks, bonds and negotiable securities abstracted from and belonging to the succession of Dauphin, subject to the further action of the court, with power to take such proceedings in other jurisdictions as may be necessary to reduce to his possession the property and securities which had been removed out of the jurisdiction of the court. Whereupon, the respondent judge made this order:—"Considering the averments contained in the foregoing petition and the affidavit supporting it, and also the affidavits of Walter J. Gex and S. G. Chopplin, and considering the issues formulated and the evidence adminis-

tered in this cause, without prejudging the cause at this time, or expressing any opinion with reference to the views entertained by me, either on the merits of the controversy, or the legal propositions involved, * * * but with the view to conserve, in the interests of all parties to this controversy, the rights of the parties, and to have subjected to the court's process, whatever may be its future action, the control of the property the subject of this controversy, it is now ordered that Jno. J. Frawley be appointed as receiver of all the property, rights and credits, of whatever nature or kind, claimed as belonging to the late M. A. Dauphin, which were not inventoried or embraced in the succession of the said Dauphin, the said receiver being directed to demand of Mrs. Rosa Labranche Dauphin, defendant, possession of the following stocks and bonds and negotiable securities, to wit:—[Then follows a list of the securities.] And the dividends arising from said stocks, bonds and securities since 1891, as well as interest upon said current money charged to have been abstracted from and not inventoried in the succession of M. A. Dauphin; that this right to demand possession and control and to have the custody and keeping of said stocks, bonds and money, as well as all stocks, bonds and money now in the hands or under the control of said Rosa Dauphin, being the fruits or proceeds of the conversion of the bonds as specified, shall be upon said Mrs. Dauphin and those holding for her and under her direction, with the right in said receiver, if he is so advised, to invoke the aid of other jurisdictions to enable this court, primarily charged with the administration of the succession of M. A. Dauphin, to have control and direction of the property of said succession; that the said receiver shall take the oath required by law, and shall inventory the property coming into his possession, whether it be specific and in kind, or whether the items above enumerated were sold and the proceeds reinvested in other securities; that said Rosa Labranche Dauphin is hereby commanded to surrender the same to said receiver upon his issuing to her his receipt therefor. Said receiver to give a bond of one hundred thousand dollars for the custody and safe-keeping of the property coming into his possession as receiver under the orders herein—the purpose of this order being to preserve said property pending this litigation." When this order came to the knowledge of the defendant, Mrs. Dauphin, she applied to this court for its writs of certiorari and prohibition. In her petition, after giving the history of the litigation and the progressive steps leading up to the order, she charges that following the granting of the order the judge authorized the withholding of the papers from the files of the court, so that neither relatrix nor her counsel timely knew of the filing of the same, nor of the order made. She also charges that copies of the petition for the appointment of receiver and the or-

der making the appointment were presented to the chancery court in Mississippi, and, thereupon, that court appointed a similar receiver in and for the state of Mississippi, in order to get possession of her property in Mississippi at Bay St. Louis, where she is temporarily sojourning. She avers that she knew nothing of the proceedings referred to until the 18th of May; that the order appointing the receiver was not only *ex parte*, but pains were taken to keep from her knowledge of the same for more than a week after the papers were filed. She charges the nullity of the appointment of the receiver, and that the proceedings taken constitute an attempt to deprive her of her property without due process of law, etc. She denies that any court of the state has jurisdiction to appoint a receiver in the manner and for the purposes shown in the proceedings referred to, and avers that in making such appointment the trial judge exceeded his jurisdictional powers, and that he should be prohibited from taking further action in the matter of the receivership. She, accordingly, prayed for writs of *certiorari* and prohibition.

To the rule nisi which issued, the respondent judge made answer as follows:—"In obedience to the orders of this honorable court, I have directed that the record in the matter of the succession of M. A. Dauphin be transmitted for examination. In answer otherwise I submit the following as my reasons for taking the action complained of by *relatrix*: The evidence oral and documentary produced before me, during the trial of the pending case of the heirs of Choppin v. *relatrix*, has established that the stock, bonds and values, appearing on what is known as the 'Poché List,' formed part of the estate of M. A. Dauphin, at his death; that they were never inventoried nor accounted for by *relatrix*, as executrix, nor by Paul Conrad, deceased, her co-executor, but that *relatrix* has personally held the same, collecting the dividends, and dealing with all this succession property for her own personal account. Knowledge of its existence was withheld from the court and from the heirs of Choppin and the heirs of Dauphin. In her answer to interrogatories, *relatrix* denied all knowledge of these securities. During all the time of the trial, *relatrix* has, on account of ill health as is alleged and shown, been away from her domicile here, and beyond the process of the court, in the state of Mississippi. Paul Conrad, Jr., a witness, was personally summoned here, but before an attachment could reach him, went also into the state of Mississippi. For some reason, plaintiffs have failed to secure the attendance of young Mr. Michel and Miss Michel for examination in regard to said securities, and their removal, after suit brought, beyond the state limits. The heirs of M. A. Dauphin intervened and joined the plaintiffs in claiming said securities. The heirs of Choppin claim them as acquisitions of the community between M. A. Dauphin and Cecilla Choppin,

his first wife. Whether they are legally to go to the Dauphins or the Choppins, or to the *relatrix*, as widow, I do not know and express no opinion. That they do belong to M. A. Dauphin's succession and that they have been withheld from the inventory and administration thereof by *relatrix*, personally, clandestinely, and for her own personal use, there is no doubt. When the heirs of Choppin and Dauphin applied for a receiver, I had no doubt of my duty as probate judge to have this abstracted property returned to the succession. Judicial sequestration seemed a remedy, but as the property is concealed and in another state, and has to be sued for there by ancillary proceedings, to get it from the *relatrix*, who was Dauphin's executrix, it was suggested that a receiver with letters would be recognized by any court of another state, while a judicial sequestrator would not. Names are nothing, substance is everything. So I concluded to appoint a receiver, finding, by examination of the authorities produced, that I had the power to do so. I appointed the receiver and ordered letters upon his giving bond. I ordered, for good reasons, suggested by counsel, that the clerk keep the papers relating to this matter from publicity. The petitioners feared that, if notified, the *relatrix* would place the property and herself beyond pursuit. On the same principle, indictments are kept on secret files until the accused can be arrested. When search warrants issue, the person to be searched is not notified in advance, nor is the defendant, whose goods are to be attached. Considering that *relatrix* had placed herself beyond the state limits and had removed the succession property there, and that she denied its existence and conceals it, if plaintiffs' evidence, allegations and affidavits be true, I felt it to be my duty to take all necessary measures to vindicate my jurisdiction, as probate judge, over said property, and to cause its return, for administration and disposal, for whom of right. To this end, I appointed a receiver whose bond and letters would give him standing in the tribunals in our sister state, that by ancillary proceedings he might recover and bring back to this jurisdiction the concealed and abstracted property, and I directed that the matter should be kept from publicity until he should be in a position to act effectively, and no longer, and this was done as directed. I accept service of *relatrix*'s petition and waive all notice and delays and will render faithful obedience to whatever may be the further orders of this honorable court, whose sole desire I well know, as is my own, is to see justice done and that the law shall not prove weak and shrinking, where justice requires that it should be strong and firm."

The history and facts of this case make it one out of the ordinary. The inquiry, on this proceeding, is limited to one of jurisdiction. Code Prac. art. 845. If the respondent judge exceeded his powers the writ of prohibition should reach him. If his powers have not

been exceeded, but erroneously exercised, the remedy is by appeal. Much discretion is wisely vested by the law in the trial judges. They are not to be interfered with, in the administration of justice, except for weighty reasons and upon a clear showing of powers exceeded. This court, in *Schwan v. Schwan*, 52 La. Ann. 1187, 27 South. 678, through Mr. Justice Monroe, said:—"The judge a quo had the right to hear and determine the case as presented to him. His competency, as to the persons who were before him, and as to the subject matter, is not questioned. Whether it was proper for him to make the particular interlocutory order which we are now considering, was a question which, as part of the whole case, the obligations of his position compelled him to decide, and he was, of necessity, vested with jurisdiction in the premises. Jurisdiction means the power of him who has the right of judging, and the competency of the judge, quoad the subject-matter and the parties litigant being conceded, it includes not only the power expressly conferred by law, but all such power as may be necessary to the full exercise and enjoyment of that expressly conferred." Citing Code Prac. arts. 130, 877; Civ. Code, art. 21. The case now under consideration is one wherein knowledge is brought to the judge that the very property forming the subject-matter of the litigation pending before him—securities of very large value—had been withdrawn from the immediate reach of the process of his court and conveyed to Bay St. Louis, a town in the state of Mississippi, a few hours' run from the city of New Orleans, and that the defendant in the litigation had herself withdrawn there—thus virtually placing herself and the property in contest beyond the territorial reach of the court. The issue in the suit pending in his court is whether the securities thus deported out of the state belong to the succession of M. A. Dauphin. That is the question involved. If they do, then are they to be administered by the reopening of that succession, and distributed to those who, as heirs, are entitled to same. The case is not, as we have seen, yet submitted to the judge, but the evidence is in and it only awaits the argument to make the submission. But through the evidence adduced the judge is in possession of all the facts. If the securities involved are splitrled away then is all the labor of the long trial to avail nothing. In order that the property may be kept and retained in reach of the court, to respond to whatever judgment may be rendered, it was necessary for the judge to act and act promptly on the showing of deportation of the securities made to him. It was a case which seemed to justify resort to judicial sequestration, which, at the discretion of the judge, may issue without affidavit and without bond. Code Prac. arts. 273, 274. But a writ of judicial sequestration placed in the hands of the sheriff would have been idle. He had no authority to go into

Mississippi, where the securities had been conveyed, and take possession of them. As an officer of a Louisiana court he would be without authority to act in the neighboring jurisdiction. Was nothing to be done? Was the court powerless under the circumstances? I think not. Ancillary agencies could be invoked. True Civ. Code art. 2981, says:—"The judicial sequestration is confined to the public officer whom the law provides to execute the orders of the judge." But suppose the public officer, as in this case, could not "execute the orders of the court"—did that fact paralyze the arm of the court and render its powers in matters of ordering judicial sequestration nugatory? I hold not. In the jurisdiction of the neighboring state, whither the securities had been taken, the chancery court will recognize the appointment of a receiver made by the courts of other states, and on production of such an order from a court of another state will, on proper proceedings taken, invest such receiver with the powers of a receiver under the laws of Mississippi. In this way and this way only could the securities be apprehended and placed in custodia legis to await the determination of the rights of parties litigant to them. Had they been here, the sheriff, armed with the writ of judicial sequestration, would take possession of them. In Mississippi that other officer who is called a receiver, armed with appointment by the court here and the Mississippi court, will take possession of them, eventually to be returned to this jurisdiction and "confided to the public officer," in the language of the Civil Code, "whom the law provides to execute the orders of the judge." The respondent judge, acting under his powers relating to judicial sequestration, issued the only order that was effective to the consummation of the end in view—the apprehension and legal custodianship of the securities. He appointed what is called a "receiver." Call him what you may, he was at last an officer appointed to effect the judicial sequestration. In Mississippi they would not have known him by the name of judicial sequestrator; they do know him when he is called a receiver. There is nothing in names. The purpose and effect is what the law concerns itself with. The judicial sequestrator, whom, under the name of receiver, the respondent judge appointed, could invoke, or parties in interest could invoke, ancillary proceedings in the chancery court of Mississippi, and thus the purpose and intent of the Louisiana law would be effectuated through the aid of the judicial power of a sister state. There is nothing in the Louisiana law which prohibits this; nor is there anything in sound public policy militating against it. That was the course pursued and the chancery court of Mississippi had granted the order and it was in process of execution when the relatrix applied for the relief herein sought.

It is objected that the order of respondent judge appointing this judicial seques-

trator, called a receiver, was *ex parte*. If it be a judicial sequestration that is sought, and I hold it is—that and nothing more—such orders may be *ex parte*. While an order of judicial sequestration is usually issued at the request of one of the parties to the suit, it may be issued by the court *ex officio* (Code Prac. arts. 273, 274), and it is nowhere provided that notice is first to be given. A sound discretion in such matters is vested in the trial courts.

It is objected that the Code of Practice says nothing in regard to the appointment of a receiver as ancillary to a judicial sequestration, or to aid in its accomplishment. The answer to this is it is well settled that the Code of Practice does not exclude all other remedies. *Morris v. Cain*, 35 La. Ann. 763; *Clarke v. Saloy*, 2 La. Ann. 988; *De Lizardi v. Gossett*, 1 La. Ann. 138; *Fortier v. Sildell*, 7 Rob. 398. In *De Lizardi v. Gossett*, *supra*, the court, commenting on the absence of express law for what was sought there, said:—"Commanded to proceed in this cause and to decide it justly, notwithstanding the silence of the law, we consider it safe to resort to proceedings analogous to those by which the courts of the other states have reached the equity of cases of this description." In *Clarke v. Saloy*, *supra*, commenting on the character of proceeding there taken, the court said:—"If any provision of law could be cited forbidding such an action, we should be bound to obey it, however questionable its policy; but, in the absence of such a prohibition, the true test is, whether the ends of justice, for the determination of which courts were established, will be promoted and accomplished by the maintenance of this action." The opinion then goes on to say that the situation of the parties was to be considered, and, where the legislator, on the particular subject, is silent, analogies arising from existing legislation could be taken into view, and assistance might be gathered from the practice of courts of justice in other civilized countries. 2 La. Ann. 988. In *Morris v. Cain*, *supra*, the court said, in reference to a proceeding in the nature of a bill of interpleader in chancery:—"It may be admitted that the textual provisions of our Code of Practice do not provide for such a remedy, but under article 21, Civ. Code, and on general principles, this court has often held that the Code of Practice does not exclude all other remedies than those therein provided for, and that the courts will afford other appropriate remedies where not prohibited."

The order issued by respondent judge and which is the subject of this attack, as we construe it, relates only to property and funds not inventoried nor accounted for in the succession of M. A. Dauphin when the same was formerly under administration by the *relatrix*. It is objected that the order is broad, comprehensive and drastic. Unless it is so much so that it clearly exceeds

the lawful powers of the judge (and I do think this) it is not subject to review in a proceeding for the writ of prohibition. It is rather matter for appeal.

The affidavits hereinbefore referred to as having been presented to the judge about the time he issued the order complained of, were not intended or acted on as affidavits upon which to base an order of sequestration. They were part, merely, of the case presented to the judge as showing the necessity for, and advisability of the exercise by the court of its powers in respect to ordering the judicial sequestration of the property in dispute, pending the suit, for its protection and conservation. Affidavits are not necessary when the court orders judicial sequestration. But they serve the purpose of assisting in making the showing before the judge which he would, ordinarily, require to be made ere he would order the judicial sequestration.

Recurring again to the question of the power of the judge to take the action complained of, this court said in *Schwan v. Schwan*, 52 La. Ann. 1188, 27 South. 678:—"There are many instances in our jurisprudence in which jurisdiction, or power, predicated 'on the right of judging' has been exercised by the courts, though not expressly given by law." The opinion then quotes from the opinion of Chief Justice Eustis in *Gridley v. Conner*, 2 La. Ann. 87, as follows:—"We consider the power of the court to appoint a receiver in a case of this kind to be necessary for the purpose of effecting the object of this suit, which is the liquidation and settlement of a partnership, and it falls within that incidental class of powers which courts have full power to exercise." And then, referring to the obligation of courts to determine and conclude, in the interest of justice and equity, matters of litigation coming before them, the opinion of the learned chief justice continues:—"They have the powers necessary for the exercise of their jurisdiction, although such powers may not be expressly given them by law." Mr. Justice Monroe, in the *Schwan* Case, further quoted approvingly the ruling of Mr. Justice Rost in *Brown v. Insurance Co.*, 3 La. Ann. 177. There Justice Rost, after quoting from an opinion of the lord chancellor of England, to the effect that the courts of chancery might appoint receivers to corporations, said:—"Under the equity powers vested in our courts and the imperative command of our law, that, in cases not provided for, the judge shall proceed and decide according to equity, they might adopt a similar course *if it becomes necessary to prevent a failure of justice.*" (*Italics mine.*) In the *Schwan* Case the following was also quoted from *Eltringham v. Clarke*, 49 La. Ann. 343, 21 South. 547:—"There is a power in the courts, *ex officio*, to direct the sequestration of property to protect the rights of litigants." Cit-

ing in *re Grant & Jung Furniture Co.*, 51 La. Ann. 1254, 26 South. 97, and *State v. Judge of Eighth Dist. Ct.*, 22 La. Ann. 531. And then the organ of the court in the *Schwan Case* said:—"It is undeniable that the appointment of a receiver is practically a sequestration of the property of the partnership or corporation for the liquidation of which the receiver is appointed." The same principle is surely applicable to a case like the succession of Dauphin as presented in the litigation now pending before the respondent judge. What the judge did in that case, and which is challenged in this proceeding, finds abundant support in the *Schwan Case*, where a judicial sequestration pendente lite was sustained. There was there enunciated with emphasis the doctrine that "the right to 'judge,' in a particular case, carries with it the power, or jurisdiction necessary to the full and effective exercise of such right." In *State v. Judge of Civ. Dist. Ct.*, 36 La. Ann. 768, it appeared that the judge a quo, upon its being shown that a natural tutor was neglecting his wards and squandering their estate, ordered that he be suspended, that an action be brought for his removal, and that certain securities belonging to the minors be deposited, meanwhile, in the judicial depositary. This court said, on application for prohibition:—"The course pursued by the district judge was directed by a proper sense and appreciation of his sworn duties. This is not the first instance in which the exercise of extraordinary powers was sanctioned by this court, on the part of a judge similarly situated." Citing *Succession of Walker*, 32 La. Ann. 324. In *Succession of Carcagno*, 43 La. Ann. 1151, 10 South. 251, the judge a quo had ordered a bank, in which a tin box was deposited, to hold the same, upon the representation that it contained property belonging to the succession, although the box was deposited in the name of a third person, who claimed to be the owner. Upon an appeal from an order for the taking of an inventory of the contents of the box, and for the delivery of the key, this court said:—"Under the terms of the order, its only effect was to hold the box where it was until its contents were ascertained; and when the possessor prevented its opening, the box simply remained in the custody of the bank until the further order of the court. The effect in that case would have simply been that of a judicial sequestration, which we think, in such case, would have been authorized under Code Prac. art. 273—at least until the succession could be represented by the appointment of an administrator, who could provoke the proper conservatory process to protect the interest of the succession." The court in the *Schwan Case* also referred to the cases last quoted from, saying in reference to them that:—"These cases can be regarded in no other light than as recognitions of the pow-

er existing in trial courts to order the judicial sequestration of movable, as well as immovable property, when the exigencies of a particular case require it, and where such a course is necessary to the exercise of the jurisdiction conferred on them." In this connection the court referred to article 1961 of the Code Napoleon, and declared that the federal authorities sanctioned the idea that, in controversies over successions, the sequestration of the property, movable and immovable, may be ordered—citing *Fuzier-Herman*, vol. 4, p. 92, and *Paul Poret*, vol. 8, p. 277. "We, therefore, conclude," said the court in the *Schwan Case*, "that whether we invoke the general provisions of the law, as contained in articles 130 and 877 of the Code of Practice and article 21 of the Civil Code, or the more particular provisions of article 273 of the Code of Practice, or of articles 1085, 1090 and 2979 et seq. of the Civil Code, there was no lack of jurisdiction in the judge a quo to order, ex officio, the sequestration of the succession property, movable and immovable, and that the only question to be determined is whether, 'having the right to judge,' he judged correctly quoad the case in which he exercised that right." The *Schwan Case* was on appeal and, therefore, it was the province of the appellate court to determine whether the trial court "judged correctly." Here, there is no appeal—only an application for prohibition—and whether the judge "judged correctly" cannot arise. The court is confined to determining, did he have the power to judge? I answer the question in the affirmative.

As to the withholding of the papers from the regular files of the court, we have been referred to no law and to no rule of court authorizing the same. When papers in civil causes are presented in court, received and filed, they partake of the nature of public documents and should go on the regular files and be ordinarily accessible to the public, and by all means to litigants. But because they were withheld, in this instance, from publicity or accessibility for a few days, cannot have the effect of rendering void the judge's action in granting the order complained of, if otherwise he had the authority to grant it. If *relatrix* were by law entitled to a suspensive appeal from the order, the time of taking the same would not commence to run against her until she was notified of the order, or until, at least, the same had been entered upon the regular, public files of the court. I am unable to appreciate the great injury to *relatrix* by the proceeding complained of, so strenuously insisted on. If she were to deposit in court the securities in question, or, by arrangement with the trial judge and the plaintiffs and interveners, enough of them to cover the interests of the latter in the event of the court's deciding they had such interest and the extent of the same, there would, doubtless,

be no further molestation of her on that score, and she would go free with the remainder—which is the greater part according to her interests in the succession. The securities so deposited would be as safe in the judicial depository of the court as in her hands, and should it be finally decreed that the claims of plaintiffs and interveners are unfounded, they would be returned to her intact. But whatever of injury there may be to her, if any, by the court's action complained of, there may be far greater injury to the other parties litigant—her adversaries—if the court's action be set aside and prohibited, as is sought herein. For, if, eventually, they succeed in their demands, or part of them, and then there be nothing tangible for the court's judgment to operate on, they will have lost their all involved in this controversy.

For these reasons I respectfully dissent.

(107 La.)

STATE v. COLOMB. (No. 14,508.)

(Supreme Court of Louisiana. June 16, 1902.)

SHOOTING WITH INTENT TO KILL—APPEAL—MOTION IN ARREST—POLLING JURY.

1. The charge, in an indictment, of shooting with a dangerous weapon, includes the subordinate act of assault with a dangerous weapon.

2. This court has no jurisdiction to review questions of fact in criminal cases.

3. Error, to form the basis of a motion in arrest, must be patent on the face of the record.

4. The court is not compelled to poll the jury unless requested.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; T. Don Foster, Judge.

Colomb, alias Valery Robert, was convicted of shooting with intent to murder, and appeals. Affirmed.

Edward Simon, for appellant. Walter Guilon, Atty. Gen., and Anthony N. Muller, Dist. Atty. (Lewis Guilon, of counsel) for the State.

BREAUX, J. The defendant was charged with shooting one Lizzie Lewis with a dangerous weapon, with intent to murder. He was tried, found guilty, and sentenced to 10 years' hard labor. The defendant, in due time, moved to quash on the ground that the indictment did not set forth that the defendant had committed an assault with a dangerous weapon. An easy answer to defendant's contention suggests itself by reference to the fact that the defendant was charged as follows, "With and by means of a dangerous weapon, to wit, a pistol, did shoot one Lizzie Lewis," as shown by this excerpt from the indictment. This was substantially in accordance with the requirements of the statute. The charge that the defendant had committed the act of shooting with a dangerous weapon includes the

subordinate act of assault with a dangerous weapon. It has been repeatedly held, with reference to this crime, that the greater includes the less. It is not essential to charge minor offenses when they are unavoidably included in the charge. *State v. Will*, 49 La. Ann. 1337, 22 South. 378.

The defendant filed a motion for a new trial, which was overruled, and a bill was reserved. This motion presents exclusively matters of fact which went before the jury and were passed upon by that body. The defendant, through counsel, as relates to this bill, says that the jury returned a verdict of guilty with intent to murder; that the evidence refutes the charge. We will not disturb the verdict of a jury on a question of fact. On appeal from the verdict of a jury and the sentence of the district court the supreme court is not vested with authority to review the facts. *State v. Scanlan*, 52 La. Ann. 2058, 28 South. 211. The question of "intent" that is, whether the defendant committed the act with or without "intent" to murder—was one as presented exclusively of fact, and, when decided, as in this case, there is nothing left for the determination of this court.

In his motion in arrest of judgment, the defendant complained on a number of grounds, not one of which affords good reason to arrest the judgment. It is settled by repeated decisions that error, upon which a motion in arrest of judgment is grounded, must appear on the face of the record. The face of the record does not disclose that any reversible error was committed. We none the less will say regarding the complaint made in this motion in arrest that, in our view, if, as defendant urges, the jury was not polled, it suffices that it does not appear that the defendant requested the court to order the jury polled. We are informed by the per curiam in the bill of exceptions that nine of the jurors answered that the finding indorsed on the indictment was their verdict, and that three had not agreed to the verdict. The objection that the names of those who had agreed to the verdict and those who disagreed does not appear in the minutes, is not supported by any requirement of practice or law.

As relates to the law, the defendant, in our view, has no cause to complain, and it therefore only remains for us to affirm the verdict and sentence. For reasons assigned, the judgment appealed from is affirmed.

(107 La.)

STATE v. CAYMO. (No. 14,428.)

(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—INSTRUCTIONS—IDENTITY OF JUROR.

1. A special charge attracting the attention of the jury to the necessity of the identity of the prisoner being proved beyond a reasonable doubt may be refused when the substance of

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2423.

such charge is contained in the general charge. 2. Because the name of one of the jurors was by birth different from that by which he was selected as a juror is not ground for setting aside the verdict, where the community in which the juror has lived all his life, and the juror himself, have not known of this parental name.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Frank D. Chrétien, Judge.

Anthony Caymo was convicted of shooting with intent to kill, and appeals. Affirmed.

Henriques & Dunn (Lionel Adams, of counsel), for appellant. Walter Gulon, Atty. Gen., and J. Ward Gurley, Dist. Atty. (Lewis Gulon, of counsel), for the State.

PROVOSTY, J. The defendant was convicted of shooting with intent to murder. He complains of the refusal of the judge to give to the jury the two following special charges: "Special charge No. 1: The court further instructs the jury that, to justify a conviction of the defendant, the identity of the guilty person must be proved beyond a reasonable doubt, and the jury are not bound to believe that the witnesses were able to identify the prisoner with certainty because they might have sworn positively to his identity; and the jury should not believe so if they themselves are satisfied from the circumstances proved that there is a reasonable doubt as to whether or not the witnesses were able to identify the defendant as the guilty person. And special charge No. 2: So far as regards the question of identity, the court instructs the jury that if they believe from the evidence and the circumstances proved that there is a reasonable doubt whether the witnesses are not mistaken as to the identity of the defendant, then, before the jury would be authorized to convict the defendant, the corroborating circumstances tending to establish his identity must be such as that all the other evidence in the case produces a degree of certainty in the mind of the jury so great that they cannot feel that they have a reasonable doubt as to the identity of the defendant." The judge gives the following as his reasons for refusing the charges: "I refused to grant special charge No. 1 because it had been substantially and fully covered by my general charge. It was, for instance, requested that I should charge that the defendant could not be convicted unless his identity was proved beyond reasonable doubt. I charged: First, 'To prove the crime charged, it must be shown beyond reasonable doubt that the accused shot the prosecuting witness.' Second, 'The onus is therefore upon the state to establish to your satisfaction, beyond any reasonable doubt, the guilt of the prisoner as to the crime charged in this indictment, or any lesser one included in it. If you entertain any reasonable doubt as to any fact or element necessary to constitute the prisoner's guilt. It is your sworn duty to give him the benefit of

that doubt, and return a verdict of acquittal.' The presence of the prisoner, and his identity as the person who did the shooting, were certainly facts necessary to be proved in order to convict; and without the proof of identity or of the fact that he did the shooting, and was therefore present, being established beyond reasonable doubt, under my charge he would have received an acquittal. Third. My charge on the alibi, made as a defense, by itself, covered the charge requested. An alibi, if proved, negatives the presence of the accused. I charged the jury as follows: 'An alibi is evidence of the fact that the defendant at the time the crime is charged to have been committed was at another place, and therefore could not have committed the crime; hence it involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission. All the evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury should have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt, and find him not guilty.' The word 'identification' is not sacramental. The charge given, I believe, covers, in substance and fully, the charge requested, and for that reason I refused to grant it. As to the balance of the request made in special charge No. 1, it has reference as to what the jurors should or should not believe. This is covered by my general charge as fully as it could be done. I stated in my general charge: 'First. You are the exclusive judges of the facts. You find from the evidence what facts have been proven, and what facts have not. For this purpose you determine the credibility of the witnesses, and the weight to be given to their testimony. You have the right to accept as true, or reject as false, the testimony of any witness, accordingly as you are impressed with his veracity,' etc. (See charge.) These remarks apply to special charges Nos. 1 and 2, and having considered these special charges, as requested to be given, fully covered by my general charge, I refused to grant them, as it would be repeating that which had already been said in different words, and, instead of throwing more light upon the subject-matter, these charges would have proved more confusing to the jurors, and would have added nothing to the giving of the defendant of a fair and honest trial, which he certainly had." We think these reasons fully justify the refusal.

Defendant also complains of the refusal of the judge to grant a new trial. The first ground was the refusal of the judge to give to the jury the two special charges above referred to. Of the second and remaining ground, the judge says: "The next ground in the motion for a new trial is based upon the reason that since the trial of the case the accused had discovered that one of the jurors

who was sworn on the panel as George Perry was not, in truth and in fact, George Perry, but one George Garrett. On the trial of this motion considerable testimony was taken, and it was established that when George Perry, the juror, was six years old, that he was adopted by Mr. and Mrs. George Perry; that at that time he assumed the name, or was, rather, given the name, of George Perry, and by that name he has afterwards been known. He made his first communion as George Perry, married as George Perry, started in life under the name of George Perry, was naturalized as a citizen of the United States under the name of George Perry, and that he never knew up to the time the question was raised in these proceedings that he was any one else but George Perry, and he is not, and has never been, known in the community by any other name or any other designation. While it is true that no legal proceedings have been taken for the purpose of changing his name from George Garrett to George Perry, yet the defendant in this case could have suffered no injury from that fact. As George Perry he is as much a qualified juror as he would have been under the name of George Garrett, or, as established by the evidence, Gerhard Henry Lobeck, the party selected as a juror under the name of George Perry, is the identical party whose legal name is Gerhard Henry Lobeck. Gerhard Henry Lobeck and George Perry is one and the same party, and under the name of George Perry he is known in this community. I cannot conceive how the defendant could have been injured in this case, and I do not believe that this is sufficient reason to set aside the verdict of the jury. The cases cited in support of the proposition held by the counsel for the accused are cases in which the jurors taken upon the panel were disqualified under the law from serving as jurors, or, in other words, did not have the qualifications required by law. This is not the question involved here, for George Perry or Gerhard Henry Lobeck is qualified to serve as a juror, and no complaint is brought as to his qualifications. I do not, therefore, consider that this is sufficient ground to set aside the verdict." These reasons amply justify the ruling.

We find no error in the judgment appealed from. It is therefore affirmed.

(107 La.)

BAER et al. v. TERRY et al. (No. 14,354.)¹
(Supreme Court of Louisiana. June 16, 1902.)

LIABILITY OF MARRIED WOMAN—SECURITY FOR HUSBAND—RES JUDICATA.

1. It being shown that by the laws of the state of Missouri a wife, resident of that state and contracting in that state, is capable of binding herself for and with and as security for her husband, the obligation so resulting will be enforced in the state of Louisiana,

whither the obligor had removed, in the same manner and to the same extent that it could or would be in the state of Missouri.

2. To sustain *res judicata* the cause of action must be identical with that declared on in the former suit whose judgment is pleaded in bar. (Syllabus by the Court.)

Certiorari to court of appeals, Second circuit.

Action by Baer Bros. against I. C. and G. C. Terry. Judgment for plaintiffs was affirmed by the court of appeals, and plaintiffs apply for certiorari or writ of review. Reversed.

Hudson, Potts & Bernstein, for applicants.
Andrew Augustus Gunby, for respondents.

BLANCHARD, J. This suit is the sequel of that entitled "Baer Bros. v. Mrs. G. C. Terry and Husband," decided by this court in May, 1901. See 105 La. 479, 29 South. 886. The parties litigant in that case are the same as the parties litigant in this case, and the facts and circumstances out of which grew that litigation and this are set forth in the opinion of the court in the first suit. It is not deemed necessary to repeat them here in extenso. The first suit was against Mrs. G. C. Terry, the wife of I. C. Terry, to recover the price of certain mules which it was alleged had been purchased for, and had enured to, her separate account and benefit, and certain promissory notes executed by I. C. Terry and G. C. Terry were annexed to the petition for reference and filed with it. With reference to these notes this court in its opinion in the former case said: "Defendant is sued as purchaser of the mules, not as maker of the notes; she is sued as a Louisiana wife bound for the price of movables purchased by her for the separate benefit of herself and her paraphernal property; not as a Missouri wife bound on notes executed by her in the state of her domicile, for a debt of her husband. The petition contains not a word of allegation of the laws of Missouri, or of the notes having been executed while defendant was a resident of Missouri. These things in order to be proved had to be alleged; and in this we agree with defendant's counsel. But we differ with the able and learned counsel in his contention that because the notes are made payable in Louisiana, the capacity of the defendant to make them must be tested by Louisiana law. Capacity to contract is tested by the law of the domicile. *Ror. Int. St. Law*, p. 263. Nor do we agree with the counsel's contention that, assuming defendant to have been liable on the notes before she came to this state, the law of this state prohibiting wives from binding themselves for the debts of their husbands precludes recovery against her. That law is satisfied and its whole object and purpose is accomplished when Louisiana wives are protected against binding themselves for the debts of their husbands;—this protection

¹ Rehearing denied June 30, 1902.

² See Judgment, vol. 30, Cent. Dig. § 1092.

is not extended to Missouri wives, and if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate, or dissolve, valid obligations; to such it is a healthful and bracing atmosphere." The plaintiffs were cast in that suit, it appearing, on the proof made, that the purchase of the mules was not by the wife, nor for her account, and that the same did not enure to her separate benefit, nor that of her paraphernal estate. But it was plainly intended, and such is the purport of the language used, that this court, in the former case, did not consider that suit one upon the notes, and that had it been one upon the notes, which were executed in the state of Missouri by defendants then residents of that state, a different result would, upon proper proof made, have been reached. Following this, plaintiffs brought the present action, which is one based directly upon the notes, which are joint obligations of I. C. Terry and G. C. Terry—husband and wife. It is represented that these notes are Missouri contracts, executed in that state by the makers thereof, who were at the time residents of Missouri, and that they are enforceable as Missouri contracts under the laws of Louisiana, whither the makers have since removed and now reside. It is further represented that by the laws of Missouri the wife has the legal right to bind herself as a feme sole, and could and did validly bind and obligate herself jointly with her husband for the payment of the notes, and that under the laws of Louisiana plaintiffs are entitled to enforce the obligation springing from the notes in the same manner and to the same extent that they could be enforced in the state of Missouri. It is proved that the makers of the notes were at the time residents of Missouri, and that the notes were executed in Missouri, being dated at St. Louis. It is shown by a statute of Missouri offered in evidence that a wife is capable of binding herself for and with and as security for her husband, as was done in this instance. Defendants had filed a plea of estoppel and res judicata based upon the judgment rendered in the former suit. Correctly appreciating the views entertained and expressed by this court in its opinion in that case, the district judge overruled the pleas referred to, and rendered judgment in favor of the plaintiffs herein against the defendants jointly for the notes sued on. On appeal to the circuit court of appeals, his judgment was reversed, and a decree was entered up sustaining defendant's plea of res judicata. We are constrained to hold this was error and that the conclusion reached by the district judge was the proper one under the law and the facts.

It is, therefore, ordered that the judgment of the court of appeals be set aside and vacated, and that the judgment of the district court be reinstated as the proper determination of the issues herein presented—costs of all the courts to be borne by defendants

(107 La.)

STATE v. CHARLES. (No. 14,507.)
(Supreme Court of Louisiana. June 18, 1902.)

CRIMINAL LAW—APPEAL—HARMLESS ERROR—CONTINUANCE.

1. Even should error be committed by a judge on the trial of a criminal case, that fact will avail nothing to the accused if the error be as to an immaterial matter, working no prejudice.

2. The matter of continuances of cases is left very much to the discretion of the trial judge, and his action will not be interfered with unless the discretion be plainly abused.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; T. Don Foster, Judge.

Sullie Charles was convicted for stealing, and appeals. Affirmed.

Edward Simon, for appellant. Walter Guilon, Atty. Gen., and Anthony N. Muller, Dist. Atty. (Lewis Guilon, of counsel), for the State.

NICHOLLS, C. J. The defendant has appealed from a sentence under conviction of horse stealing. His grounds of complaint are that the court improperly refused his application to have his case, which had been fixed for trial for a particular day, reassigned for a later day of the term, and because on the trial of the cause, Davis, one of the witnesses on the stand for the state, was permitted, over his objections, to testify that in answer to a telephonic message sent by himself from St. Martinsville to one Numa Gilbeau (the alleged owner of the horse averred to have been stolen) at Crowley, in which he had given him a full description of the horse, and asked him whether the horse was his, he had answered "Yes." The objection urged was that the testimony was hearsay. The court ruled that, "where voices were recognized by parties talking to each other over the phone, testimony directly connected with the crime was admissible, as much so as if they had been in presence of each other in actual conversation." The bill of exception discloses the fact that, after Gilbeau had been so communicated with, "he went from his residence to that of the witness with witnesses, and they identified the horse as his." We understand appellant's objection to reach no further than to the conversation which took place between the parties through the telephone. Conceding that the identification of the party with whom one holds a communication by telephone through recognition of the voice is so uncertain and dangerous as should cause it

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1311, vol. 15, Cent. Dig. § 3045.

to be not receivable in law, we would find no occasion to reverse the verdict of the jury and sentence of the court by reason of the court's having permitted this particular conversation to have been received in evidence. The conversation was without significance in the case. It was an immaterial fact as to how and when Guilbeau became apprised of his horse's being in the possession of Davis. The identification of the horse and the proof of ownership were not through the declaration of Guilbeau then made, but through his testimony, and that of others taken at the trial.

Defendant, on the 12th of May,—the day assigned for the trial of the cause,—moved the court for a reassignment of the same. He averred that, owing to his penury, being in jail, he had been unable to employ counsel to defend him; that he had found recently, since the recess of the court on the 10th inst., an attorney, to wit, E. Simon, Esq., who had agreed to defend him; that he is entitled for the above reasons to a reassignment of the case for trial, and a continuance thereof up to that time; that one of his witnesses—Phyllis Baudouin—resided at Crowley, La., outside of this parish; that he expected to prove by said witness that he did not steal the horse; that he lived in Crowley, in Acadia parish, then, and was there up to 21st of January; that he had also another witness, a nonresident, whose home he could not ascertain just now, but which he would later on, who pretended that he would identify him, but did not; and another witness, —J. B. Jackson, of Beaumont, Texas,—who would prove he was all January in Beaumont; that the attorney for his defense had had no time to prepare his defense and procure his witnesses; that he is willing to do all the diligence possible, and has thus far made all the diligence he could in the matter; that the evidence of said witnesses is material; that he expects to be ready for trial, and will procure his witnesses and their evidence for that time; that this application is not made for delay, but to obtain justice. The reassignment was refused for the following reasons assigned by the judge: The facts are that the defendant was arraigned on the 5th or 7th of May, 1902; that he was represented by counsel, who was Judge Edward Simon, who pleaded not guilty for him, and asked for trial by jury. This case was fixed, without objection, for the 12th day of May, 1902. A rule of court is, before entering upon regular business of the day the court calls for motions. Counsel who represented the accused, at the time of the arraignment and at the time the motions were being called for on the day the trial was fixed and before the regular business of the day had been called, arose, and stated to the court that he desired his name to be stricken from the records as counsel of the accused, because the party accused had not complied with the agreement as to the pay-

ment of the fees entered into by the bar of the parish, but at the same time stated that he had agreed to take the case of the accused out of charity. The court thereupon stated to him that this would be a matter to come up when the accused was called for trial. After all the motions were over with, and the case was called, the counsel then stated as above, and asked for a reassignment of the case, because he had only been spoken to on the Saturday previous, and the arrangements as to his fee had been made through the father of the accused. Then as a fact he had no time to summon witnesses, one of whom is named Elias Baudouin, living in Crowley, La., and the other, by name of Jake Johnson, living in Beaumont, Tex. The order book shows that said two witnesses were summoned four days previous to the trial by an order of the accused given to the sheriff; that on the day of the trial the returns were filed on the trial of the case by the sheriff of the said respective parishes, showing that no such parties could be found. The defendant's counsel thereupon made a verbal motion for a reassignment or continuance of the case upon the grounds that he did not have his witnesses. The counsel for the state objected to a reassignment substantially upon the grounds above stated, and on the further ground that he had only a week's jury remaining, and his docket was crowded for every day of that week, and would not consent to reassignment; it being the only week of the jury. Counsel for the accused then asked for continuance, and the state attorney stated that he would consent to no continuance, and exacted of the accused's counsel a written motion to that effect. Time was granted to him for making same, and the motion for continuance was overruled: First. Because the motion does not comply with the requisites of the law granting a continuance, in that it does not set forth that he could not prove the alleged facts by any other witness. Second. That in matters of this kind, if permitted at all, and if the counsel for plaintiff had just been employed and appointed in the case, the attorney thus appointed must make the affidavit for time to make proper defense on account of want of time between the time of his appointment and the time of trial. Third. Because in summoning witnesses outside of the parish the law requires that the application shall be made in writing, as to the materiality of the testimony set forth, that said testimony is material, and it must be sworn to by accused, which was not done in this case. Fourth. Because he has no right to the presence of witnesses residing in another state through process issuing from this state.

The granting or refusing of a continuance vests largely in the discretion of the trial judge. We do not think he has abused his discretion in this case. The judgment is affirmed.

(107 La.)

Succession of GLANCY. (No. 14,175.)
(Supreme Court of Louisiana. June 16,
1902.)

PARTITION—PLEADING—DEFENSES.

1. By article 1289 of the Revised Civil Code the general rule is announced that no one can be compelled to hold property with another unless the contrary has been agreed upon; that any one has the right to demand the division of a thing held in common. This being the case, it behooves any one against whom an action of partition is directed by joint owners to set up objections thereto, either by answer, or by some exception other than an exception of no cause of action.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

In the matter of the succession of Owen Glancy. From a judgment sustaining an exception to no cause of action taken by Margaret Higgins, widow of Owen Glancy, Thomas E. Glancy and Owen Glancy, Jr., appeal. Reversed.

Thomas E. Glancy and Owen Glancy, Jr., have appealed from a judgment sustaining an exception of no cause of action taken by Mrs. Margaret Higgins, widow of Owen Glancy, Sr., individually and as dative tutrix of the minor Viola Glancy, and Margaret Murray, wife of Martin Murray, to the petition filed by them in the district court. In this petition they averred that they were the owners, in common with Mrs. Margaret Higgins, widow of Owen Glancy, Michael Glancy, Elisabeth Glancy, widow of Charles J. Canus by first marriage, and now the wife of Thomas Huff, Margaret Glancy, wife of Martin Murray, Viola Glancy, a minor, and May Ellen Redmond, wife of August Caspar, all of this city, of certain real estate, which they described, among which were two properties, described as lots Nos. 21 and 22 of square No. 5 in the Fifth district of the city of New Orleans. That though said lots Nos. 21 and 22 were acquired in the name of Mrs. Margaret Higgins, wife of Owen Glancy, Sr., and though it was stated in the act by which they were acquired that the same were acquired with the separate and paraphernal funds of the said Mrs. Margaret Higgins, petitioners averred that it was not true that same were acquired with the separate and paraphernal funds of Mrs. Margaret Glancy. The fact was that said lots 21 and 22 were acquired with funds and moneys belonging to the community of acquets and gains which then existed between the said Mrs. Margaret Higgins and the said late Owen Glancy. That Mrs. Margaret Higgins never had any separate and paraphernal funds. That said Owen Glancy died testate, as appeared by his last will and testament, which had been probated in the civil district court. That the bequests made in the will had all been duly discharged or paid, and there were no debts due by the estate, and petitioners were unwilling to hold the property of said estate in in-

division, and desired that same be partitioned. That said Mrs. Margaret Higgins, widow of said late Owen Glancy, had ever since his death collected rents and revenues of the properties belonging to said estate, for which she is liable to all parties in interest therein. That said fruits and revenues were as follows: For the improvements on lot No. 8 in square No. 4, and lots Nos. 3 and 4 of square No. 5, at the rate of \$40 per month. That in the rear of said lots Nos. 3 and 4 there was a stable, which was burned and destroyed by fire on the 21st day of January, 1900. That the rental of same is fully worth \$10 per month, which is due by said Mrs. Margaret Higgins, beginning April 9, 1894, up to January 21, 1900. That said Mrs. Margaret Higgins, widow of Owen Glancy, disposed of a cart belonging to the estate on a date unknown to petitioners, and, petitioners are informed, for the sum of \$20. That there is also to be partitioned the sum of \$310, being the loss by fire of the properties of said estate, which occurred on said 21st day of January, consisting of a stable and other improvements in the rear of the premises known as No. 310 Webster avenue, and which amount of \$310 is due by the National Fire Insurance Company of Hartford, Conn., and was adjusted by said company at the aforesaid sum. That the estate was also possessed of live stock, consisting of cows and a horse, and also a wagon, which were lost at the time of said fire, all of which cows, horse, and wagon were fully worth the sum of \$500. And petitioners averred that they were kept in ignorance of the will made by said late Owen Glancy, and that the discovery of said will was accidental; they having been at all times under the impression that the said late Owen Glancy had made no will, and that Mrs. Margaret Higgins, widow of Owen Glancy, was entitled, as surviving spouse in community, to the usufruct of the estate left by said late Owen Glancy; and because of the willful concealment by the said Mrs. Margaret Higgins, widow of said Owen Glancy, petitioners allowed her to retain possession of said live stock, which they would not have done had they had been informed of the existence of said will, and because of said concealment, and, further, because of the negligence and proper want of care on the part of said Mrs. Margaret Higgins, widow of Owen Glancy, petitioners have been damaged in the loss of said live stock and wagon. Petitioners also averred that ever since the death of said late Owen Glancy the said Mrs. Margaret Higgins, his said widow, has had the use and derived an income from the said live stock, horse, and wagon of about \$50 per month. Petitioners averred that the said Mrs. Margaret Higgins, widow of Owen Glancy, is dative tutrix of the minor Viola Glancy, but, by reason of conflicting interest herein, a special tutor ad hoc should be appointed to represent the said minor, Viola Glancy. In view of the premises, they prayed that a tutor ad

hoc be appointed to the minor Viola Glancy; that the different parties named as being owners in common and their husbands be cited; that after due proceedings there be judgment ordering the real estate described to be sold in order to effect a partition; that there be judgment against Mrs. Margaret Higgins, widow of the late Owen Glancy, decreeing that she is indebted unto the mass for all the rents and revenues collected from said properties at the rate of \$40 per month from April 9, 1894, up to the day that the same shall be sold; that it be further decreed that she is further indebted unto the mass for the rents and revenues of the stable or dairy in the rear of the premises No. 310 Webster avenue at the rate of \$10 per month from April 9, 1894, to January 21, 1900, 6 years, 9 months, and 12 days (say, the sum of \$815 for rental of the stable or dairy); that it be also decreed that said Mrs. Margaret Higgins, widow of Owen Glancy, is further indebted unto the mass in the sum of \$20, value of the cart sold by her, and further indebted unto the mass in the sum of \$500 for the value of the live stock and wagon belonging to the estate, and further indebted unto the mass in the sum of \$4,075, being the profits realized by her from the use and enjoyment of said live stock, and that the amount of \$310 due by the National Fire Insurance Company be also included as forming the mass, when collected from said National Fire Insurance Company, and that all the parties in interest be referred to Robert J. Maloney, notary public, to effect and complete said partition; and that all the costs of these proceedings and all other necessary charges and expenses of these proceedings be borne by the mass; and for general relief. Before filing their exception of no cause of action, the parties excepting had filed an exception that the suit could not be proceeded with, because the petition was vague, general, and indefinite; that nowhere did the acquisition of the properties by any of the respective parties appear; no allegations were made as to whether or not there existed a family relationship, or otherwise, between the parties, or in what proportions, if any, the respective parties might be entitled to the properties, and that otherwise said petition was so verbose, involved, and ambiguous that exceptors could not safely answer thereto. (2) Insisting upon the above exception, and in event only that it could be overruled, exceptors said that the estate of Owen Glancy was under administration of the honorable court; that a contest over the appointment of an administrator had arisen, and was still pending, undetermined; that the rights of the minor Viola Glancy were involved, and were not ascertainable until the estate was administered, and it should appear affirmatively of record that said estate owed no debts; that the law accepted the succession for the minor under benefit of inventory, until her rights be ascertained as aforesaid; this action was premature. In view of the premises, exceptors

prayed these exceptions be maintained, and plaintiffs' action be dismissed at their costs. This exception had been overruled.

Appellants moved for a new trial on the following grounds: "(1) That the judgment maintaining the exception of no cause of action was contrary to law. (2) That if the exception of no cause of action was well founded, which was, however, denied, the petition for a partition should only be dismissed as against such defendants as have filed and had the right to urge the exception, leaving the petition undisturbed as against such defendants who had not urged the exception, but had joined issue. (3) That where there are several defendants, all sued upon the same grounds of action, and the object of the suit was to effect a partition of property held in common, and involving an accounting and settlement of the respective interests of all parties, and some of the defendants had joined issue, and one or two others had urged the exception of no cause of action, the best practice would be to refer the exception to the merits, and not try the case piecemeal. (4) Was the exception filed, in the light of the argument and reason urged in support thereof, really an exception of no cause of action, and should not the exception of prematurity have been filed in limine? (5) If the judgment of the court be allowed to stand, then the rights of the petitioners in the partition proceedings had been adjudged and passed upon, and they were forever barred from renewing their application. (6) Had Thomas Glancy and Owen Glancy any rights whatever in the estate of their father, and, if so, what were these rights, and to what extent? (7) The usufruct was destroyed if the bequests and the usufruct could not coexist; and, in the instant case, how could it be said that the dispositions contained in the will of the late Owen Glancy were not adverse to the usufruct, when one hundred and fifty dollars were bequeathed to Margaret Murray out of the real estate, which clearly showed that it was the intention of the testator that the real estate should be sold, and one hundred and fifty dollars paid to the legatee? (8) Petitioners prayed in their petition that two lots of ground then standing in the name of the widow be declared community property. Why, we ask, was there no cause of action disclosed as to that part of the petition? The court took no notice of that branch of the case. (9) The court took no notice of the additional statement in the petition which referred to money in the hands of the insurance company, and which the insurance company refused to pay unless all parties joined in receipting for, and releasing the company from further liability under its policy of insurance. (10) Even if the court were correct as to the question of the usufruct, which we denied, that nevertheless any one of the parties having an interest in the property might require a partition of a thing held in common, sub-

ject to the right of the usufructuary, whatever they might be. (11) If the bequest made by the late Owen Glancy exceeded the disposable portion, same could only be ascertained after a sale of that property, and payment of all just charges against it."

The new trial was refused, and the plaintiffs appealed.

Theodore Cotonio, for appellants. McCloskey & Benedict and Walter L. Gleason, for appellee.

NICHOLLS, C. J. (after stating the facts). We find copied in the transcript filed in this case all of the proceedings had in the succession of Owen Glancy, although the only issue before us is as to the correctness of the ruling of the district judge sustaining an exception of no cause of action filed by Mrs. Margaret Higgins, the widow in community of Owen Glancy, Sr. We, of course, have come to a knowledge of these proceedings through that fact, but we do not feel justified by reason of that fact into going into an examination of and discussion of the whole situation of the succession upon this appeal. We think we should confine ourselves to the pleadings of the appellant in his petition. We do not think plaintiffs' demand should have been dismissed upon an exception of no cause of action. The exception was leveled at the whole demand, and we have held that an exception so made was correctly overruled if any part of the demand could stand against the exception. *People's State Bank v. St. Landry State Bank*, 50 La. Ann. 528, 24 South. 14; *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 South. 532. At least a part of plaintiffs' demand should be tried upon the merits.

The plaintiffs allege that they are owners in common with the defendant of certain described property; that they are unwilling to remain any longer in indivision. They ask that a partition of the property be made, and that, to that end, a sale of the same be made. That certain properties described stand in the name of their mother, Mrs. Margaret Higgins, widow of Owen Glancy, as having been purchased by her with her paraphernal funds, but that she had no paraphernal funds to purchase the property with, and the property really belonged to the community which existed between her and her husband. That Owen Glancy had died testate. That the bequests made by the will had all been duly discharged, and there were no debts due by the estate. That the widow of Owen Glancy had taken possession of all the property, and drawn all the fruits and revenues therefrom, and used the same, since the death of her husband. That she had been permitted to do this by plaintiffs in ignorance of the fact that Owen Glancy had left a will. That she should be held to account for the same, and for certain moneys which she had received from an insurance company for the loss of a

certain building. There is no declaration made by the plaintiffs that they are the sons of Owen Glancy, nor that their rights as forced heirs have been in any manner trench- ed upon by the will of the deceased. What dispositions the will contained are not set out. Inferentially, they are such as induce the plaintiffs to believe that Mrs. Owen Glancy has, by reason of its terms, no usufruct under the act of 1844. We presume, from the whole tenor of the petition, that plaintiffs' joint ownership of the property is based upon being heirs of their father, and that the property sought to be partitioned is community property.

While the issue between the parties is one raised on the face of plaintiffs' petition, yet the briefs and arguments before us are directed entirely to a discussion of the legal question as to whether or not, under the terms of Owen Glancy's will, the widow was deprived of the benefit of the usufruct granted to a surviving widow under the act of 1844. The district court had all papers of the succession before him, and may have felt himself justified, through his judicial knowledge of their contents, in using them in connection even with an exception of no cause of action, but they were not introduced in evidence on the trial of such an exception.

Plaintiffs insist that the widow has no usufruct, and that their right to a partition is absolute. The widow set up no objection or exception to this claim, other than the exception of no cause of action. If plaintiffs be joint owners of the property with Mrs. Owen Glancy, the law gives them the right to a partition. Article 1289 of the Revised Civil Code declares that: "No one can be compelled to hold property with another unless the contrary has been agreed upon. Any one has a right to demand the division of a thing held in common by the action of partition." This being the case, it behooves any one against whom an action of partition is directed by their joint owners to set up their objections by way of special exception or defense, and not meet the demand by an out and out denial of a right of action. Appellee should have set up exceptions other than this particular exception, or gone to trial on a denial of the right of partition in an answer. Defendant urges, it would seem, that if she is, in point of fact, entitled to a right of usufruct, as surviving widow in community, the co-owners with her are, as a resulting fact, cut off from a right of partition. If by this she means that since the act of 1844 the children of the marriage cannot sue and actually recover from the mother, and take out of her possession, freed from her usufructuary rights, their father's interest in the community property, she is supported in her contention by the decisions of this court in *Day v. Collins*, 5 La. Ann. 588. The court held, however, in that case, that, notwithstanding the existence of usufruct, the affairs of the community could be ascertained and liquidated by action. See

Ogden v. University, 49 La. Ann. 183, 21 South. 685; Succession of Moore, 42 La. Ann. 336, 7 South. 561. We are not aware that this court had ever held that the fact of the existence of the usufruct in the surviving partner in community would cut off an action of partition by the heirs of the other spouse if the result of the partition would not be to extinguish the usufructuary's right. The expressions used in Dickson v. Dickson, 33 La. Ann. 1372, 1377-1380, do not go that far. We are not disposed to pass upon that question on an exception of no cause of action. Article 605 of the Revised Civil Code declares that the owner may mortgage, sell, or alienate the thing subject to the usufruct without the consent of the usufructuary, but he is prohibited from doing it in such circumstances and under such conditions as may be injurious to the enjoyment of the usufructuary. This article deals with the conventional usufruct. We have several instances in the Code where the property affected by a usufruct is none the less authorized to be sold if sold subject to the usufruct. Articles 584, 585, 587. We think that question should be left to be determined after evidence adduced on the facts of each particular case.

We would regret that a succession as small as this succession is should be exhausted by costs, and we feel warranted, in view of the discussion of the subject before us, in making some remarks which may have the effect of putting an end to future litigation. The usufruct granted to the surviving partner in community under the act of 1844 (section 629, Rev. St.) is one conferred upon him or her by the law itself. It exists subject to the right of the deceased spouse to control and regulate it, either in part or entirely, by his last will and testament. If he makes no last will, the law declares the surviving partner shall hold in usufruct so much of the share of the deceased in said community as may be inherited by his issue,—in that case, the whole of his share. If by his will he has disposed of certain specific property, and no more, in full ownership, that particular property would pass out of the succession to the legatee, free from the usufruct, but the usufruct would attach to the balance; that being "so much of his share in the community property as would be inherited by his issue" under the circumstances. The cutting off of the usufruct would be measured exactly by what had been disposed of by the deceased spouse to the prejudice of the usufruct, and inconsistent with it. If the deceased left the survivor the full ownership of certain property, he or she would take that, holding the balance of his share in usufruct. If he left a legacy to a third person, payable out of the revenues of either the whole of his share in the community property, or of a particular or specific part of it, the survivor would take the usufruct, but with the charge upon it of making payments of the legacy out of the revenues to the extent; the legatee having the right to

make his legacy available by and through the usual legal remedies.

For the reasons assigned herein, it is ordered, adjudged, and decreed that the judgment herein appealed from be, and the same is hereby, annulled, avoided, and reversed, and the exception of no cause of action is set aside, and this cause is hereby remanded to the district court, with orders to reinstate the same for further proceedings according to law. Costs of appeal to be paid by appellee; those of the lower court to await the final decision of the case.

On Application for Rehearing

(June 28, 1902.)

Among other grounds assigned by appellee for a rehearing, it is urged that she had filed a motion to dismiss the appeal for want of jurisdiction *ratione materie*, as the amount in dispute was below the limit of our appellate jurisdiction. The motion did not escape our attention. It was considered by the court, though no mention was made of the fact in our judgment. Appellee must bear in mind that the appeal in this case was taken from a judgment of the district court sustaining an exception of no cause of action. For the purposes of the trial of that exception the allegations of plaintiffs' petition were taken for true, and they must also be taken for true for the purposes of the appeal taken from the judgment sustaining the exception. Matters, therefore, are not in a condition such as would justify the court in declaring that the claims and amounts for which plaintiffs allege appellee to be responsible are fictitious claims, or for fictitious or inflated amounts. Testing our jurisdiction from the standpoint of appellants' allegations that the appellee is chargeable with the amounts declared on by the plaintiffs in partition, there is no ground for dismissing the appeal. The motion to dismiss for want of jurisdiction was not well grounded.

The rehearing is refused.

(107 La.)

VALLEE v. HUNSBERRY. (No. 14,211.)¹
(Supreme Court of Louisiana. April 14, 1902.)

APPEAL—DISMISSAL—BOND—WAIVER—VENUE
—REMOVAL FROM PARISH.

On the Motion to Dismiss the Appeal.

1. A motion to dismiss an appeal because of informality in or absence of an order of appeal must be filed within three days after the filing of the transcript in this court.

2. When the district court grants an appeal to the circuit court on condition that a bond be filed for an amount fixed, it may vacate such an order before the filing of the bond, and grant an appeal to this court, if the same is applied for in time.

3. The granting of an appeal to a court which is without jurisdiction to hear the same does not divest the trial court of jurisdiction

¹ Rehearing denied June 21, 1902.

to grant an appeal to another tribunal to which such appeal properly lies.

4. Where an appeal is taken by motion in open court at the same term at which the judgment is rendered, no citation of appeal is required.

5. Where a motion to dismiss an appeal is predicated upon several grounds, the last stated of which refers to want of citation, the latter will be considered waived.

On the Merits.

6. Where a party has removed from one parish to another without making a formal declaration of intention, as provided by Civ. Code, art. 42, he may be sued, within the year, at the option of the party claiming, in either parish. And the fact that his domicile in the parish ad quem is with his employer does not affect the question.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermillion; Minos T. Gordy, Jr., Judge.

Action by Louis Vallee against Columbus Hunsberry. Judgment for plaintiff. Defendant appeals. Reversed.

Edward Simon, for appellant. L. L. Bourges, for appellee.

On the Motion to Dismiss the Appeal.

MONROE, J. The transcript in this case was filed in this court November 8, 1901; and upon February 21st of the present year the defendant and appellee moved to dismiss the appeal upon the grounds (1) that the transcript fails to show any order of appeal from the only final judgment "read and signed"; (2) that the district court had divested itself of jurisdiction by granting an appeal to the court of appeals, and could not thereafter grant an appeal to this court; and (3) that no notice of the appeal was served on the appellee or his counsel.

As to the first ground, the motion comes too late. *Webb v. Keller*, 39 La. Ann. 55, 1 South. 423.

As to the second, the transcript shows that a judgment was rendered September 12th, "maintaining the exception of want of jurisdiction and dismissing the suit," and that upon the same day an appeal was granted to the court of appeals, conditioned upon the applicant's giving bond; that upon the following day, no bond having been filed in the meanwhile, on motion of the applicant's attorney the order of the previous day was vacated, and an appeal was granted to this court. It is clear, under these circumstances, that the jurisdiction of the district court had not been divested. But if the bond had been filed under the first order, the subsequent discovery that the appeal had been made returnable to a court having no jurisdiction would have entitled the appellee to an appeal to a competent tribunal, if applied for in time; the first order in such case being a nullity. *McWilliams v. Michel*, 43 La. Ann. 984, 10 South. 11.

As to the third ground set forth in the motion, the transcript shows that the appeal was taken by motion in open court. It also

shows service of citation of appeal upon "W. P. Edwards, Esq., a member of the firm of Edwards & Green, attorneys for defendant, in person, in the town of Abbeville"; and whilst it does not appear from the transcript that Edwards and Green were the attorneys of record, and the fact is denied in the motion filed, neither does it appear that a citation was necessary. Beyond this, the motion to dismiss sets forth several grounds, the last of which relates to the want of notice, and it has been held that this amounts to a waiver of such notice. *State v. Montegut*, 7 Mart. (O. S.) 448.

The motion to dismiss the appeal is therefore overruled.

On the Merits.

The petition alleges, in substance, that the defendant, by verbal contract, leased to the plaintiff a tract of land for one year at the stipulated price of \$100; "that the agreement was that, as soon as the said lessor could communicate with his godson, so as to find out what buildings he could deliver to the lessee, this contract of lease was to be written by J. N. Green, Esq., and signed by lessor and lessee"; that said Green, by direction of defendant, drew up a contract, the terms of which were different from those agreed on, which plaintiff refused to sign, offering at the same time to sign a contract drawn in conformity to said agreement, but that this was refused by the defendant; and that plaintiff thereby sustained loss and damage, the details of which are set forth, in the sum of \$2,500, for which he prays judgment. Citation was served on the plaintiff personally in St. Martinsville, and he filed a plea to the jurisdiction of the court on the ground that he had abandoned his domicile in the parish of Vermillion, and resided in the parish of St. Martin. Upon the trial of this exception, the defendant, who was examined at St. Martinsville by commission in April, 1901, testified that he lived in that town; that he was working as the servant of the Reverend Augustus Thebault, and living on his premises, and had been so working and living constantly for six months; and that he had formerly lived in the parish of Vermillion, but had left there permanently, and with the intention never to return. The Reverend A. Thebault, also examined by commission, corroborated the testimony of the defendant to the effect that the latter was domiciled with and working for him at his residence in St. Martinsville; that he had left the parish of Vermillion permanently, and had directed the witness to sell his (defendant's) plantation in Vermillion. There is nothing in the record which in any manner suggests a doubt as to the verity of this testimony. It falls short, however, of showing that a year had elapsed, prior to the service of the citation, since the defendant had abandoned his domicile in the parish of Vermillion. On the contrary, considered in connection with some other evidence in the

record, it is manifest that the year had not elapsed. Under these circumstances, and as it is not claimed that he had made written declaration of intention, as provided by Civ. Code, art. 42, it was optional with the plaintiff to sue him in either parish. Code Prac. art. 167. *Ausbacker v. De Nevue*, 45 La. Ann. 988, 13 South. 396. The fact that his domicile in the parish of St. Martin is at the residence of the reverend gentleman by whom he is employed in no manner affects the question. Some time after the plea to jurisdiction was filed, the defendant filed an exception to the effect that the citation was defective, as not setting forth his domicile, and that it was served by the sheriff of the parish of St. Martin. This exception was not, however, passed on by the district court, has not been referred to here, and therefore requires no further notice.

For these reasons, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this cause be remanded to be proceeded with according to law; the defendant to pay the costs of the appeal, and the costs of the district court to await final judgment.

(107 La.)

STATE v. BROUSSARD. (No. 14,493.)¹
(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—APPEAL—QUESTIONS PRESENTED.

1. Where an accused is charged with the larceny of property which may be the subject of that offense, and is found guilty as charged, motions for new trial and in arrest of judgment, predicated on the ground that the offense proved on the trial was "severing from the soil," but unaccompanied by any bills of exception or by the evidence relied on, present no question of law for the consideration of this court.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermilion; Minos T. Gordy, Jr., Judge.

Thomas Broussard was convicted of larceny, and appeals. Affirmed.

S. P. Watts, for appellant. Walter Guion, Atty. Gen., and J. Nelson Greene, Dist. Atty. (Lewis Guion, of counsel), for the State.

MONROE, J. The defendant in this case was tried, convicted, and sentenced upon the charge that he did on or about the 6th day of September, 1900, "unlawfully, willfully, and feloniously, take, steal, and carry away two sacks of corn, of the value of one dollar, and the property of one Baptiste Gilbert." A motion for new trial was made on the ground that the evidence adduced showed "that the corn which was stolen was on the stalks," and the only "conviction in this case that would conform to the facts would be under a charge of 'severing from the soil,' with allegations of the ownership of the real-

ty incorporated therein." In overruling this motion, as also a motion in arrest, the judge a quo says "that the court considered that the evidence before the jury justified them in returning a verdict of guilty against the accused; the evidence showing that the accused was seen, in the nighttime, carrying a sack of corn out of the field of the injured party, and he (the accused) immediately became a fugitive from justice, and evaded arrest for a period of nearly a year. As to the motion in arrest of judgment, the facts before the jury, to my mind, did not establish severance from the soil. The proof, as above stated, was, the accused was caught, with the sack of corn on his back, going out of the field."

There is no question of law presented, and the judgment appealed from is affirmed.

(107 La.)

SUCCESSION OF BUDDIG. (No. 14,178.)
(Supreme Court of Louisiana. June 16, 1902.)

LIFE INSURANCE—DEATH OF HUSBAND—COMMUNITY PROPERTY—INVESTMENT BY TUTOR.

1. A policy of life insurance issued to a married man during the existence of the community, and made payable to his executors, administrators, and assigns, falls into the community, and not his separate estate, on the dissolution of the former by his death.

2. In answer to a rule taken by the under-tutor against the tutrix to show that proper investment has been made of a minor's funds the tutrix should clearly show that the law has been complied with.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

In the matter of the succession of Henry Buddig. From a judgment on the account, Otto Knoop, under-tutor of certain minor children, appeals. Affirmed.

Frank McGloin, for appellant. Buck, Walshe & Buck, for appellee Mrs. Henry Buddig.

BREAUX, J. Opponent claimed an amount collected on an insurance policy issued to the late Henry Buddig constitutes a separate asset, and does not fall into the community. Otto Knoop, under-tutor of Marie L. and Frederick M. Buddig, minor children of the late Henry Buddig, obtained an order of the district court directing Mrs. Henry Buddig, natural tutrix of these minors, to file a detailed and specific account of her administration, and to show cause why she should not invest the funds of the minors in bonds of the state, in accordance with an order of the court which had been previously issued. In compliance with the order of the court on the rule of the under-tutor, the tutrix filed a provisional account of tutorship. The following is one of the items of the account showing assets as follows: "Life insurance policies payable to estate of assured falling

¹ Rehearing denied June 22, 1902.

to the community, \$30,000." Otto Knoop, under-tutor of the children, opposed the account as erroneous, because, as he alleges, the estate, and not the community, was the beneficiary. Otto Knoop, under-tutor, also filed a rule to compel the tutrix to show cause why she had not complied with the court's order regarding the bonds of the minors. The evidence shows that the policies were issued in favor of the executors, administrators, and assigns of the assured, Henry Buddig. With reference to the bonds, an exhibit shows a list of 80 state bonds headed by the names of the two minors before named; but nothing shows that they have been registered in the office of the auditor. The district court homologated the provisional account of Mrs. Henry Buddig by judgment signed on December 10, 1900. The rule before mentioned having been filed separately, the district court passed upon the issues it presented in a separate judgment dismissing the demand of the under-tutor. From the judgment homologating the account, and from the judgment dismissing the rule, the under-tutor appeals.

We take up, in the first place, for decision, the question whether the amount collected on the policy of insurance belongs to the separate estate of the assured or to the community. The late Henry Buddig died intestate, and left no creditors. His estate was large, and, unless these policies belong to a separate estate, as claimed by opponent, all the assets fall into the community between him and his wife, which was dissolved by his death. The assured having made the policy payable to an "executor, administrator, or assigns," it is, in our view, as if it had been made payable to himself. The question arises, since the husband has the right to take out a policy upon his life in favor of his wife, and make it a separate asset of hers, why may he not take out a policy in his own interest, and make it part of his separate estate? We can only say in answer: The two interests are not entirely similar. Different issues present themselves when the wife is concerned from what they are when it is the husband who is concerned. The husband is the head and master of the community. On the other hand, generally, when the wife takes charge of the community because of the death of her husband, or sometimes his insolvency, or for any other cause, she is accorded certain rights. She can, for instance, renounce the community, and recover the amount of a policy of which she is the beneficiary. But even as to her we do not imagine that the courts will go any farther than they have toward protecting her separate interest. With reference to the husband, the conditions are not the same. He has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him, primarily all the property belongs to the community. Everything left at the dissolution is presumed com-

mon. This court has never been called upon to decide the issues now in hand. By inference only a similar question was treated, in a case which will be cited in a moment. The court said that the right and obligation dated back to the moment the contract was completed; that the date the policy was issued was to be considered in determining to whom the amount was to be paid, otherwise subsequent acts would have retroactive effect. "The character of the interest and of the ownership, therefore, takes its impress from the date of the contract." Civ. Code, art. 2141; *In re Moseman's Estate*, 38 La. Ann. 219. It is not because the insured directs that the policy be paid to his executor or administrator that it is to be inferred that he intended that it should not be considered as forming part of the estate of the community. We have read with attention the case of *Lambert v. Insurance Co.*, 50 La. Ann. 1032, 24 South. 16, cited by learned counsel for opponent, and have not found the principle announced as applying here. The decision sustained jurisprudence of a prior date as relates to the wife as beneficiary of a policy taken out by her husband, and does not hold or warrant the conclusion that the husband can make a policy a separate asset by directing in a policy issued during the community that it be paid to his executor. Common-law authorities, under a system of laws which does not recognize the presumption that all property acquired during the community becomes assets of the community, cannot have a direct bearing upon the issues here. We have read the instructive and interesting decision from the *Journal de Palais*, A. D. 1877, p. 1063, cited by learned counsel. The insurance was taken out in the name of the two spouses. The court held that the surviving wife acquired a personal right, and to that extent there is, perhaps, some similarity between our and the French jurisprudence. We take it that French authorities are not always thoroughly in accord. On page 1069 of the same volume of the *Journal* it is said, *inter alia*, upon the subject: "*La femme ne pourrait pas en présence de l'art. 564 C. Comm. recueillir au détriment de la masse un avantage que lui aurait fait son mari*,"—a conclusion not sustained by the preceding text of the opinion, and which has application to the husband in the case here as one who cannot advantage himself by an investment of community funds.

The only other question in this case is whether there has been sufficient compliance with the rule regarding the investment of minors' funds in state bonds. The tutrix has introduced a list of bonds bought for her minor children. She should, we think, in answer to the rule, have shown that she had made the investment as required. We have no reason to think that she has failed to have proper registry made of those bonds as required by article 348 of the Civil Code; but that

fact must be shown, i. e., that these bonds are properly registered.

It is therefore ordered, adjudged, and decreed that the judgment of the district court homologating the provisional account of Mrs. Henry Buddig, and signed on the 10th of December, 1900, be, and it is, affirmed at appellant's costs. As to the second judgment in the same record, it is ordered, adjudged, and decreed that the judgment be, and it is hereby, amended by directing the tutrix to present proper proof to the court of all investments for the minors, Marie Marguerite Buddig and Frederick M. Buddig, by showing that the bonds have been duly registered in the auditor's office in the manner required by article 348 of the Civil Code. This part of the case is remanded in order that additional testimony may be heard in accordance with the views before expressed. In other respects the judgment is affirmed, at appellee's costs.

On Application for Rehearing.

(June 30, 1902.)

The judgment appealed from dismissing opposition to the account of appellee was affirmed, with costs of appeal upon the appellant, while the judgment dismissing appellant's rule upon tutrix was reversed, with costs of appeal upon appellee. To this extent there was error, which we correct at once, and without granting a rehearing, as we do not think that a rehearing is necessary to the end of merely correcting a decree involving costs to a very small amount. It is ordered, adjudged, and decreed that our original decree is amended so as to charge all costs to appellee, the tutrix, who shall pay these costs out of the estates of the minors, whom she, as tutrix, represents, and that none of these costs are due by the under-tutor, who has acted for and in the interest of the minors. This amendment having been made, the rehearing is refused.

(107 La.)

STATE ex rel. PRINCE et al. v. POLICE JURY et al. (No. 14,121.)¹

(Supreme Court of Louisiana. Feb. 8, 1902.)

MANDAMUS—APPLICATION—DELAY—ENFORCEMENT OF CONTRACT.

1. The application for writ must be timely filed.

2. The one to whom the bid was awarded went in possession of the franchise and privilege with the assent of the relators. He had been in possession and at work for the past two months prior to relator's application, and nearly a year prior to the present date.

3. Examination has not resulted in finding any authority to sustain a mandamus filed at as late a date in matter of an awarded contract, after the award has been made and the contractor engaged in its execution.

4. The remedy to enforce is by direct action. A judgment in mandamus proceedings would not result in ending the litigation.

5. The right of relators to bring an ordinary suit is specially reserved.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Concordia; J. L. Dagg, Judge.

Application by the state, on the relation of George Prince and others, for a writ of mandamus to the police jury and others. Judgment for defendants, and relators appeal. Affirmed.

J. S. Boatner and Boatner, Dodds & Boatner, for appellants. John Dale and Samuel Lucius Elam, for appellees.

BREAUX, J. Relators sued for a writ of mandamus to force the officers of the municipality to enter into a contract with them. They aver that the police jury illegally advertised the public letting of a public ferry for five years, from Vidalia, La., to Natchez, Miss., by inserting in the advertisement that "the right is reserved to refuse any and all bids," and that the president of the police jury refused to let the ferry privilege to them, but that after the bidding, and after it had been announced that relators were the highest bidders, he, by private contract, let the ferry privilege to S. B. McNeely for an amount less than relators' bid. Plaintiffs had been lessees since 1896. They were notified to vacate and to discontinue their ferry service at the end of the term of the lease (i. e., on March 11, 1901); and they aver that, being in ignorance of their legal rights at the time, they surrendered the ferry in accordance with the notice they received. They only brought their suit by mandamus 60 days thereafter. Plaintiffs aver that the police jury was without right, under the terms of the statute which requires that body to let out its contracts to the highest bidder, to reserve "the right to reject any and all bids," and to follow up this advertisement by rejecting the highest bidder and accepting the lowest. Defendants, on the other hand, contend that relators never asked to run the ferry before suit had been filed; that they willingly gave up the ferry, its franchise and privilege. It appears that a committee was appointed by the police jury some time before offering the ferry privilege for sale, and a committee was appointed by the city of Natchez, on the opposite side of the river, in order to act together. These committees met, and agreed to act jointly as far as possible, in order to obtain a joint ferry service. This agreement was carried into execution. Bids for the Natchez side were received; relators bidding \$450, and the one to whom the contract was adjudicated (McNeely), \$652. It happens that on the Natchez side the relators were the lowest bidders. On the Vidalia side, relators' bid was \$360, while that of McNeely, to whom the contract was awarded, was something less. Respondents

¹ Rehearing denied June 30, 1902.

¶ 2. See Mandamus, vol. 23, Cent. Dig. §§ 25, 181.

contend that, without this agreement between the authorities of Vidalia and Natchez, there would have been two ferries,—one from each side,—and that in consequence the public have suffered inconvenience, as the business does not justify two ferries. The relators, it seems, were advised of the joint action of the authorities before mentioned. One of them was present in Natchez when the committees met and conferred, and, when they submitted their bids, relators had complete knowledge of everything that had been done to place the ferry on both sides in the hands of one lessor.

We have no concern with the plea of estoppel, and have not dwelt upon the narrative of facts as above with any thought of sustaining the plea urged by respondents. We purposely withhold all expression of opinion regarding estoppel. We decide that, in view of the facts of this case, mandamus does not lie, although it may be that relator is entitled to a direct action. The facts are referred to only as showing how far the contract which had been awarded as before mentioned had been executed when relator sued for a mandamus. There had been acquiescence enough on the part of the relators to render it impossible for them to sustain an application for mandamus. The writ must issue in strict conformity to law. It cannot very well be issued after an act has been completed in the presence of, and without objection on the part of, the one by whom mandamus is asked. Mandamus compels the performance of an act enjoined by law, and does not issue to compel the undoing of an act after it has been executed, as in this case, under the facts and circumstances disclosed by the record. The court will not make an order to affect an awarded contract under which operations have been conducted for some time without notice of contest, and this although no allegation is directed against the one to whom it has been awarded, who is not a party. Should he, in a case later, by direct action, be made a party, he may interpose and urge whatever rights he may have. Less grounds were held fatal to a mandamus in *State v. Commissioners of Printing*, 18 Ohio St. 388. In *People v. Campbell*, 72 N. Y. 498, it was said that: "If the right of the relator was absolute to contract, as claimed, he has a remedy at law, and was not, in strictness, entitled to a mandamus. If the relator has complied with the provisions of the city charter, he has a right against the city for damages sustained. No rule is better settled than that in such a case mandamus will not lie,"—citing a number of decisions. In *State v. Board of Education of City of Fond du Lac*, 24 Wis. 684, the court went further than there is any necessity in order to support our view, by holding that the mere letting of public works does not entitle the one who claims that he is the lowest bidder to a mandamus to compel the letting of the contract to him after his bid has been rejected, and the contract awarded to another; that the bidder has no absolute right to a writ

compelling the execution of a contract with him after one has been in fact let to another. This view, also, is sustained by cited decisions. The weight of authority seems to hold that a bidder cannot compel the issue of a writ of mandamus to force the officers to enter into a contract with him after the award has been executed. *Paving Co. v. Murphy*, 23 C. C. A. 631, 78 Fed. 23, 37 L. R. A. 634. Mr. High, in his *Extraordinary Legal Remedies*, is equally as clear in the view expressed. Page 74 et seq. These decisions go much farther than there is any necessity for us to go in this case.

Other grounds germane to the foregoing are equally as fatal to the mandamus for which relator sues, viz.: It will not be granted where it is manifest that it will prove unavailing. Under no circumstances could it be decreed that the one to whom the contract was awarded must vacate and surrender the contract to relators, and without such an order there could be no specific performance, and the mandamus would be a dead failure. The act, the performance of which is asked for, must be legally possible, before the writ issues. In the present suit it is not legally possible. Mandamus was not the remedy. The one to whom the contract was awarded was in possession, and was carrying passengers, luggage, and freight across the river,—a work from which he cannot well be stopped without making him a party; and, as he is not one who can be made a respondent, it only remains for us to sustain the decision of the district court. The rights of relators to bring a direct action are reserved.

For reasons assigned, the decision of the district court is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(107 La.)

PALMISANO et ux. v. NEW ORLEANS CITY R. CO. (No. 13,851.)¹

(Supreme Court of Louisiana. March 17, 1902.)

STREET RAILROADS—INJURY TO PERSON ON TRACK.

1. Where urchins have been stealing rides by hanging onto the rear end of a gravel train on the street of a city, the employé in charge of the train, who has in vain tried to make them desist by warnings and threats, is entirely justified in catching hold of one of them and lecturing him.

2. If the employé's lecture has been temperate, and he has not rough-used the boy, but has merely held him, and no longer than was necessary for the purpose of the lecture, he or his employer is not responsible if the boy (a child eight years, lacking three months, old), on being turned loose, runs blindly in a direction converging with that of a coming car, and collides with the car and is injured.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

¹ Rehearing denied June 20, 1902.

Action by Antonio Palmisano and wife against the New Orleans City Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Denègre, Blair & Denègre, for appellant. Boatner, Dodds & Boatner, for appellees.

PROVOSTY, J. Salvator Palmisano, a boy seven years and nine months old, and two other boys, were stealing a ride by hanging onto the rear end of a gravel car drawn by an electric street car on defendant's road in the city of New Orleans. The motorman of the traction car, who had been considerably annoyed by the like conduct of these and other boys as his train went back and forth that day, conceived the plan of capturing one of the boys to lecture him, and, in execution of that plan, turned off the power from his car, put on the brake, and beckoned to the conductor to come and take his place, and, when the car was about to come to a stop, slipped off, and crouched, and as the rear end of the gravel car reached him, caught hold of the Palmisano boy. He stood with him between the rails of the track up which the gravel car had just passed, and lectured him, holding him with one hand, and shaking a finger of the other hand at him the while,—and then turned him loose. What he said to the boy was this: "Look here, young fellow; you have been jumping on this car every time you get a chance, and I have a good mind to have you arrested. Go and tell all your playmates the first one I catch on this car, I am going to lock him up." Alongside this track was another track, the two tracks being four feet three inches apart. On this other track an electric street car was coming. The boy, as soon as set free, scampered off, running towards his home, in the direction opposite to that in which the gravel car had gone, and the same as that in which the car on the other track was coming. His course tended to converge with that of the coming car. The bystanders and the motorman of the coming car, seeing the danger of a collision, hallooed at him, but too late. He came in contact with the side of the car just aft of the front platform, was thrown down, and his left foot crushed, necessitating amputation just above the ankle. How far the spot where the motorman stood when he held the boy was from the spot of the collision, and precisely in what direction the boy started to run when he was released, and at that exact moment how far off was the downcoming car,—these are the points on which the testimony conflicts. This testimony cannot be reconciled, and the analyzing of it would serve no useful purpose. The efforts of plaintiff have tended to abbreviate the distances so as to bring the act of the motorman and the accident in closer relation, and those of the defendant

have tended to the contrary, so as to give greater scope to the agency of the boy; and, with the same ends in view, the plaintiff would have the course of the boy as direct across the course of the car as possible, and defendant the contrary. The boy ran far enough to give time to the bystanders and to the motorman of the descending car to halloo at him, and to hope that there was yet time for him to change his course. This shows that mere distance and time are not controlling elements, or even necessarily important elements, in the problem. The view we take of the case is that the descending car was blameless, as plaintiff admits, and that the motorman of the traction car did nothing but his duty, and did not do it in an improper manner. The theory of the plaintiff is that the child was so frightened by the acts of the motorman that for the time being he had lost his wits, and that, in a dazed and bewildered condition, he instinctively made for home,—his course there to lying across the path of the car,—and that the motorman, by detaining the child until the downcoming car was close, and the danger from it imminent, and then suddenly turning him loose, in the face of the car, as it were, was guilty of negligence. If it be true that the child was so frightened as to lose his wits, is the motorman responsible, when he did no more to him than what was the proper thing to do? Had he exercised undue severity, either in act or language, then might some fault attach to him; but he simply caught and held the child (admittedly the proper thing to do), and lectured him with moderation (again the proper thing to do). We do not see how fault could attach to him on that score. To say that he should have held the child longer than was necessary for the purpose of the lecture, or that he should have carried him away from a place so near to a track on which an electric car was either going to pass or in the act of passing, is to look at the situation from the standpoint of what has happened, and not from the standpoint of what, under the circumstances, was likely to happen, or of what the motorman, under the circumstances, had reasonable grounds for supposing might happen. Here was a street urchin who that very day had been getting on and off this gravel car every time it sped by; was the motorman to suppose for a single instant that this boy, who had been accomplishing these car-riding feats all day, would be likely to run into a passing car if turned loose near a car track? So far as the impressionability or timidity of the boy is concerned, the motorman had the perfect right to deal with him as with any other street gamin caught in the same way; and the average street gamin is not usually bereft of his wits by being held, without violence, and being told that future punishment shall be visited on him in case he renews his offense. By continuing to catch on to this car and holding

on to it all that day despite the remonstrances and threats of the motorman and of the conductor, this boy had made full proof of his possessing the usual assurance and brazenness of the street gamin. That the boy forgot himself is clear, and that the act of the motorman contributed to cause the forgetfulness is also clear; but those acts were mere links in the chain of events, and were themselves brought on as the legitimate or natural consequences of the fault of the boy in catching onto the car, and of the fault of the parents of the boy in letting him indulge in that dangerous amusement. By the way, the house of the parents was close by, facing on the same street, so that they had had a full opportunity that day of witnessing the boy's dangerous pastime.

We cannot hold defendant responsible. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be set aside, and that the plaintiff's suit be dismissed, with costs in both courts.

BREAUX, J., concurs in the decree.

(107 La.)

HAUSSER v. ADER et al. (No. 14,171.)
(Supreme Court of Louisiana. June 16, 1902.)

NEGLIGENCE—RUNAWAY HORSE.

1. A personal injury case, turning upon facts. Judgment of the district court in favor of defendant affirmed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by Mrs. Jacob L. Hausser against Ader & Gerac, in solido. Judgment for defendants. Plaintiff appeals. Affirmed.

The plaintiff, on her own behalf, and as tutrix of her child, Jacob W. Hausser, sues to recover the sum of \$5,110 from the defendants, in solido, for damages resulting from an injury received by the said child on August 3, 1899. She alleges that on the morning of that day, while the child, six years of age, was quietly walking along the sidewalk of Chartres street, a fiery and vicious horse, known to be a race horse, belonging to the defendants, and used by them in making their collections, was carelessly left standing alone by one of defendants' employés, without guard or check of any kind, right over the spout of a mill on St. Louis street; that said horse took fright at the sudden issue of steam from the pipe, and ran away, breaking the light vehicle to which he was hitched, rushed up Chartres street, and galloped on the sidewalk, and, after scaring several persons and killing a man, rushed upon the child from the rear before it could realize it, knocked him down, and trampled upon him, inflicting severe wounds; that defendants were aware of the fact that the horse was of a dangerous and fiery temper, and, notwithstanding said fact, allowed it to

be driven by a careless driver, in a thickly populated part of the city, attached to a light vehicle, and left to stand alone in the midst of factories and mills, right over a visible steam pipe. The defendants pleaded the general issue, coupled with the contingent defense of negligence on the part of the child and his mother. Judgment was rendered in favor of the defendant, and plaintiff appealed.

Albert Voorhies and William J. Formento, for appellant. John G. Robin, for appellees.

NICHOLLS, C. J. (after stating the facts). The case turns entirely upon questions of fact. It is useless to refer particularly to the evidence. It suffices to say that plaintiff has failed to sustain allegations of her petition. The horse was not driven by a careless driver when it took fright. It had not been left standing alone. The owner of the horse and vehicle had just gone into an adjacent building to collect a bill, leaving them in charge of an attendant, who had gotten out and was holding the horse by the bridle, when there was a sudden blowing off of steam from the boilers of a rice mill in the immediate neighborhood, through a pipe leading into the street, and near where the horse was standing. The animal is shown not to have been vicious, as alleged, but a very gentle one, and the escaping steam was calculated to frighten any animal. It took fright, whirled around, and threw the attendant into the gutter, although he did his best to hold him. It then ran through the streets, finally injuring the child upon the sidewalk on Chartres street. It is true that the pipe through which the steam escaped upon the street was visible, but there was no reason whatever on the part of the owner or the attendant to anticipate that steam would have been permitted to be blown off through it at that hour, and without warning from the mill, and such was not the practice. We discover no negligence on the part of the defendants. The accident was a deplorable one, but it is not to be attributed to any fault of the appellees.

The judgment of the lower court is correct, and it is hereby affirmed.

(107 La.)

NEIDER v. ILLINOIS CENT. R. CO. (No. 13,653.)¹

(Supreme Court of Louisiana. May 6, 1901.)
INJURY TO EMPLOYEE—NEGLIGENCE OF MASTER—ASSUMPTION OF RISK.

1. A cross-tie, a piece of timber 8 inches by 10 inches thick and 10 feet long, was left beside a path along which a flagman had to run in the discharge of his duties. It was left parallel with the path, and clear of it. On each side of the path were the tracks of the defendant company; two on one side and three on the other, all parallel. The distance between the tracks was 8 feet. The place was the middle, or neutral, ground between the two roadways of a wide street in the city

¹ Rehearing denied June 23, 1902.

of New Orleans, which middle ground was also the yard of the defendant company. On this yard vehicles could not pass, and pedestrians were supposed not to pass, and could not pass without going considerably out of their way from the sidewalks. The tie remained in that position three to five days, when some person unknown moved it to a position across the flagman's path. Within less than 1 hour and 15 minutes thereafter, none of the employees of the defendant company having during this time come near the spot, the flagman, while running ahead of a backing freight train, stumbled on the tie, fell on the track, and was run over. *Held*, as a matter of fact: First, the tie was inoffensive where left; second, the flagman, passing and repassing along the track during three to five days in the discharge of his duties, must have seen the tie alongside the path; third, the defendant company had no knowledge of the changed position of the tie. *Held*, as a matter of law: First, defendant company could not foresee that some unknown person would move the tie to across the path, and the failure so to foresee was not negligence; second, the contingency of some one moving the tie to across the path was as much within the flagman's observation as within the defendant company's, and was a matter as much within the flagman's competency to judge of as within the defendant company's, and therefore this contingency was a risk which the flagman must be presumed to have assumed as an incident of his employment; third, in the absence of knowledge, actual or constructive, of the tie's being across the path, not removing it from there was not negligence.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Henry Neider against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hunter C. Leake and Gustave Lemle (J. M. Dickinson, of counsel), for appellant. Armand Romain, *amicus curiæ*. W. R. Stringfellow and Thomas M. Gill, for appellee.

PROVOSTY, J. Plaintiff was run over by one of the trains of the defendant company while in the performance of his duties of flagman in the employ of the defendant company. Both his legs were crushed, and three of the fingers of his right hand. One leg had to be amputated at the hip, one below the knee. The little finger and the finger next to it had to be cut off at the middle joint, and the middle finger at the tip. He charges that the accident occurred through the fault and negligence of the defendant company, and he claims \$50,000 damages. The place of the accident was Poydras street, in this city, between the intersections of Bolivar and Claiborne streets. Poydras is a very wide street, with two roadways, and, between these roadways, a middle ground, on which the tracks of the defendant company, five in number, and all parallel, are laid. The street runs from the woods to the river. The territory or beat of plaintiff as flagman began at Bolivar street, and extended, going towards the river, to Clara street, comprising the intersections of Bolivar, Claiborne, and Clara. Plaintiff was sta-

tioned on a path between tracks Nos. 2 and 3, and in the discharge of his duties was required to run along this path. The accident occurred at about half past 2 o'clock on a bright, warm day. Just before the accident the situation was this: Plaintiff was at his post at the intersection of Bolivar street, the end of his beat nearest the woods. Not far from him, about six or eight feet from the crossing, stood the rear end of a freight train. This train was on track No. 2,—one of the tracks next to the flagman's path. This train was composed, according to some of the witnesses, of 27 cars, and according to others of the witnesses of 18 cars, and it was about 1½ or 2 blocks long, extending beyond Bertrand street, which, towards the woods, is the next street after Bolivar, where plaintiff was standing. Some of the cars in the front part of the train were being weighed at a scale near the intersection of Bertrand street; that is, about the distance of a block from where plaintiff stood. Defendant's theory of how the accident happened is stated in the brief as follows: "Plaintiff was standing in the rear of a stationary train belonging to defendant, the cars of which were being weighed. The train was moved backward in order to weigh another car, and in doing so struck plaintiff, knocking him down and running over him." Plaintiff, on the other hand, says that just as the train started to move a lady and a child attempted to cross; that he checked them from doing it, and, after warning the lady and child, he ran ahead of the car to flag the Claiborne and Clara streets crossings; when, after he had run about 10 steps, he stumbled on a loose cross-tie that lay diagonally across his path, and he fell on the track and was run over.

It is not necessary for us to decide between these two theories, as there is no case against the defendant company even if plaintiff's fall was caused by his being tripped by the cross-tie. In order to recover, plaintiff must prove negligence on the part of the defendant. Now, while the plaintiff charges negligence in connection with the manner in which the offending train was run,—in that the speed was excessive, and in that there was no lookout to give timely warning to the engineer,—his main reliance evidently is on what he alleges to be the failure of the defendant company to provide for him a safe path on which to run in doing his work. As to the speed of the train, we adopt the estimate of the foreman of the crew weighing the train, who was in charge of the engine. He was moving the train so as to get the tenth car from off the scale and get the thirteenth car on the scale. The scale barely accommodated the car. Here was a nice operation, requiring careful attention to the speed of the train. We think the estimate of this man as to the speed of the train is much more likely to be correct than is an estimate of the plaintiff and his witness

Carter. Besides, the probability is that no greater speed was imparted to the train than was necessary in the operation of weighing. As to the absence of a lookout to warn the engineer, the train was not on the street, but on the middle or neutral ground between the two roadways. This middle ground was also the yard of the defendant company. There was a flagman at the crossings to give timely warning both to would-be passers and to the engineer. We think that under these circumstances a lookout was not needed. Plaintiff, when he fell, had run, according to his own testimony, only about 10 feet, and according to the testimony of his witness Carter was only about 8 or 10 feet ahead of the train. Evidently the train was close upon him, and would have run over him no matter how moderate its speed might have been, and no matter if there had been a lookout at the rear end. Between these alleged negligences, therefore, and the injury, there is no causal connection, and without such causal connection the negligences are insignificant. *Snider v. Railroad Co.*, 48 La. Ann. 1, 18 South. 695; *Nivette v. Railroad Co.*, 42 La. Ann. 1153, 8 South. 581; *Clements v. Light Co.*, 44 La. Ann. 694, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Henry v. Lumber Co.*, 48 La. Ann. 954, 20 South. 221. The responsible agency of defendant in connection with the presence of the cross-tie on the path is limited, under the uncontradicted evidence, to the fact that the tie was left alongside the flagman's path. Neither plaintiff, nor any one of his witnesses, nor any one else, undertakes to say by whom the tie was moved from its position parallel with the track to its position across the flagman's path. The tie was moved, if at all, by an unknown person; and, it not being proved or claimed that defendant could have foreseen and prevented this act on the part of this unknown person, the negligence of the defendant, if any there was, consisted either in permitting the tie to be placed alongside the path, and to remain there, or in not removing it from across the path after the unknown person had placed it there. Was it negligence to permit the tie to be placed alongside the path, and to remain there? We think not. The distance between the two tracks is eight feet. The tie lay parallel with the track, and entirely clear of the path. So long as it remained there it was inoffensive. The danger, if any, lurked in the possibility of some one moving it to a position less inoffensive. But the place was the company's yard, where vehicles could not pass, and where pedestrians were not expected to pass, and could not pass without going considerably out of their way from the sidewalks. Besides, the tie was a piece of timber 8 inches by 10 inches thick and 10 feet long, which no pedestrian could move accidentally. The contingent danger was, therefore, that some one should move the tie deliberately. This contingency was entirely

too remote for the not taking it into consideration to be imputed as negligence. It was not negligence on the part of defendant not to foresee and provide against the deliberate act of an unknown person. True, if the tie had not been left there, it would not have been put across the path; but that is no argument. Railroad companies are certainly not required, under penalty of negligence, to remove every piece of material beyond the reach of malicious persons. *Mire v. Railroad Co.*, 42 La. Ann. 385, 7 South. 473. Was it negligence not to have removed the tie from across the path after the unknown person had placed it there? We think not. The position of the tie was changed, if at all, after the crew of the train that was being weighed had gone to their dinner, and the accident occurred within 15 minutes after the return of the crew from their dinner. The record does not show that the tie as it lay across the path attracted the attention of the crew of the train after their return from dinner, or that this crew, or any one of them, or any other employé of defendant, except plaintiff, came near the spot; so that the record fails to show that the defendant company had any knowledge of the change in the position of the tie. For the defendant company not to have remedied a situation of which it had no knowledge, actual or constructive, certainly cannot be imputed to it as negligence. *Wood, Mast. & S.* (2d Ed.) p. 768, § 382.

There is another reason why plaintiff cannot recover. The tie, a piece of timber 8 inches by 10 inches thick and 10 feet long, of cypress, and new, and therefore of light color, as it lay on the cinder-covered, and therefore dark or black, ground, was a conspicuous object; and plaintiff cannot have failed to see it during the three to five days it lay there, as he passed and repassed constantly along the path in the discharge of his duties. He testifies that part of his employment was to look after the property of the company; but, be that as it may, he, we say, cannot have failed to see the tie in the position alongside the path. Now, if danger there was that some one should move the tie from its position of safety to a position across the path, this danger was within plaintiff's plain observation, and of a nature as much within his competency to judge of as within the defendant company's; and the law is well settled that if the servant has knowledge of the danger, and continues in the employment, he assumes the risk as an incident of his employment. *Carey v. Sellers*, 41 La. Ann. 500, 6 South. 813; *Jenkins v. Cotton Mills*, 51 La. Ann. 1017, 25 South. 643. Had the plaintiff stumbled on the tie while it was in the position in which the employé of the defendant company left it, whereby the tie would have been shown to have been dangerous in the position in which the employé of the defendant company left it, the question of the liability of the defendant

company would have been exceedingly intricate. The event would then have demonstrated the danger, and the danger would have been one to which plaintiff would have been subjected unnecessarily, and his assumption of it could hardly have been presumed, since he could not be presumed to have contemplated the occurrence of a combination of circumstances whereby he should be suddenly placed under the necessity to run at his utmost speed without attention to where he trod. But plaintiff did not stumble on the tie in the position in which it was left by the employés of the defendant company. The event showed, if anything, that the tie in that position was not dangerous; so that the liability of the defendant company would have to be deduced from the danger that some one should deliberately move the tie from its safe position to a position across the path; and we have given our reasons for thinking that that contingency, in the first place, was too remote for the neglect of it to be characterized as negligence, and, in the second place, was of a nature to be as fully foreseen and appreciated by plaintiff as by the defendant company, so that it came within the risks of plaintiff's employment.

The judgment of the lower court is set aside, and the suit of plaintiff is dismissed, with costs in both courts.

(107 La.)

MAYOR, ETC., OF NEW IBERIA v. FONTELIEU. (No. 14,307.)

(Supreme Court of Louisiana. June 18, 1902.)

MUNICIPAL CORPORATIONS—TAXATION—PUBLIC IMPROVEMENTS.

1. Whilst it is true that the power to impose taxes and local assessments can only be exercised by municipal corporations when conferred in express terms or by necessary implication, the power to compel the owners of urban property to construct banquettes in front of the same, and to keep them in repair and free from obstruction, is not the taxing, but the police, power, and may be exercised under more general grants.

2. Under provisions of its charter authorizing its board of trustees "to make and pass such resolutions and by-laws and ordinances as may be deemed necessary and proper," and to "regulate and make improvements to the streets, alleys, side-walks, public squares, wharves, and other public property and places," etc., the town of New Iberia may legally require the owners of lots fronting on particular streets to construct and keep in repair the sidewalks and curbings in front of such lots.

Blanchard, J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; T. Don Foster, Judge.

Action by the mayor and board of trustees of New Iberia against Charles Fontellieu. Judgment for defendant, and plaintiffs appeal. Reversed.

Andrew J. Cammack, for appellants.
Broussard, Dulany & Broussard, for appellee.

MONROE, J. Plaintiffs sue on a promissory note executed by the defendant November 18, 1900, which reads as follows: "On February 1st, 1901, after date, I promise to pay to the order of the mayor and board of trustees of the town of New Iberia one hundred and eighty dollars, for value received, with interest at the rate of eight per cent. per annum from date until paid. For cement sidewalk." The defense is that the note is without consideration, and was extorted from the maker when he was under the impression that the amount for which it was given was due and demandable under the law; that the supposed consideration was the amount assessed by the town of New Iberia for constructing a sidewalk along the front of defendant's property, but that the town was and is without authority to impose such an assessment; and that the ordinance imposing the same is ultra vires, null, and void. Plaintiffs offered the following ordinance, adopted by them in December 1899, to wit: "Be it ordained * * * that it is hereby made the duty of the property holders, holding property on Main street of the town of New Iberia, within fire limits, to build curbings and make, or repair, the sidewalks in front of their property at their own expense. * * * That all curbings * * * shall be built of brick, laid in concrete, and all sidewalks or banquettes * * * shall be made of cement and concrete or asphalt. * * * That the street and bridge committee is hereby given the right to determine when it shall be necessary to cause the building of a new sidewalk or curbing in front of the property of any person who owns property on Main street, within the fire limits, * * * and in case the * * * committee or a majority of them, determine that it is necessary that a new sidewalk or curbing should be built or repaired, it shall be their duty to instruct the mayor to notify the property holders, or owners, to build, or repair, his, or her, sidewalk, at his, or her, own expense, within twenty days of the date of said notice which must be given in writing; and in case the property holder, or owner, should neglect, or refuse, to make, or repair, his sidewalk, or curbing, as above provided, then, it shall be the duty of the mayor to have such sidewalk or curbing, built or repaired, at the expense of the owner, or owners, of the property along which it will stretch; and, should the property owner, delinquent as above, refuse, or neglect, to pay the costs incurred for the material and labor as above provided within ten days' delay, to be counted from the presentation of a bill, * * * the amount of said expenses shall be recovered before any court of competent jurisdiction." Plaintiff also offered a certified copy of an amendment to the town charter adopted in December, 1898, which contains the following, among other, provisions: "The board of trustees shall have full power and authority to make and pass such resolutions, by-laws and ordinances, as may be deemed

necessary and proper: First. To regulate and preserve the peace and good order. * * * Second. To regulate and make improvements to the streets, alleys, sidewalks, public squares, wharves, and other public property and places, and to provide for the lighting and watering of the same; to order and direct the ditching, filling, opening, widening and continuing of any streets," etc. It is admitted that the defendant was duly notified to construct a sidewalk in front of certain lots owned by him, and that he failed to comply with the notice; that the sidewalk was constructed by the municipal authorities at a cost of \$180; and that the note sued on was given by the defendant in satisfaction of the claim resulting therefrom. So far as appears, the note was given voluntarily and without compulsion of any kind. The power to compel an owner of urban property to keep in repair the sidewalk in front of the same seems to be distinguished by the textwriters and the courts from the power of taxation or local assessment, and to fall within the police power of the state or municipal corporation. Mr. Cooley, referring to certain things that may be done in the exercise of that power, says: "And it has been held competent, under the same power, to require the owners of urban property to construct and keep in repair, and free from obstructions, the sidewalk in front of it, and, in case of their failure to do so, to authorize the public authorities to do it at the expense of the property [citing *In re Goddard*, 16 Pick. 504]; the courts distinguishing this from taxation on the ground of the peculiar interest which those upon whom the duty is imposed have in its performance, and their peculiar power and ability to perform it with the promptness which the good of the community requires." Cooley, *Const. Lim.* (4th Ed.) p. 734. Whilst, therefore, the power to levy taxes or local assessments must be conferred upon municipal corporations in express terms or by necessary implication, the power to compel the owners of property to construct sidewalks in front of the same, and to keep them in repair and free from obstructions, may be conferred in more general terms, and is held to be included in general grants of authority, such as those contained in the provisions of the plaintiff's charter which we have excerpted for the purposes of this opinion. 2 Dill. Mun. Corp. (4th Ed.) § 798; 7 Lawson, *Rights, Rem. & Prac.* p. 5263, § 3994. In the case of *Mayor, etc., v. Weeks*, 104 La. 489, 29 South. 252, upon which the defendant seems to rely, the amendment to the plaintiff's charter containing those provisions was not before us; and what we there said was predicated exclusively upon the provisions of Act No. 130 of 1898, and is inapplicable here.

Our conclusion, then, is that the plaintiffs are entitled to recover; and it is accordingly ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judg-

ment in favor of the plaintiffs, the mayor and board of trustees of New Iberia, and against the defendant, Charles Pontellen, in the sum of \$180, with interest thereon at the rate of 8 per cent. per annum from November 16, 1900, until paid, and costs.

BRANCHARD, J., dissents; holding that the power to compel property holders to construct sidewalks must be conferred by the charter of the municipality, and does not arise under the police power.

On Application for Rehearing.

(June 30, 1902.)

BREAUX, J. The defendant, having voluntarily executed a note for the amount claimed, is not in a position, from a legal point of view, successfully to urge that he is not indebted for the amount. The work had been performed by the municipality. The defendant, in common with the public, had the use and enjoyment of the new sidewalk, when, we infer, the defendant chose, for his convenience in matter of payment, to execute his note. At its maturity he had changed his mind, and sought in constitutional limitations the defense for which he now contends. Under repeated decisions, perhaps not directly in point, yet having, to our mind, a bearing, a property owner must be held bound by his acquiescence and approval of a tax, when it was intended for the common welfare, in which a defendant takes a part and benefit. There was something in the nature of a natural obligation on defendant's part to see to the repair of sidewalks in front of his property sufficient to hold him liable for the amount he assumed to pay. This court has said: "A taxpayer who actively engages in having an ordinance passed imposing a tax which results to his own interest, and acts so as to induce others to accept the tax as legal, is estopped from setting up the illegality of the tax." *Andrus v. Board*, 41 La. Ann. 697, 6 South. 603, 5 L. R. A. 681, 17 Am. St. Rep. 411. For similar reasons, one was held "estopped from questioning the legality of the tax." *Dupre v. Board*, 42 La. Ann. 802, 8 South. 593. The view that the defendant is bound by a natural obligation, made binding by his own act in executing a note, also finds support in *Factors' & Traders' Ins. Co. v. City of New Orleans*, 25 La. Ann. 457; citing a number of decisions in support of the text on this point.

Our attention has been called by plaintiffs' attorney to the fact that the New Iberia charter contains a special delegation of power regarding the making and repairing of sidewalks. If the power has been delegated, it strengthens the view that defendant is bound on his note, and that we cannot do otherwise than hold that it should be paid.

For reasons assigned, the rehearing is refused.

BLANCHARD, J., dissents on the ground that nothing whatever in the record shows any charter authority in the town of New Iberia to compel a property holder to construct sidewalks at his expense along the property, and that such power does not arise under the police power.

(107 La.)

STATE v. BAPTISTE. (No. 14,509.)
(Supreme Court of Louisiana. June 18, 1902.)

HOMICIDE—EVIDENCE—CORONER'S INQUEST.

1. Restricted to showing the death and cause of death, the *procès verbal* of the coroner's inquest is admissible in evidence on the trial of the person accused of the homicide.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; T. Don Foster, Judge.

Albin Baptiste was convicted of manslaughter, and appeals. Affirmed.

Mouton & Simon, for appellant. Walter Guion, Atty. Gen., and Anthony N. Muller, Dist. Atty. (Lewis Guion, of counsel), for the State.

BLANCHARD, J. Indicted for murder, convicted of manslaughter and sentenced to 12 years at hard labor, defendant appeals. Two bills of exceptions are in the record. They bring up the question of the admissibility in evidence, when offered by the state, of the *procès verbal* of a coroner's inquest; how far admissible; for what purpose admissible, etc. In this instance the state offered the *procès verbal* to prove the fact and cause of death; to show the man was dead and that his death was caused by a blow received. The defense objected that the *procès verbal* is not admissible to prove anything except death; that neither the manner nor cause of death, nor the participation therein of the accused can be shown thereby. The *procès verbal*, exclusive of the evidence taken before the coroner, read as follows: "At an inquest taken for the parish of St. Martin upon the body of Oneziphore Thibodaux, there lying dead, the jurors, whose names are hereto subscribed, upon their oaths say:—That death was caused by a blow inflicted with a singletree, the singletree being held in the hands of one Albin Baptiste, actually in jail." This is signed by the jurors and the coroner. The trial judge ruled the *procès verbal* was admissible to show the fact and cause of death, and thereupon he permitted to be read to the jury so much of the *procès verbal* as follows, and no more:—"At an inquest taken for the parish of St. Martin upon the body of Oneziphore Thibodaux there lying dead, the jurors, whose names are hereunto subscribed, upon their oaths say: That death was caused by a blow inflicted with a singletree." There was no error in this ruling. It is well settled

that the *procès verbal* of a coroner's inquest is admissible for the restricted purpose of showing the fact and cause of death. State v. Duffy, 39 La. Ann. 419, 2 South. 184; State v. Parker, 7 La. Ann. 84; State v. Taylor, Man. Unrep. Cas. 366. The portion of the *procès verbal* admitted to the jury was offered while the coroner himself was on the stand. Because he testified that no autopsy had been made upon the body of the deceased after death, that he had not seen the body of the deceased until several hours after death had ensued and a day or two after the wound was inflicted, and that he could not say what the cause of his death was, except from what the dead man's father told him and from the history of the case, it was objected that the introduction of the *procès verbal* had the effect of contradicting the witness, and this the state could not do since he (the witness) had been called by the state. There is no force in this objection. It was permissible for the state, in connection with the coroner's testimony, and as recalling the facts to him and assisting his faulty recollection, and even to show his mistake, to offer the *procès verbal*. In doing so, there was no such contradicting of the witness as made the reception of the *procès verbal* illegal evidence. Neither is there force in the objection that the *procès verbal* could not be received in evidence because it was not first shown that the jurors who signed it were sworn, and by whom sworn. The document itself sets forth the jurors were sworn and the law presumes the regularity of the proceedings. "Omnia rite acta presumuntur."

Judgment affirmed.

(107 La.)

CHAPMAN v. MORRIS BUILDING & LAND IMPROVEMENT ASS'N, Limited. (No. 13,975.)

(Supreme Court of Louisiana. May 26, 1902.)

PREScription—BURDEN OF PROOF.

1. The burden of proof to establish the facts necessary to support prescription rests on him who makes the plea; but where the facts are difficult of proof, and lie no more within the knowledge of one of the parties than of the other,—as, for instance, the time when a heavy building in New Orleans ceased to sink,—the burden will be discharged by making out a *prima facie* case; as, in the instance supposed, by proving the time within which such buildings cease to sink, as a rule. The burden then shifts to the opposite party to overcome the *prima facie* case, and rebut the presumption of prescription.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Thibodaux, Judge.

Action by Esther Chapman against the Morris Building & Land Improvement Association, Limited. Judgment for plaintiff, and defendant appeals. Reversed.

Robert G. Dugué, for appellant. Branch K. Miller and Funnell M. Milner, for appellee.

¶ 1. See Homicide, vol. 23, Cent. Dig. § 462.

PROVOSTY, J. The plaintiff, alleging herself to be the owner in her separate and paraphernal right of the building on Camp street, in this city, adjoining the Morris Building, at the corner of Camp and Canal streets, and to have said paraphernal property under her exclusive, separate administration, brings this suit to recover damages from defendant, the owner of the said Morris Building, for injury caused to her said building by the said Morris Building. The wall between the two buildings is a party wall, constructed as part of the Morris Building; and the contention is that this party wall, in settling, has dragged down plaintiff's building, causing walls to crack, plaster to crack and fall, floors to dip, and other injuries. The answer is a general denial and a plea of prescription.

Defendant contends that the damages in question, if they ever occurred, fell into the community of acquets and gains presumed to exist between plaintiff and her husband, and that as no separation of property is shown, and as the allegation of the property being under the separate administration of the wife is disproved by the evidence, the husband alone was qualified to bring suit. This defense cannot avail defendant; it being a special defense, and not having been specially pleaded. *Hen. La. Dig. p. 1152.* Had it been pleaded, non constat that plaintiff would not have shown that her husband was acting merely as her agent. *Miller v. Handy, 33 La. Ann. 160.* The plaintiff was not challenged to the proof of her separate administration. What evidence there is in the record going to show acts of administration by the husband went in only incidentally.

The defense of prescription is much more serious. The Morris Building was completed in September, 1889, and this suit was filed in May, 1898, and the prescription applicable to the action is one year. Conceding, for the purposes of the case, that the time when the building ceased sinking must be taken as the initial point of the prescriptive period, and that the burden to establish that time was on defendant, we think it has discharged the burden, and that the plea must be maintained. The proof is that, as a rule, heavy buildings, like this Morris Building, do not continue to sink longer than two years; and the proof is, further, that the Morris Building was constructed according to the methods most approved at the time of its construction, with less regard to expense than to excellence, and that it is more likely, therefore, to have conformed to the rule, than to have made an exception to it. Moreover, the testimony of the two architects who constructed the building goes far towards establishing affirmatively that it did, in point of fact, cease sinking within the two years. After this rule had been established, the burden shifted to the plaintiff to show that the Morris Building had proved an exception to the rule. *Powers v. Foucher, 12 Mart. (O. S.) 70; Knox v. Haslett, 12 Mart. (O. S.) 255; Hubnall v. Watt,*

11 La. Ann. 57; Bailey, Onus Probandi. 1, 5; Steph. Dig. Ev. arts. 95, 96; Black, Law Dict., "Burden of Proof."

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the plaintiff's suit be dismissed, at her costs in both courts.

On Application for Rehearing.

(June 30, 1902.)

MONROE, J. In the application for rehearing the attention of the court is called to the fact that the plea of prescription was not filed until after the plaintiff had finished offering evidence in rebuttal, and the case had been closed. It is evident, therefore, that the defendant's counsel had the advantage of introducing evidence with reference to the plea which they intended to file, and of which the counsel for the plaintiff were ignorant; and as there was judgment for plaintiff, and no new trial asked for, she cannot be said to have had a hearing on the facts upon which the prescription is based. Under these circumstances, we are of opinion that the interests of justice will be best subserved by remanding, instead of dismissing, the suit, in order that further testimony may be heard upon the question whether the defendant's building had ceased to settle more than one year prior to the assertion by the plaintiff of her claim for damages.

It is therefore ordered, adjudged, and decreed that the decree heretofore entered be set aside, and that there now be judgment reversing the judgment appealed from, and remanding this cause for the taking of further testimony upon the question referred to in this opinion; the costs of the appeal to be paid by the appellee, and those of the lower court to await the final judgment.

(107 La.)

HILL v. BIG CREEK LUMBER CO., Limited. (No. 13,842.)¹

(Supreme Court of Louisiana. March 3, 1902.)

INJURY TO SERVANT—DANGEROUS PREMISES—FELLOW SERVANTS—SUPERVISION BY MASTER.

1. Whatever application the "fellow servant" doctrine may have under the law of Louisiana, it cannot be given the effect of defeating recovery against the master for injury to a servant, when it is shown that the mill, or that part of it where the casualty occurred, was, from the standpoint of safety, being run with an insufficient force.

2. A master must be held responsible, not only for the employment of competent persons to do his work, but also for failure to employ enough of them to do it safely, as respects others employed, at all times.

3. He must also be held responsible for such reasonably constant and steady supervision of his workmen that they will not be permitted to become grossly and criminally negligent.

¹ Rehearing denied June 22, 1902.

He is in a position to exercise that supervision; no other person is.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Belle Hill against the Big Creek Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed.

Scarborough & Carver and Solomon Wolff, for appellant. Hudson, Potts & Bernstein (Boatner, Dodds & Boatner, of counsel), for appellee.

BLANCHARD, J. Plaintiff sues in the capacity of widow of George B. Hill, deceased, and as natural tutrix of her minor child Adolph B. Hill. She claims \$12,500 damages for and on account of the violent death of her husband in the sawmill of defendant company, where he was employed. Twenty-five hundred dollars of this sum she claims by reason of the physical and mental agony and pain suffered by the stricken man between the time of the casualty and his death. With regard to this, the evidence shows Hill was instantly killed. He did not live an appreciable length of time after being struck by the piece of lumber which caused his death. Damages under this head may, therefore, be eliminated from the case. The claim for the remainder of the amount sued for is predicated on the loss she has sustained of her husband and the child of its father. The petition charges the cause of Hill's death to the unsafe and dangerous condition of the mill premises and of the machinery of the mill, especially pieces or parts of the machinery called "the edger" and "the conveyor," and that the condition of the premises and of the machinery was the result of the neglect of the defendant. On behalf of defendant this is denied and it is asserted, per contra, that the mill, its machinery and equipment were in good order and condition, and that if there was any negligence in the operation of the machinery at the time of Hill's death, it was the negligence of a fellow servant, for which no liability attaches to defendant. The case was tried before the judge—a jury not having been asked for. All the evidence was taken under commission. The trial judge did not have the advantage of seeing and hearing the witnesses. There was judgment rejecting plaintiff's demand and she appeals.

Ruling—The contention of defendant is that Hill's death was due to the risks incident to the nature of his employment, and that these risks were well known to and understood by him. Plaintiff's case as set forth in her petition is confined to narrow limits—negligence of the master in permitting the mill and its machinery to be and remain in an unsafe and dangerous condition. Defendant's answer broadens its scope by reference to the operation of the machinery, and, in this connection, pleading the doctrine of negligence of a fellow servant. The evidence

admitted still further broadens its scope. Evidence received without objection makes pleadings, or rather supplies deficiencies in pleading. The case, then, to be judged is that which the evidence, in its fullness, discloses. Defendant's mill is one of large capacity. It easily averages over 100,000 feet of lumber per day. It is a modern sawmill, well equipped with improved machinery, and all the testimony negatives plaintiff's averment of the unsafe and dangerous condition of things in and about the mill, or any of its appliances, or appurtenances. There was no neglect of the master in this respect. For sawing logs this mill operated both a large circular saw and a gang saw. The logs entered the mill from the east and their progress was westward through the mill, coming out on the west side in the form of finished product of lumber. Looking in the direction towards which the logs were moving, the circular saw was on the left, the gang saw on the right. What are called "live rollers" conveyed the lumber forward from the saws to what is called "the edger." The edger is a table about eight feet long by about six feet wide, through which projected seven smaller circular saws. It was situated westward of the large circular saw and the gang saw, and midway between the two—that is to say, a line drawn from the center of the edger eastward would be equally distant from the circular saw and the gang saw in passing them. But the gang saw was nearer the edger. The live rollers that were appurtenant to the gang saw conveyed the lumber sawed by it to the right side of the edger, those appurtenant to the circular saw conveyed the lumber sawed by it to the left of the edger. The purpose of the edger was to further manipulate the lumber, now in the form of planks, and advance it towards the stage of the finished product, which stage was not to be attained until it had gone through still other machines located westward from the edger. The edger is a dangerous machine—perhaps the most dangerous to be found in and about a modern sawmill. Three of the small circular saws of the edger were on the right and manipulated the lumber that came from the gang saw. The other four saws were on the left and dealt with the lumber that came from the large circular saw. The edger crew in front of that machine consisted of six men—three who fed lumber to the three circular saws located on the right side of the edger, and three who fed lumber to the four saws located on the left of that instrument. Those on the left were John P. Cosman, Joe Cosman and George B. Hill, the deceased. Joe Cosman was not present when the accident occurred. He stepped aside for a few minutes. His absence has no bearing on the case. Those working as feeders at the front of the edger could see only the upper half of the bodies of those working behind the edger. Those working immediately behind the edger

were William Willett and Oliver Cobb, and still further back, having charge of the transfer table and chain conveyor, was Adam Cosman. As the lumber came from the edger it was received on live rollers and conducted to the transfer table and conveyor, the latter conveying it northward to the trimmer, which was a machine for its still further manipulation. William Willett and Oliver Cobb (sometimes referred to in the evidence as Alvin Cobb) were called "the strippers." That is to say, their immediate duty was to catch the strips cut from the lumber by the edger, and adjust the lumber straight on the rollers that were moving it out of the way and towards the transfer table. Adam Cosman stood at the transfer table and it was his duty to keep the lumber moving on the transfer chains or conveyor from the transfer table to the trimmers, where it was received and fed to, or put through, the trimmers by the two other men, to wit, Jno. Bell and Jno. McClure. It was also Adam Cosman's duty to look after and keep the transfer table and conveyor free from stray strips that might lead to the obstruction of those parts of the machinery of the mill. If the live rollers back of the edger, or the transfer table back of the rollers, were permitted to clog by the lumber or strips falling to move on by not being properly adjusted and kept straight upon the same, imminent and great danger to those feeding the edger in front would result. It was especially Adam Cosman's duty to see that there was no clogging of lumber upon the transfer table and conveyor. About 11 o'clock of the day of the casualty Jno. P. Cosman and Hill, working in front of the edger, had fed to the latter a plank from the large circular saw. This plank was 20 feet long and 2 inches thick. It had gone through the edger except about 2 feet of the rear end of the plank. Hill had then, it seems, turned his face towards the large circular saw, presumably to receive another piece of lumber coming from that direction to be fed to the edger. Just then the front end of the heavy plank still in the edger and not yet through it came in contact with a jam, a clog of lumber, upon the transfer table and conveyor. That stopped its progress, the plank turned a little and raised, the teeth of the small circular saws forming the edger, coming up through the table and revolving with incredible swiftness and power in the direction whence came the lumber, seized the plank and hurled it with great force back out of the edger towards its front, striking Hill about the waist and instantly crushing the life out of him. So great was the force with which the plank was hurled back that the pressure rollers, which held the lumber down, coming in contact with it immediately back of the small circular saws on the edger, were raised and the plank shot back in spite of them. There is some testimony to the effect that the rope controlling the lever, which operated the pressure roller

on his side of the edger, was seized by Jno. P. Cosman at that moment and pulled, and that by this means the roller was raised permitting the saws to hurl the plank back, destroying Hill. But the preponderance of evidence is that Jno. P. Cosman did not raise the roller, which seems to have required considerable effort, though he did seize the rope as an aid in vaulting upon a platform to the left of the edger, in the endeavor, which he successfully made, to get out of the way of the plank. He saw the trouble, instantly realized the danger, and sprang to a place of safety. But he swears he did not raise the pressure roller. Hill, with his face turned back looking for another piece of lumber to feed to the edger, pursuing the line of his duty, did not see the danger, and while he may have heard the outcry which Jno. P. Cosman gave as he sprang, it was too late; the heavy plank was already upon him. Adam Cosman, whose place was upon, or at the transfer table, as we have seen, to keep it and the conveyor clean, had left his post and gone off somewhere, and within a few minutes after his departure the clogging of the lumber took place, resulting in Hill's death as described.

We are asked to hold that Hill, thus done to death in the discharge of his duty, had assumed as a risk of his employment that the live rollers, the transfer table and conveyor back of the edger would be kept unobstructed, would not be permitted to clog with lumber. In other words, that he had assumed as a risk of his employment all the dangers incident to the operations and conduct of those stationed by the master at the rear of the edger. We cannot do so. The evidence shows that the three men, Willett, Cobb and Adam Cosman, were needed, each of them, all the time in the work back of the edger; no one of them could safely be spared even for a few minutes from his post. Especially was this true of Adam Cosman. He was the only man at the transfer table. He worked behind Willett and Cobb. They were up nearer the edger, looking towards it, catching the strips coming rapidly from the edger and adjusting the lumber coming from it straight upon the live rollers leading to the transfer table. Adam Cosman (or some man in his place when he stepped aside for any purpose) was needed all the time back at the transfer table to keep things straight and moving there. If he left, even for a very few minutes, danger to those feeding the edger immediately stalked forth. The master knew this; it was his (the master's) duty to have an extra man in attendance, at a post so dangerous, to keep watch on the situation, and immediately to step forward and take the place of either of the workmen, Willett, Cobb or Adam Cosman, who might step aside to answer a call of nature, or for any other purpose. The master did not have such a man. The mill, therefore, or that part of it, was, from the standpoint of safety, being run with

an insufficient force. This was negligence and the master's liability results. Wood, Mast. & S. §§ 384, 396. Whatever application "the fellow servant's doctrine" may have under the law of Louisiana, it cannot have the effect, under the circumstances of this case, of defeating plaintiff's recovery. A master must be held responsible not only for the employment of competent persons to do his work, but also for the failure to employ enough of them to do it safely, as respects others employed, at all times. 1 Bailey, Pers. Inj. §§ 471, 982, et seq.; Id. § 1562. He must also be held responsible for such reasonable constant and steady supervision of them that they will not be permitted to become grossly or criminally negligent. He is in a position to exercise that supervision. No other person is. See Lucey v. Oil Co. (Mo.) 31 S. W. 125. Hill, working in front of the edger, had a right to assume that his safety would be adequately looked after in the operations going on behind the edger. He had a right to assume he would be taken care of in respect to danger from that quarter. Undoubtedly, it was gross if not criminal negligence in Adam Cosman vacating his post without warning and going off, thus permitting the lumber to clog and cause the accident. But this negligence of a fellow servant, even from the standpoint of the advocates of that doctrine, cannot operate to discharge the master from liability where it appears, as here, that the negligence of the master caused or contributed to the injury and death of the servant. This is the doctrine of the Stucke Case, 50 La. Ann. 172, 23 South. 342, and it is supported by the text writers and the authorities generally. See Towns v. Railroad Co., 37 La. Ann. 630, 55 Am. Rep. 508; Bailey, Pers. Inj. p. 439, § 982 et seq.; Maupin v. Railway Co., 40 O. C. A. 234, 99 Fed. 49. It will not do for defendant corporation to argue it had enough men behind the edger to do the work there. It was its duty to have had a sufficient number of men there not only to do the work, but do it with safety to those working in front of the edger. If Adam Cosman could not leave his post for five minutes without danger and death attending on his absence, the master should have provided against that contingency. There should have been an extra man there for just such purpose. Defendant's counsel, in their brief, claim there was an extra man employed to attend momentarily to the duties of an employé having occasion to absent himself for awhile. But this is error. There was no such extra man. One of the witnesses (Jno. P. Cosman) speaks of a "floor manager," but not in the sense of an extra hand. The floor manager is he in charge of the operations of that particular floor of the mill. The same witness says it was "usual for the floor man to come and help when we are cutting long timber, but not when we are cutting short logs." The "floor man," then, was not an extra hand hired to fill

temporary posts vacated by a laborer, doing work attendant with danger to others if left undone, stepping aside for a few minutes. It is abundantly shown that if Adam Cosman had remained at his post, or any other man had been there to take his place when he left, the trouble would not have occurred. It is also shown that all the men employed were necessary to do the work—that is to say, each man had his hands full to do his own work, and no time to look after the duties of others who stepped aside, though it is said by some of the witnesses that when an employé stepped aside, it was the duty of those working with him to keep his work going. The witness Coates, speaking of the work at the mill was asked:—"Q. Each man there at the mill has his position and it is required of him to stay there and discharge his duties? A. Yes, sir. Q. Do you keep any more laborers in that mill than is necessary to run it? A. Just the right number. Q. Does it not keep everybody busy to keep it running? A. Yes, sir. Q. If every man attends to his own business, if he goes to any one's work, his work will get behind? A. Yes, sir. Q. When everything is operating no man has any authority to leave his place to go and do anything else? A. No, sir, his duty is to be at his place, unless he is called away by some one." Another witness, Jno. Bell, testified that the accident occurred because they (the mill owners) did not have a man to keep the transfer table clear. He was off at the time. No suggestion that an extra man was employed to fill such temporary vacancies. Indeed, all the witnesses testify that the accident was occasioned because of the clogging of the lumber on the transfer table, and that it clogged because of the fact there was no one at the time at the table to keep it clear. W. A. Shields was foreman of defendant's mill and in charge of all the work there. He testified for defendant. He speaks of "an extra man" working behind the edger, but on cross-examination, asked who this extra man was, said he had heard it was Adam Cosman. Defendant's position, however, is that Adam Cosman was not an extra man, but regularly employed behind the edger, doing duty constantly there that day. The foreman, whose business it was to know, did not know this, and all he knew about an extra man was that he had heard Adam Cosman was such extra man. The only conclusion to be reached from the evidence is there was no extra man on duty to take Cosman's place when he left, and that Willett and Cobb, who were working nearest him, were absorbed in their own duties which required them to look away from where Adam Cosman was stationed. It is not even shown they knew he was gone. Adam Cosman, himself, was not put on the stand, nor did defendant account for his absence as a witness. He had been their employé and presumably was when the evidence was taken. He knew more about his

own absence from his post that day, the reason for it, how long he had been gone, etc., than any one else. Yet he was not called to testify. His two brothers were, as were others employed in that part of the mill the day of the accident. All the testimony relating to the accident, given in the case, is from men who were then and are now employees of defendant. Necessarily, plaintiff had to go into the mill, itself, for witnesses.

For the reasons assigned it is ordered that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that plaintiff do have and recover of defendant the sum of \$5,000, with legal interest from judicial demand, together with costs of both courts.

(107 La.)

PLANTERS' OIL MILLS v. MONROE WATERWORKS & LIGHT CO.

(No. 13,829.)¹

(Supreme Court of Louisiana. Nov. 18, 1901.)
WATERWORKS COMPANY—ACTION FOR DAMAGES—FAILURE OF WATER SUPPLY.

1. Judgment of the district court affirmed on the facts of the case.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; Luther Egbert Hall, Judge.

Action by the Planters' Oil Mills, individually and for the use of certain insurance companies, against the Monroe Waterworks & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. Tyler Lamkin and Andrew Augustus Gunby, for plaintiff. Hudson, Potts & Bernstein, for defendant.

NICHOLLS, C. J. The present cause was before this court once before, on an appeal taken by the plaintiff from a judgment of the district court sustaining an exception of a cause of action which had been filed by the city of Monroe, and also by the Monroe Waterworks & Light Company, the defendants therein. The judgment appealed from was, as will be seen by reference to the report of the case made in 52 La. Ann. 1243, 27 South. 684, affirmed in so far as the city of Monroe was concerned, but it was reversed as to the waterworks and light company. The cause, as to the latter, was reinstated and remanded for a trial upon the merits. This trial having taken place, and having resulted in a judgment against the plaintiff in favor of the defendant, we are now called on to decide, on an appeal taken by the plaintiff, as to the correctness of this judgment. The plaintiff, on its own account, and for the use and benefit of a number of insurance companies, demands judgment against the Monroe Waterworks & Light Company for damages accruing by reason of the destruction by fire of certain property belonging to the

plaintiff in the city of Monroe. The demand is predicated upon an alleged breach by the Monroe Waterworks & Light Company of the terms and conditions of a certain contract made between it and the city of Monroe, under which contract the latter erected, maintained, and operated a system of waterworks in the city of Monroe. The plaintiff averred that said contract was made by the city, not only on its own behalf, but for the use and benefit of, and on behalf of, its citizens and property owners and taxpayers, of which it declared itself one. It alleged that it was entitled to the benefit of the provisions of that contract, and that a violation of the same by the waterworks company gave rise to a right of action by it for damages sustained thereby. Plaintiff averred further "that under a contract directly between it and the said waterworks company, entered into about the 1st of October, 1893, there had been erected long previous to the fire, on the same lot where the burned property was situated, two hydrants of the best and most approved character, one within thirty (30) and the other within sixty (60) feet of the place where the fire originated, and connected by pipes with the water mains to be used by petitioner to extinguish fires and for sprinkling purposes, which said hydrants were erected and connected with the water mains by the said Monroe Waterworks & Light Company at a cost of several hundred dollars to petitioner, and that in consideration of the payment of one hundred dollars per annum thereafter, payable quarterly, and which petitioner had punctually paid for the last six years, said Monroe Waterworks & Light Company agreed to furnish and have ready at all times water sufficient to throw streams through hose kept by it in proper condition, to be connected with the two hydrants, the height provided for in said contract between said Monroe Waterworks & Light Company and the city of Monroe." The plaintiff, after describing the buildings which it had erected on its property in Monroe, and the movables therein, and reciting the fact that they had been destroyed by fire, places the amount of the loss to itself at the sum of \$5,309, over and above all insurance, and the amount collected by it on the policies of insurance thereon, which sum so collected amounted, in the aggregate, to the sum of \$41,114.30. Plaintiff averred that, at the time of collecting said amount from the insurance companies, it executed to them, by written act of subrogation, all its rights and actions. Plaintiff alleged that the insurance companies, as subrogees, are entitled to recover the said sum of \$41,114.30, with legal interest from judicial demand; that it is itself entitled to recover the amount of \$5,309.65, with legal interest from judicial demand. Plaintiff alleged the damage aforesaid to have resulted on account of the reckless disregard and flagrant and wanton violation of the contract between said Monroe

¹ Rehearing denied June 28, 1902.

Waterworks & Light Company and said Planters' Oil Mills. Referring to the fire and destruction of property, plaintiff averred that "shortly after the fire's origin was discovered the alarm of fire was promptly turned in to the fire department of the city of Monroe, and said property would never have been destroyed had the waterworks company complied with its said contract and agreement with the city and with it." Referring to the waterworks company, plaintiff alleged that said company on the occasion of said fire, without cause or excuse, wholly failed to comply with its said contract with the said city and with petitioner, by failing to have water in the standpipe sufficient to throw a stream through any kind, size, or length of hose or nozzle to the height of 10 feet, and said company for more than 1 hour and 30 minutes after the fire started, and after the fire alarm was given, and after the efficient city fire department and company and petitioner's employes had armed and applied hose to said fire hydrants, and could not get water, failed to have the pumps, engines, and machinery ready to co-operate or in operation, and failed for more than 1 hour and 30 minutes after said time, and after the chief of the fire department had ordered the pumps put in operation, to have any competent employé or engineer at the engines or pumps to start and operate the same, and by reason of said failures, and each of them, the said property was destroyed by fire. Plaintiff's petition charged that not only on this particular occasion had the waterworks company violated their contract obligations, by failing to furnish a sufficient supply of water for the extinguishment of fires, thereby wrongfully and negligently occasioning the loss and destruction of various properties within the city of Monroe, other than that of petitioner, but the inefficient service and its insufficient supply of water for the extinguishment of fires had become notorious in said city of Monroe, and had not infrequently been brought to the knowledge of the mayor and city council of Monroe, through reports made by the fire department and citizens of the city, as well as from frequent and striking observation on the part of city officials while attending fires occurring both before and after that which destroyed plaintiff's property, and that the city, by reason of failure and negligence on the part of the officials to compel a compliance on the part of the waterworks company with the provisions of the contract, or else to take charge of and operate the same, was guilty of gross negligence and malfeasance, which contributed to the loss and damage suffered by petitioner, and was therefore liable in solido with the waterworks company to the plaintiff for its losses in the premises. The waterworks company, after pleading a number of exceptions, which were overruled, answered, pleading first the general issue. It specially denied any private or other con-

tract with plaintiff at any time, either verbally or in writing, by itself or any one legally authorized to represent it.

On the 22d of February, 1893, the city of Monroe adopted an ordinance designated by the number 703, which was entitled "An ordinance to provide for a system of waterworks and electric lights, both arc and incandescent, in and for the city of Monroe, Louisiana, and granting W. A. Bright and F. F. Gravely, their associates, heirs or assigns, the right to construct and operate the same; giving the right to streets, alleys and public grounds to them, their associates or assigns, and agreeing to contract with the said W. A. Bright and F. F. Gravely, their associates, heirs or assigns, for fire and lighting purposes for a period of thirty years from the date of the ordinance or until the works shall be purchased by the city of Monroe." The first section of the ordinance ordained "that for and in consideration of the benefit to be derived by constructing and operating a system of waterworks and electric lights, and furnishing a sufficient supply of pure and wholesome water, suitable for drinking, washing and fire purposes, and arc and incandescent electric lights, at such points or places as may be designated by the city council, the rights to all the streets, lanes, avenues and public grounds as they now exist or may hereafter be extended for the purpose of laying mains, conduits, pipes and erecting hydrants, poles with electric lights or such as may be necessary for building and operating said works hereby contemplated, is hereby given and granted W. A. Bright and F. F. Gravely, their associates, heirs or assigns, for the period of thirty years, or until the city of Monroe shall purchase the said works or system." The second section declared: "The general plan of the works shall consist of a brick pump house, appropriate in design and containing suitable pumps, having a capacity of two million five hundred thousand (2,500,000) gallons per twenty-four hours, and two steel boilers each of sufficient capacity to drive the two pumps, a standpipe to be built of steel, of sixty thousand tensile strain, not less than fourteen feet in diameter and one hundred feet high, the mains to cover a length of not less than four miles, and to vary in size from eight to four inches in diameter, all mains to be of iron pipes and guarantied to withstand a pressure of two hundred and fifty pounds to the square inch. The electric light system to furnish not less than fifty (50), and one thousand incandescent lights of sixteen candle power each. All of which will be more fully set forth in detailed specifications to be furnished by said W. A. Bright and F. F. Gravely, within ninety days from the passage of the ordinance, and said specifications when accepted by the city council shall form part of the ordinance." The third section declares that "with a view to encountering [encouraging] the construction and operation of said works, and as a con-

sideration, the city hereby agrees to rent for the term of this ordinance seventy double discharge hydrants at an annual rental of forty dollars each, and twenty-five arc lights at an annual rental of ninety dollars each, payable semi-annually in cash, said fire hydrants and arc lights to be located at such points as may be designated by the city council." The fourth section provided for the hydrant rental and electric lights by the levying and collection of a special tax for that purpose. The fifth section declares that "the said W. A. Bright and F. F. Gravely and their associates, their heirs or assigns, may charge and collect quarterly for the water consumed by subscribers, other than the city of Monroe, the average rates now charged and collected by the cities of New Orleans, Louisiana, Pine Bluffs, Arkansas, and Jackson, Mississippi, and make such rules and regulations as they may deem proper from time to time, with the sanction of the city council: provided however that in case of failure of the said W. A. Bright and F. F. Gravely, their associates, or their heirs or assigns, to keep the said system of waterworks and electric lights in good and efficient working order, except in case of unavoidable accident, the city of Monroe may require said Bright and Gravely to give satisfactory bonds for carrying out the provisions of this ordinance, and may take charge of and operate said works until said bond is given: provided further that in case of fire at any time when the pumps are not running, the chief of the fire department shall have the right to order the pumps to be put in operation and kept running, that is, with pressure direct on the mains, until the fire is extinguished." The sixth section declares "that the waterworks when completed shall be subject to a test which shall consist of throwing two streams sixty (60) feet high through a seven-eighths ($\frac{7}{8}$) nozzle, at the same time," and, upon this test being made, the city shall be obligated and bound for the hydrant rental as provided in section 3 of the ordinance. The seventh section authorizes the city to rent additional hydrants for the unexpired term of the ordinance at the rate of \$40 per annum, and makes it the duty of the company to make extensions whenever required by a resolution of the city council, under certain conditions. The eighth section confers upon the city, under certain conditions and terms, the right to purchase the works. The ninth section declares that "the ordinance shall be a contract between W. A. Bright and F. F. Gravely, their associates, heirs or assigns, and the city of Monroe: provided the said W. A. Bright and F. F. Gravely, their associates, heirs or assigns, shall commence work within three months from the time the three and a half mill tax has been voted and promulgated, and have the works completed within nine months after said work shall have been so commenced." The tenth section requires Bright and Gravely to furnish within 20 days after the 3/4-

mill tax has been voted a bond in favor of the city, in the sum of \$2,500, to secure the faithful performance by them of the stipulations of the ordinance. The record contains a copy of the proceedings of a meeting of the council of the city of Monroe held on the 20th of May, 1892, from which it appears that Bright and Gravely had executed and tendered to the city a bond as required by the tenth section of Ordinance 703, accompanying the same with the plans and specifications of the works which they proposed to construct, and that the meeting in question was a "called meeting," the object of which was to examine the bond and the said plans and specifications of the works. At this meeting the council and mayor accepted the bond and the said plans and specifications, and adopted Ordinance No. 11, reciting that certain conditions and stipulations contained in said Ordinance No. 703 had been performed and complied with, that the special tax required to be voted in order to make the contract referred to in that ordinance become operative had been duly authorized at an election by the people, and that Bright and Gravely had executed their bond as required by said Ordinance No. 703, and it was thereon ordained and declared that the said Ordinance No. 703 was a contract between the mayor and city council of the city of Monroe and the said W. A. Bright and F. F. Gravely, and binding upon all parties thereto. Neither in the privilege granted to Bright and Gravely, nor in the contract between them and the city of Monroe, is there any agreement or stipulation by which the grantees agreed to hold themselves liable for damages to citizens from loss to their property by violation of their obligations under the permit and the contracts with the city. Such a stipulation was placed in several of the permits for waterwork plants and franchises, and in the contracts made by different cities under such franchises, which have been submitted to and undergone judicial investigation in other states. Such was the situation in the case of *Gorrell v. Supply Co.*, decided by the supreme court of North Carolina, and reported in 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

We are of the opinion that the judgment of the district court was correct, upon the facts of the case. Plaintiff complains that the water service of the defendant at the time of the fire upon its property was entirely defective, and that to this was due the loss of his property; but we are of the opinion, under the evidence, that if the fire department failed to accomplish, in the extinguishment of the fire, all that the situation itself admitted, it was to a very large extent, if not entirely, attributable to the sprinkler system which the plaintiff had itself established on its premises. That system is shown by the evidence to be very effective in the extinguishment of fire in its earlier stages, if the water from the sprinkler can reach it.

The sprinklers are closed by some metallic substance, which melts in the presence of a low degree of heat, and by melting permits the water from the pipes with which they are connected to be precipitated at once below. The expert witnesses who testified in the case declare that under certain conditions, and at certain stages of fires, when the supply of water to the sprinklers is obtained by pipes which connect with the public mains, the system, unless cut off at the proper time, would interfere greatly with efficient use by the city fire department of the instrumentalities furnished by the city for the extinguishment of fires. The witnesses testifying who seem most familiar with the scientific rules governing the subject-matter with which they are dealing attribute any failure of the fire department of Monroe to have done more effective work than it might have done on the occasion of the fire on the plaintiff's property, not to any fault on the part of the defendant company, but to the existence of the sprinkler system upon the plaintiff's property, and to the fact of there being a continuous simultaneous discharge of water during the fire from all of its openings, through the connection of the system with the public mains, in close proximity to the public hydrants from which the defendant was operating. If this be true,—and we are not prepared to say that it is not,—the plaintiff is itself to blame for the situation.

Being of the opinion that the judgment appealed from is correct, it is hereby affirmed.

(107 La.)

Succession of SLAUGHTER. (No. 14,317.)¹
(Supreme Court of Louisiana. May 28, 1902.)
PRESCRIPTION—ACKNOWLEDGMENT OF DEBT
—PARTIAL PAYMENT.

1. Acknowledgment of a debt will interrupt the course of prescription, but a mere acknowledgment of the existence of the debt will not operate as the renunciation of an acquired prescription.

2. An expression of ability on the part of the debtor to pay his debt, followed by part payment, amounts to nothing more than to a mere acknowledgment of the existence of the debt, and does not operate the renunciation of an acquired prescription.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ascension; Paul Lèche, Judge.

In the matter of the succession of James E. Slaughter. From the judgment on the opposition of J. H. Gardner the heirs appeal. Reversed.

Edward M. Hudson and Mercer W. Patton, for appellants. Ambrose Smith, for appellee.

PROVOSTY, J. The opponent, J. H. Gardner, was holder of three notes of the de cujus,—one for \$500, dated May 28, 1884, due 45 days after date, with 8 per cent. interest from

date; another for \$200, dated May 1, 1885, due 60 days after date, with 8 per cent. interest from date; and another for \$75, dated May 31, 1889, due 60 days after date, with 8 per cent. interest from date,—all to the order of the opponent. No payment had been made on these notes, and they were long prescribed, when, on the 28th of July, 1900, the de cujus wrote a letter to the opponent, in which is found the following: "And my memorandum book tells me I owe you money. That I can pay. Difficult to pay you constant, never-falling friendship. I must plead bankruptcy for that." This excerpt is the only part of the letter having reference to any debt of the de cujus to the opponent. Five months later the de cujus gave the opponent a check for \$1,000. Parol evidence being inadmissible to show the circumstances under which this payment was made, the payment stands as an isolated fact in the case. Parol evidence was admitted—and, we think, properly—to show that the three notes in question were the only debt due by the de cujus to the opponent. *McGinty v. Succession of Henderson*, 41 La. Ann. 394, 6 South. 638. The question is whether, under this condition of the facts, that part of the three notes not satisfied by the \$1,000 payment was taken out of prescription. The renunciation of a prescription once acquired may be either express or tacit. Civ. Code, art. 3461. The letter, standing by itself, amounts to nothing more than to an expression of ability on the part of the writer to pay some uncertain sum of money which his memorandum book told him he was owing the opponent. The payment of the \$1,000, reduced to an isolated fact,—as it is by the exclusion of parol evidence to show the circumstances under which it was made,—amounts at most to an acknowledgment of the existence of the debt. The letter and the payment taken together amount to nothing more than to an acknowledgment of the existence of the debt. They neither expressly nor tacitly renounce the acquired prescription. A man may acknowledge his debt, and pay part of it, without renouncing the prescription acquired on it. *Frellsen v. Gantt*, 25 La. Ann. 477; *Levistones v. Marigny*, 13 La. Ann. 354; *Blossman v. Mather*, 5 La. Ann. 335; *Utz v. Utz*, 34 La. Ann. 754; *Lackey v. Macmurdo*, 9 La. Ann. 18 (dissenting opinion of Judge Ogden). The following common-law cases collated by the diligence of the learned counsel for the succession are interesting to read in connection with the question of the renunciation of an acquired prescription: *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625; *Bell v. Morrison*, 1 Pet. 363, 7 L. Ed. 174; *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170; *Biddell v. Brizolara*, 56 Cal. 382; *Krueger v. Krueger*, 76 Tex. 178, 12 S. W. 1004, 7 L. R. A. 72; *Ayer v. Hawkins*, 19 Vt. 26. Also, note to *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

It is ordered, adjudged, and decreed that

¹ Rehearing denied June 28, 1902.

² 1. See *Limitation of Actions*, vol. 23, Cent. Dig. § 597, § 515.

the judgment appealed from be set aside, and that the opposition herein be dismissed, at the cost of the opponent in both courts.

(107 La.)

COMER v. ILLINOIS CAR & EQUIPMENT CO. (No. 14,048).¹

(Supreme Court of Louisiana. May 26, 1902.)
COMPROMISE AND SETTLEMENT—IMPEACHMENT—DURESS—CONTRACT—PERFORMANCE

1. Where a claim is made for a balance said to be due for services rendered under a contract, and the plaintiff alleges that an account had been rendered, and the balance thereby shown to be due had been accepted, but under duress, his failure to offer proof of the duress alleged, especially where the defendant proves by uncontradicted testimony that there was none, leaves the settlement thus effected unimpeached, and the plaintiff is concluded as to everything embraced therein.

2. A. having agreed to pay B. one-half of the net profit, as shown by A.'s statement of the cost, on work solicited by B., the latter is entitled to nothing in a case where the former is compelled to sue on a claim for work done, and, by advice of counsel, compromises the claim at a loss; the presumption, in the absence of proof to the contrary, being that more was recovered in that way than would have been recovered by going on with the litigation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by John W. Comer against the Illinois Car & Equipment Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Branch K. Miller, for appellant. Howe, Spencer & Cocke, for appellee.

MONROE, J. The plaintiff, as transferee of R. H. Cobb, sues the defendant for a balance alleged to be due for services rendered under the contract expressed in the following communication, which, being signed by the defendant's general manager, was delivered to and accepted by Cobb, to wit: "Anniston, Ala., February 18, 1898. R. H. Cobb, Anniston, Ala.—Dear Sir: Referring to our conversation this morning, we would be pleased to make you the following proposition on any business that you might obtain in the sugar district, such as cane cars, castings, forgings, etc. We will be pleased to pay you one-half of our net profits, as shown by our statement of cost; this contract to be in effect for one year, but can be terminated by either party giving thirty days' notice to the other. Yours very truly, [signed] J. M. Maris, General Manager." Plaintiff alleges that this contract meant that the defendant was to furnish in advance statements of the cost of work solicited by Cobb, that Cobb was to obtain orders predicated thereon, and that the difference between the cost so stated or estimated and the price realized for the work was to be considered the net

profit, of which Cobb was to receive one-half. And he claims the balance sued for upon that basis. He further alleges that an account was rendered to Cobb by the defendant, showing a smaller balance than is here claimed, and predicated upon the theory that the contract meant that the net profit to be divided was the difference between the actual and ultimate cost of the work solicited by Cobb, as executed and delivered, and the price realized therefor by the defendant, and that Cobb signed a receipt for the balance as shown by said statement on account, but that he objected and protested, and signed under duress, and because the defendant declined otherwise to pay any part of the amount due. The defendant admits the contract, and alleges that Cobb's compensation was to be one-half of the price received for work solicited by him, after deducting the actual cost, as shown by its statements; that an account was rendered and stated to said Cobb, which, upon the basis mentioned, showed a balance due him of \$436.97; that said account was accepted and agreed to, and that the balance so shown to be due was paid to, and voluntarily accepted by, Cobb; and that he gave his receipt in full, and in acquittance therefor, and is estopped to deny the same, or to assert that his compensation was to be fixed upon another basis.

It is admitted by both sides that certain work solicited by Cobb and executed by defendant for Hauptman & Loeb was not included in the statement above mentioned, and it is shown that a suit had been brought by defendant to recover the price of said work, and that the claim has been compromised, pending this litigation, with the result that the defendant sustained a loss.

R. H. Cobb was the only witness examined on behalf of the plaintiff, but he gave no testimony as to the circumstances under which he accepted the account and signed the receipt presented to him; and the allegations in the petition that he objected and protested and signed under duress, etc., are absolutely unsupported by proof. On the other hand, the statement of account and receipt in question were offered on behalf of the defendant, and its general superintendent testified, without contradiction, that they were prepared in the presence of Cobb, and were delivered to and retained by him for several days, after which, voluntarily and without duress of any kind, he signed the receipt as in full of the balance shown to be due; his only statement or objection made before signing being that the actual cost of the work as shown by the statement was excessive. It is not even alleged that Cobb did not understand the basis of the settlement to which he agreed; the substantial statement of the plaintiff's petition being that he knew that he was making the settlement in accordance with the interpretation of the contract which the defendant here sets up, and that he settled upon that basis under duress. But as

¹ Rehearing denied June 21, 1902.

no proof was offered in support of the allegation of duress, the statement stands unimpeached, and the plaintiff is concluded as to all that is embraced therein. *Flower v. Millaudon*, 19 La. 189; *Green v. Glasscock*, 9 Rob. 119; *James v. Fellowes*, 20 La. Ann. 118, 119; *Pickens v. Friend*, 26 La. Ann. 585; *Brodnax v. Steinhardt*, 48 La. Ann. 682, 19 South. 572; *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. Ed. 629; 1 Am. & Eng. Enc. Law (2d Ed.) p. 460 et seq.

Beyond this, it appears that the defendant was compelled to sue on its claim for the work done for *Haubtman & Loeb*, and that, as the suit was pending at the date of the settlement with *Cobb*, the *Haubtman & Loeb* matter was excluded from the settlement. It was not, however, excluded because it was to be settled on any other basis than the matters which were included, but because it was impossible at that time to determine whether, upon the basis agreed on, or upon any other basis, it would yield a profit. It further appears that whilst the instant action was pending the suit against *Haubtman and Loeb*, by advice of counsel, was compromised at a loss, exclusive of attorney's fees paid by the defendant. There is nothing in this record to prove that the defendant failed to prosecute the claim to the utmost of its ability, and, from the fact that the compromise was effected by the advice of its counsel, it is fair to assume that it recovered more in that way than it would have done by going on with the litigation. Nevertheless there was no net profit, but a loss, and the plaintiff does not ask that the latter should be divided.

There is no error in the judgment appealed from, and it is affirmed.

(107 La.)

Succession of JAMISON. (No. 14,068.)¹

(Supreme Court of Louisiana. May 12, 1902.)

ADMINISTRATOR'S ACCOUNT—HOMOLOGATION—PRESENTATION OF CLAIM.

1. Assuming that a belated creditor, appearing and asserting his claim for the first time after the homologation of an administrator's account, may arrest, in the hands of the latter, any unpaid balances which, by the judgment of homologation, are to be distributed among the heirs of the deceased debtor, it is, nevertheless, incumbent upon such creditor to prove his claim contradictorily with the heirs or their creditors. He is not entitled to proceed summarily and by rule before such homologation, or to a trial in the civil district court during vacation, for the purpose of making such proof; and the fact that he asserts his claim after the account is homologated does not confer those rights upon him.

(Syllabus by the Court.)

In the matter of the succession of *Anna E. Jamison*. Application of the Louisiana National Bank for certiorari or writ of review to the court of appeals. Denied.

Branch K. Miller, for applicant. Carroll & Carroll, for respondent *Dubost*. *Florance & Rosen*, for respondent *Manhattan Cement Co.* *Joseph C. Gilmore* and *P. M. Gilmore*, for respondents *Holmes & Salter*.

MONROE, J. This is an application on behalf of the Louisiana National Bank for the review of a judgment rendered by the court of appeals for the parish of Orleans. The following case is presented: *Mrs. Anna E. Jamison* died in December, 1899, and in June, 1900, her administrator filed an account, showing that he had on hand \$30,675 in cash, which had been realized from the sale of real estate; that he proposed to pay debts amounting to \$27,209.59; and concluding as follows: "Total cash from real estate, \$30,675.00; total amount liabilities, \$27,209.59; balance for distribution, \$3,465.41. The above balance is to be distributed among the heirs as follows: To the heirs of *David Jamison*, \$577.57; to *Samuel Jamison*, \$577.57; to *Miss Jennie A. Jamison*, \$577.57; to *Miss Anita R. Jamison*, \$577.57; to *Irwin Jamison*, \$577.57; to *Robert Jamison*, \$577.57,—\$3,465.42." To this the administrator attached a memorandum to the effect that, as against *Irwin Jamison*, *Mrs. Louisa M. Dubost* had obtained judgment for \$1,224.95, May 30, 1898, and recorded same June 15, 1898; that the *Manhattan Cement Company* had obtained judgment for \$2,543.49, February 8, 1898, upon which a writ of execution had been issued and recorded May 16, 1900; and stating that he did not propose to decide which of said creditors was entitled to the share of said *Irwin Jamison*, but submitted the matter to the court. The memorandum further sets forth that, as against *Robert Jamison*, *Holmes & Salter* had obtained judgment for \$300, February 12, 1896, which was recorded May 12, 1896; that *Leon J. Reinberg* had obtained judgment for \$34.25, September 2, 1897, which was recorded October 25, 1897; and that *Livingston & Wood* had obtained judgment for \$40, which was recorded January 27, 1900. The account, as thus presented, was opposed by *Mrs. Dubost*, who set up the judgment which she had obtained against *Irwin Jamison*, alleged that she had caused his interest in the succession to be seized, and prayed that the account be amended by crediting said interest upon her claim. No other oppositions having been filed, the account was homologated, so far as not opposed, by judgment signed June 28, 1900. The next proceeding taken in the case was in the form of a rule filed on behalf of the Louisiana National Bank, August 2, 1900, in which the mover alleges that it holds and owns two promissory notes made by the decedent; one for \$100, dated August 27, 1896, and payable on demand, and the other for \$925, dated January 2, 1896, also payable on demand, and both wholly unpaid. Mover further alleges that the notes were omitted from the account, and that it had filed no opposition, but that the succession is solvent,

¹ Rehearing denied June 28, 1902.

and that, though the amounts appearing to be due to the other heirs have been paid, the shares of Irwin and Robert Jamison are still in the hands of the administrator, as funds of the succession, which must be used for the payment of its debts before it can become the property of said heirs or be appropriated to the payment of their debts. And in accordance with the prayer of this rule the administrator and the different creditors of Irwin and Robert Jamison who have been named were ordered to show cause why the amounts appearing on the account to be due to those heirs should not be paid to the mover. The administrator answered that he had paid to the several heirs the amount due to them as per the account, save in the case of Irwin Jamison, whose share he still retained, and in the case of Robert Jamison, of whose share he still had in his hands \$374.25. Irwin and Robert Jamison disclaimed interest in the matter, and their creditors urged the following, by way of exception and answer: (1) That the proceeding by rule was unauthorized; (2) that the issues presented could not be tried during vacation; (3) that the judgment homologating the account could not be ignored, revised, or reversed in the manner proposed; (4) that the judgment homologating the account operated, in fact and in law, as a partition of the funds offered for distribution, and had become executory, and that the distributive shares of Irwin and Robert Jamison no longer belonged to the succession, but belonged to the creditors of said heirs by virtue of the judgments obtained and the seizures made by them; (5) that in no case could the mover in the rule recover more than one-sixth of its claim out of the shares of said heirs, respectively; (6) that the decedent was not indebted to the bank as claimed. After hearing, the judge of first instance made the rule absolute in so far as to order that the virile shares of Irwin and Robert Jamison of the debt claimed by the mover be paid from the funds in the hands of the administrator. In the court of appeal the judgment so rendered was reversed, the objection to the form of the proceeding was sustained, and the rule dismissed, with costs, "reserving to the mover the right to assert, by proper proceedings, such claim as it may have in the premises."

Assuming that a belated creditor appearing and asserting his claim for the first time after the homologation of the account may arrest in the hands of the administrator any unpaid balances which, by the judgment of homologation, are to be distributed to the heirs, it is nevertheless incumbent upon such creditor to prove, contradictorily with those who are interested in defeating his claim, that he is a creditor of the decedent or of the succession. He would be obliged to make such proof if he appeared before the homologation of the account, and is not relieved of that necessity because he appears afterwards. He would not be entitled to proceed sum-

marily, and by rule, before the homologation of the account, nor would he be entitled to a trial during vacation of the court; and the fact that he asserts his claim after the account has been homologated does not enlarge his rights in either respect. In the instant case, if the bank, finding that its claim against the deceased had not been recognized by the administrator, and that the balance necessary for its payment was to be distributed among the heirs, or among the creditors of those heirs, had sought a remedy before the homologation of the account, that remedy would have been found in an opposition, which is an ordinary proceeding, and upon the trial thereof it would have been obliged, contradictorily with the heirs and their creditors, to prove its claim. It is not suggested that the necessity for making such proof was any the less imperative because the claim was not asserted until after the account of the administrator had been homologated, but it is insisted that the bank had the right to proceed by rule, and out of term time, for that purpose. This position is untenable. "The right to proceed by rule or on motion implies the pendency of a suit between the parties, and is confined to incidental matters which may arise in the progress of the contestation, except in certain cases, where a summary proceeding is expressly allowed by law." *Thomas v. Bourgeat*, 6 Rob. 437; *Copley v. Conline*, 3 La. Ann. 206; *Baker v. Doane*, Id. 434; *Nolan's Heirs v. Taylor*, 12 La. Ann. 202; *Sharp v. Bright*, 14 La. Ann. 390; *Code Prac. arts. 98, 170, 754*. The right to summary proceedings cannot be extended beyond the cases expressly authorized by law. *Baker v. Doane*, 3 La. Ann. 434; *Sumner v. Dunbar*, 12 La. Ann. 182; *Mussina v. Alling*, Id. 799. The case of *West v. His Creditors*, 8 Rob. 123, to which we are referred by counsel for the plaintiff in rule, is inapplicable. It there appeared that a rule had been taken by a syndic to show cause why a certificate of debt in the hands of the clerk of the court should not be delivered to him, to which a creditor of the insolvents, who had caused the certificate to be seized under execution, objected that the proceeding by rule was illegal. It was held (quoting the syllabus) that: "The rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a direct action."

It is said that the civil district court is authorized by article 136 of the constitution to adopt rules, and that the rules adopted are not in the record, but that they authorize the trial of summary matters in vacation. But, as the matter in question was not summary, the rules referred to would not apply to it. And article 135 of the constitution evidently contemplates that contests arising over accounts filed by administrators shall be tried

only in term time. These views preclude inquiry into the merits of the controversy between the plaintiff in rule and the creditors of Irwin and Robert Jamison, as to which no opinion is expressed.

For these reasons it is ordered, adjudged, and decreed that the relief prayed for by the applicant be denied, and this proceeding dismissed, at its cost.

(107 La.)

SALLIER v. ROSTEET et al. (No. 14,126.)¹
(Supreme Court of Louisiana. March 3, 1902.)

PARTITION — INSANE CO-TENANT — SPECIAL CURATOR—SUCCESSION—ADMINISTRATION—RIGHTS OF HEIRS.

1. Parties who own property in common with an insane person have the absolute right to put an end to the indivision. They can sue to have the co-owner interdicted and a curator appointed. If subsequently the curator refuses to qualify, they have the right to provoke the appointment of a special curator or curator ad hoc to represent the interdict. The rules governing in matter of an interdict's interests are very similar to those governing in matter of a minor's interest. As with the latter, the former may be represented by a special curator or curator ad hoc. The difference between the two is not sufficient to afford ground to set aside proceedings in partition five years after their date.

2. While successions should be regularly administered, and the forms of law observed in making partitions of immovable property, a judgment will not be rendered to reopen a succession, it being evident that nothing can be accomplished by such a judgment.

3. After 10 years the transfer by heirs of a succession to the usufructuary of property will not be disturbed.

4. Persons not heirs who may owe to a succession may be held bound by an heir who claims a sum due because of certain acts by the one from whom they inherit. They may be proceeded against by the complaining heir without making all the heirs parties to the suit, and without, to that end, reopening the succession.

5. A family meeting may recommend that specially designated property held in indivision with owners who are not heirs be partitioned, and, if the order be complied with more than five years after, the irregularities of form will be cured.

6. Years after property of the succession has, without objection, passed into the hands of third persons, an heir who has a complete remedy will not be heard to champion the rights of his coheirs in order to reinstate the property of the succession as a whole, and to have another administration of the property.

7. Property in partition proceedings may be appraised after judgment ordering the partition.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

Action by Valery Sallier, curator, against J. W. Rosteet and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kleinpeter & Kleinpeter and Albert Voorhes, for plaintiff. Gabriel A. Fournet and Arsène P. Pujo, for defendants.

¹ Rehearing denied June 23, 1902.

BREAUX, J. Plaintiff seeks to have a partition decreed null, and to have certain properties brought to the mass of the succession of the late Charles Sallier and of Severine Sallier, his wife. Anselme Sallier, the interdict, in whose behalf this suit was brought by his curator, was a nephew of the late Joseph Charles Sallier, from whom he inherits. Years ago, the two, Joseph Charles Sallier and Severine Fruge, were married, and in time accumulated considerable property, which fell under the régime of the community. Neither of these parties brought separate property in marriage, save very small amounts, which do not give rise to any issue in this case. Joseph Charles in 1880 died, leaving no will. His widow about 10 years afterward died testate, leaving all her property to Joseph W. and Arthur Rosteet, whom she had reared. The late Joseph Charles Sallier left neither ascendants nor descendants, but brothers and sisters and children of predeceased brothers and sisters. In July, 1880, an inventory was taken, and in October of the same year a supplemental inventory, showing total assets \$56,871.97, belonging to the community, and showing value of real estate \$6,238. The inventory of the property was approved by the interdict; at the time he was, it appears, sane. His insanity dates from a period long subsequent. The widow was placed in possession of the portion of her husband's estate as usufructuary, after having furnished bond in a sum about equal to the value of the late husband's share; and afterward she bought certain interests of the heirs of her late husband, but did not buy any interest from Anselme Sallier. A short time after the death of Mrs. Sallier her will was probated, and Judge G. A. Fournet, whom she had named as her executor, qualified. An inventory of her property was taken, showing assets to the amount of \$22,470.44. Her legatees were placed in possession of the property, and after due administration the executor was discharged. In the year 1889 Joseph W. Rosteet, one of the legatees and the heirs of Arthur Rosteet (the other legatee, deceased), alleged that they were coproprietors with Anselme Sallier of property, real and personal, and that there were claims and accounts between them which required adjustment and settlement, and that they were desirous of partitioning the property held in common. They alleged that Anselme Sallier was insane and unable to administer his property; that he should be interdicted, and a curator appointed. They asked for citation to issue for the appointment of an attorney to represent him. They further asked for his interdiction, and for a curator to represent him. The required formalities were complied with. Sallier was interdicted, and Joseph L. Ryan was appointed his curator, but he did not qualify as curator. J. H. Sallier was appointed under-curator. Thereafter these parties presented another petition to the court, in which they alleged that Anselme Sallier,

defendant in their suit for a partition, had no curator, and that a special curator should be appointed to represent him. We have already stated that Ryan had failed to qualify. A special curator was appointed and qualified. Plaintiff, in his petition, with reference to the interdiction and the appointment of a special curator, alleged, in the suit now before us for decision, that no curator ad hoc was appointed to represent the interdict; that the special curator cited had no authority to stand in judgment in the partition suit, and in consequence that the interdict was not a party. No good reason was urged which would warrant us in setting aside the proceedings upon the ground that the special curator did not represent the interdict. He had been, as we think, regularly appointed. An interdicted person who has no curator may be represented in a partition by a special curator.

With reference to the word "special," as used instead of "ad hoc," we can only say that to us the translation, "special," and the original, "ad hoc," have very much the same meaning. In decisions they are used indifferently,—as in the decision in *Hansell v. Hansell*, 44 La. Ann. 548, 10 South. 941, for instance.

We will say further, in regard to parties in proceedings looking to a partition of property, that one cannot be compelled to hold property in indivision. The right cannot be impaired by the refusal of the regularly appointed curator to qualify. It follows, after a reasonable time has expired after the interdiction, if the curator appointed fails to qualify, a special curator may be appointed. The person of the interdict is like the minor under a tutor. The rules governing in matter of the interest of each are very similar. Civ. Code, art. 415. "In emergency the probate court may appoint a curator ad hoc, or a special curator to represent a minor" or interdict. In *re Fortier*, 31 La. Ann. 51. A "special tutor or curator may be appointed to represent a minor or interdict." Code Prac. art. 195. See, also, article 116, Code Prac.

The following is, in substance, another of plaintiff's grounds: That no legal partition has been made, and the heirs continue to hold the property in indivision. One of the complaints urged by plaintiff in support of this attack is that the estate was a whole thing in itself, and that a final partition could not be made of less than the whole; that specific property could not be selected for the partition. We glean from the record that the testatrix, Mrs. Joseph Charles Sallier, did not inherit property from her husband. She received one half as survivor in community, and was recognized as entitled to the usufruct of the other half. During her usufruct she bought all of her late husband's interest as owner of the property of which she had the usufruct, except only such interest reserved in property to which we will hereafter refer, except also the interest of plaintiff. It follows that the property passed out of the pos-

session of the succession of Joseph Charles Sallier into the possession of the Rosteet legatees, who were not parties to any act looking to the settlement of his Joseph Charles succession. They stood in the position of third persons to that estate, and owned the property in indivision with Anselme Sallier, an heir of this succession, whose interest in the property is quite limited. They, it is true, are answerable for the debts and obligations of the succession of Mrs. Joseph Charles Sallier; but we do not find it possible to hold that they must be made to return all of their property to the succession of Joseph Charles Sallier, in order that the succession may be restored to the condition of an entirety. The heirs sold their rights, and divested his succession of the entirety for which his one heir (i. e., the plaintiff) contends. Beyond all question, the Rosteets are the owners of all the property left by Mrs. Joseph Charles Sallier, and that includes everything except a small fractional interest of plaintiff, which passed to these legatees subject to whatever right this plaintiff may have; and it may be that there are small balances due some of the heirs, although we understand the settlement with all the heirs is full and complete. There is no necessity of constituting a whole or an entirety, as relates to the succession of Joseph Charles, in order that plaintiff may recover that which can as well be recovered in a direct action against the Rosteet legatees. Besides, when the property has been sold to effect a partition, the partition will not be rescinded by reason of the discovery made since the partition of the omission of property of insignificant value. *Woolverton v. Stevenson*, 52 La. Ann. 1147, 27 South. 674.

Considering that the interdict cannot be held to have been in any way prejudiced by the proceedings of which his legal representative complains, and that he has all of his rights unaffected, and that he can proceed and hold those legatees for whatever interest he may have which is in their possession, or for which he may be accountable, we pass to a consideration of other objections urged. They are that the community was not liquidated, and that the rights of the late Mrs. Sallier and of the heirs of Joseph Charles Sallier in the latter's estate have never been fixed; that no sale was made of the property, either public or private; in fine, that the nullity is complete and absolute. It must be borne in mind that the widow went into possession of the property as owner of one half, and usufructuary of the other.

We return to a consideration of the sale of the interest of the heirs to Mrs. Sallier, to which we have before referred. There are a number of these collateral heirs, not one of whom, except plaintiff, is complaining. They have signed receipt in full, and others have reserved some claims. Plaintiff seeks to avail himself of the rights, whatever they may be, of those parties, in order to urge that the succession of Joseph Charles Sallier is not

settled. This, in the order of things, plaintiff has no right to do. The property has passed from the succession in question to his widow more than 20 years ago. We do not think that issues can be reopened, as relates to uncomplaining heirs, whose interests plaintiff has no right to champion. "If plaintiffs obtain all they are entitled to, they have no legal concern as to how the other parties to the litigation may settle their relative differences." *Benton v. Sentell*, 50 La. Ann. 869, 24 South. 297. Plaintiff says that he had an interest in reopening the settlement as made. We have not found how that interest arises. If the sale for a partition is legal, he must then look to the proceeds, and not to another administration of the succession and sale of the property. The partition was at least provisional. To the extent that property was divided, it was binding. If the "partition is only considered provisional, it is not necessary to sue for a rescission of it, but a new partition may be demanded." Civ. Code, art. 1400. Considered in the light of a provisional partition, the fact that property has been omitted and rights overlooked would afford no good ground to set it aside. "The mere omission of a thing belonging to the succession is not ground for rescission, but simply for a supplemental partition." Civ. Code, art. 1401. The necessity of making a new partition of property omitted would not then have the effect of invalidating an already made partition.

Plaintiff urges that the extent of his interest in the property sold to effect a partition is greater than plaintiff admitted in his petition for a partition. This defense cannot now be heard to set aside the partition, which is now an accomplished fact. Those who buy at a sale for a partition cannot be made to incur the risk of nullity because an interest is alleged to be somewhat less than it really is. This question was considered in *Choppin v. Rank*, 47 La. Ann. 660, 17 South. 201, in which the court held the parties bound by the issues as originally decided. This court has said, "The partition as made would stand, though the two parties might have to adjust rights between themselves." *Benton v. Sentell*, 50 La. Ann. 869, 24 South. 297.

Plaintiff insists that the usufructuary and the heirs of age, the minors and the interdict, should have been made parties, in order to settle the rights of each, and to liquidate the community. We have seen that the usufruct of the widow was brought to a close by her death, and we have already said that defendants are bound for whatever obligation was incurred by the testator to the heirs of her late husband. With reference to community, we do not take it that the partition would prevent plaintiff from recovering any interest heretofore unsettled.

Stress is laid by plaintiff upon the fact that the succession of the husband had been accepted by plaintiff and the minor heirs, with

benefit of inventory. This fact cannot be urged with good reason against defendants, who were not heirs of the husband, and who have had naught to do with the settlement of the succession. Assuming that the late Mrs. Sallier and her legatees owed a settlement to the interdict of the community and of the usufruct, it does not follow that the partition is a nullity. With reference to the fact that the partition was accepted by defendants with benefit of inventory, that mode of acceptance can scarcely be of any avail to him after property of a succession has gone into his possession by the effect of a decree of the court regularly rendered, ordering that it be sold to effect a partition, and after it has been regularly sold in proceedings to which he was a party.

Plaintiff insists that the action of partition should have been brought against all the heirs of the husband, and should have been for the partition of the whole estate. We have heretofore stated that the value of the real estate, as compared with the cash on hand and other movable property, was limited. Plaintiff in the proceedings for partition (defendant here) held the receipts of all the heirs, covering all interests they had in the land; for the reservation contained in some of these receipts referred to other property than lands. Having this muniment of title, there was no good reason requiring them to go to the expense of making heirs parties who had no remaining interest in the land. The only one who had given no receipt was the plaintiff here. They properly proceeded against him to put an end to the indivision. Now, with reference to the entirety of the succession, and the asserted necessity of settling this succession as a whole, these defendants who were not heirs cannot be expected to reinstate the entirety of the succession in order to enable them to put an end to an indivision of property nearly all owned by them. They proceeded properly, as we think, against the heir in possession, who raised no objection. It is now too late to annul a final decree of partition, and order persons who are not heirs to return the property to the mass. The defendants are protected by the act of partition, in which plaintiff has acquiesced for more than five years. If there were informalities, not of substance, they are cured by the prescription of five years, duly pleaded. *Linman v. Riggins*, 40 La. Ann. 761, 5 South. 49, 8 Am. St. Rep. 549.

Another ground of objection urged by plaintiff is that a new inventory and appraisalment should have preceded the partition, and should have been the basis of the judgment of partition. This heretofore has not been considered a fatal irregularity. *Bayhi v. Bayhi*, 35 La. Ann. 530. An inventory was taken, which was approved by plaintiff's ward before he had become insane. A settlement (out of court, it is true) was made on the inventoried value of the property. This was accepted by plaintiff's coheirs, who continue to

treat it as just and correct. The immovables were disposed of in partition, and against the former curator of the heirs. Years have elapsed. We find no law or authority to reopen a succession after these many years. We grant, only for the purpose of illustration, that from this date the succession of the husband is reopened in accordance with plaintiff's petition. The uncomplaining heirs are called before the court. It suggests itself: Cui bono? They cannot be held bound for the acts of the usufructuary. They cannot be made to pay the cash forming part of the assets which they have not received, and to find property of the community of a succession opened in 1880, and which passed into the hands of the usufructuary. As relates to the form of the transfer made by the Saller heirs to the surviving widow in community, it gives no good ground for plaintiff's complaint after these many years. The other parties (i. e., the Rosteet legatees) not being heirs, they can be proceeded against only to the extent of their indebtedness. This can and should be done without reopening the succession.

Again, with reference to the partition, another issue raised in attacking its validity is that a family meeting held without special reference to a succession sale cannot legally advise the sale of an hereditary right of the minor or the interdict. If we correctly seize this contention, it is based on the fact that a family meeting recommended the sale for cash of different pieces of land in which the interdict had an interest. A portion of the land was owned by defendants independently entirely of the succession of Joseph Charles. There could be no good reason not to sell them on the separate advice of a family meeting held in the interest of the interdict (i. e., separate from the proceedings in settlement of the succession of the late Joseph Charles).

Plaintiff urges that a branch of his coheirs, the Pitthons, are not bound by the proceedings of a family meeting held in their behalf, by reason of the fact that they are null and void. That would, in all probability, have been a good ground before irregularities had become cured by time. It is now too late. Parties have acquired rights, and that which was at one time informal, perhaps, has become formal, or at any rate must be considered until the parties in interest choose to raise the issue.

We have carefully examined every issue raised by the pleadings. While they would have presented good ground if timely urged, after these many years we do not think they should be reopened, as it is not apparent that plaintiff has any right entitling him to have a succession reopened, in which he is only one of many heirs, in order to enable him to bring into court the two defendants who are not heirs. The judgment of the district court reserves to the plaintiff all rights needful to enable him to recover all amounts due him, under the views herein expressed.

The law and the evidence being with the defendants, it only remains for us to affirm the judgment. It is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(197 La.)

WILLIS et al. v. RUDDOCK CYPRESS CO., Limited. (No. 13,963.)¹

In re WILLIS et al.

(Supreme Court of Louisiana. March 31, 1902.)

PETITORY ACTION—PLEADING—TAX TITLE—JUSTICE OF THE PEACE—JURISDICTION—COLLECTION OF TAX—SALE—PRESUMPTIONS—CURATOR AD HOC—DEED—DESCRIPTION OF PROPERTY.

1. Where in the answer to a petitory action a tax title is set up, such tax title is open to every objection of law or fact the plaintiff may have to urge against the same, just as if such objections had been specially pleaded in the petition.

2. In 1873 a justice of the peace had jurisdiction of a suit brought by the tax collector to recover an amount of less than \$100, due for state taxes.

3. In such a suit the tax collector did not need to be represented by the district attorney. If it had been necessary that he should be thus represented after the judgment and after the lapse of 25 years, the presumption would be, in the absence of proof to the contrary, that he was so represented.

4. A sale made under the judgment in such a suit did not need to be approved by the auditor except as a matter affecting the right to pay costs out of state funds.

5. In the case of a judgment rendered by a justice of the peace court more than 25 years ago, in the absence of proof that the defendant was dead at the time the suit was brought and prosecuted to judgment the presumption will be that the defendant was living; the justice of the peace court not being a court of record.

6. Where the defendant has died after the rendition of judgment, and his heirs are unrepresented or unknown, the justice of the peace may appoint a curator ad hoc on whom notice of seizure may be served.

7. In a petitory action against a defendant claiming title by patent from the state the plaintiff is without interest to urge that the officers of the state were without authority to dispose of the land by patent. The title, if still in the state, would defeat the suit of plaintiff just as effectually as if vested in defendant.

8. In the description of property according to the maps of the United States surveys an error in the number of the range is immaterial where the description is otherwise sufficient to identify the property.

Breaux, J., dissenting.

(Syllabus by the Court.)

Certiorari to court of appeals, Fifth circuit.

Action by J. D. Willis and others against the Ruddock Cypress Company, Limited. Judgment for defendant was affirmed by the court of appeals, and plaintiffs bring certiorari or writ of review. Affirmed.

Robert J. Perkins, for applicants. Harry H. Hall, for respondent.

¹ Rehearing denied June 20, 1902.

PROVOSTY, J. This is a petitory action to recover a tract of swamp land situated in the parish of St. John the Baptist. The land was located by Joseph Désert in 1864 under a state land warrant of the series known as the "Gorlinski Certificates." The plaintiffs claim under this title. Defendant impugns said title on the grounds: First, that the Gorlinski certificates had no validity; second, that the location of the land under the certificate was never approved by the governor, and that without such approval the title remained inchoate, never maturing into a perfect title, and did not stand as an obstacle to a subsequent sale of the land by the state; third, that the said title, if otherwise good, was never recorded in the parish of St. John the Baptist, where the land is situated, and as a consequence is null and void as to third persons; fourth, that the same land was adjudicated to the state at a sheriff's sale made in 1874 under a judgment rendered against Joseph Désert for taxes; and, finally, defendant claims title under a patent issued by the state to W. R. Rutland in 1890.

The first two grounds above set forth have not been settled by the decision of this court in the case of *Betz v. Railroad Co.*, 52 La. Ann. 898, 24 South. 644, as is erroneously supposed by plaintiff's counsel. A rehearing was granted in that case, and thereafter the case never came to trial. But the omission of plaintiff's counsel to discuss this ground, as well as the omission to discuss the third ground relied on by defendant, is immaterial, as we propose to follow the example of the district and circuit courts, and rest our decision on the validity of the sheriff's sale. We proceed to consider the several grounds of nullity set up against this sale. They are properly set up in the present form of proceeding. *Hickman v. Dawson*, 33 La. Ann. 438; *Telle v. Fish*, 34 La. Ann. 1243.

1. That justice of the peace courts have no jurisdiction in suits to recover taxes, or in land controversies. The suit involved nothing more than a moneyed demand. That the judgment had to be satisfied out of the immovables of the debtor in the absence of movables did not make the suit a land controversy. Code Prac. art. 1144. No reason is assigned why, because such moneyed demand was for taxes, the justice of the peace did not have jurisdiction of it.

2. That the tax collector was not represented by the law officer of the state. The record is barren of proof that he was not; and, if it was necessary that he should be, the presumption in favor of the regularity of official proceedings would compel us to hold that he was.

3. That the sale was never approved by the auditor. Here again, in the absence of proof to the contrary, we are constrained, under the presumption "omnia rite acta," to hold that the approval was given if it was necessary. But such approval was necessary

only for the payment of the costs, not for the perfection of the sale.

4. That, Joseph Désert having died in January, 1873, and the suit having been for the taxes of 1871 and 1872, which taxes of 1872 did not become delinquent before the end of 1873, the suit was necessarily against a succession, and the justice of the peace had no jurisdiction of it. We do not see that under these facts the suit was necessarily against a succession. It might have been instituted and carried to judgment before the death of Désert. True, the demand for taxes of 1872 would, in such case, have been premature, but the tax collector, while suing for the taxes of 1871, may have included in the demand the current taxes of 1872, although not delinquent. His doing so would have given rise to nothing more serious than to a plea of prematurity.

5. That the *fi. fa.* was executed contradictorily with a curator ad hoc. We do not see what else the justice was to do, if the heirs of the deceased were unknown, or absent and unrepresented; and under the same maxim "*Omnia rite acta*," we must presume that such was the case. He had either to make such an appointment, or else let the judgment remain unexecuted. We think that under the circumstances it was admissible for him to appoint some one specially on whom notice of seizure might be served *quoad hoc negotium*. *Ball v. Crockett*, 9 La. Ann. 293; *Theus v. Kemp*, 49 La. Ann. 1857, 22 South. 962.

6, 7. That the tax collector was without authority to bring suit for the taxes. This question was settled by the judgment condemning the defendant to pay the taxes. After judgment and execution and sale, it is too late to urge objection to the capacity of the plaintiff to stand judgment.

8. This ground, as we understand it, is the same urged later in plaintiff's brief, namely, that the officers in charge of the state land office were without authority to sell this land to W. R. Rutland by patent, that the land could be validly sold only in pursuance of the statutes passed expressly to provide for the sale of lands acquired by the state at tax sale. The suit being a petitory action against a defendant claiming title, this title, if still vested in the state, would be just as effectual a bar to the suit as if vested in defendant; hence plaintiff has no interest in the question. *Hen. La. Dig.* p. 1114. The possession taken by the sheriff when he made the seizure is joined to that of the present time, and the defendant is presumed to have been continuously in possession. *Brien v. Sargent*, 13 La. Ann. 198.

Finally, plaintiffs contend that the land adjudicated to the state at the sheriff's sale is not the same for which suit is now brought. The land sold is the land that was owned by Joseph Désert. This is shown by a plat introduced in evidence by plaintiffs. The description in the deed agrees with the descrip-

tion in the plat in name, boundaries, and acreage, and differs only in that section 25, which is the land in controversy, is put by the deed in township 10, range 8, whereas by the plat it appears to be in township 10, range 7. That this is an immaterial error is not debatable in the light of past adjudications of this court bearing on errors in descriptions according to government surveys. Error in the range has time and again been held immaterial where by the other parts of the description, and even by competent proof all-unde, the land was identified. See *Bryan v. Wisner*, 44 La. Ann. 832, 11 South. 290, and cases there referred to.

For these reasons, we find no error in the judgment of the court of appeals, and the same is hereby sustained.

BREAUX, J., dissents.

(107 La.)

KELLY v. VICKSBURG, S. & P. RY. CO.
(No. 14,314.)¹

(Supreme Court of Louisiana. May 12, 1902.)
CARRIERS—INJURY TO PASSENGER.

1. A local freight train, with a caboose car attached, was in the habit of carrying passengers. As it drew up at a station, plaintiff, without delay, boarded the caboose at the rear end, it being the last car of the train. Just as he gained the door, and before he could enter, the train started with a violent jerk, throwing him backwards off the platform, and severely injuring him. Held actionable negligence on part of defendant. Sufficient time to board the car and reach a place of safety inside the caboose was not given him before the train was started and the violent lurching of the cars came.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; Luther Egbert Hall, Judge.

Action by J. B. Kelly against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stubbs & Russell, for appellant. Andrew Augustus Gunby, for appellee.

BLANCHARD, J. This is an action sounding in damages for personal injuries alleged to have been sustained by plaintiff through the negligence of the servants of defendant corporation. The amount sued for is \$2,500. The defense is a denial of the negligence charged, and the averment that plaintiff came to harm through his own negligence. The case was tried without the aid of a jury, and from a decree entered up by the district judge in favor of plaintiff for \$750, defendant prosecutes this appeal. Answering the appeal plaintiff prays an amendment of the judgment by increasing the same to the amount demanded in his petition.

Ruling—We agree with the trial judge that the plaintiff has made out his case. The

conflict of testimony characteristic of damage suits is observable here; but the weight of evidence sustains the plaintiff. On the afternoon of the 14th of June, 1901, plaintiff arrived at the depot of defendant company at Calhoun, a station some 16 miles west of the Ouachita river. The east-bound local freight train was due at Calhoun at 4 o'clock p. m. This train had a caboose attached and made a practice of carrying passengers. Plaintiff had gone to the depot to take this train. He purchased a ticket from the station agent, and awaited the train. It was nearly an hour late that day, reaching Calhoun a little before 5 o'clock. One or more of the passengers on this train were anxious to catch the south-bound passenger train at the city of Monroe on the Ouachita river, and if the movements of the freight train were expedited and some of the lost time made up between Calhoun and Monroe, this could be done, otherwise not. Under the circumstances it is evident no time was to be wasted at Calhoun. Something of a hurry was on. The train, composed of some 25 or 30 cars, drew up at the station, the rear car, which was the caboose, halting some 20 or 30 feet east of the depot platform. Plaintiff and J. H. Young, strangers to one another, stood on the platform of the depot and as the train slowed down, left the platform to board it. They walked rapidly towards the rear end of the caboose, the conductor calling out "All aboard" as they did so. Just as the caboose stopped, Young, who was ahead, ascended the steps, crossed the rear platform of the caboose to the door, and had just entered the doorway, when the plaintiff, closely following him, and about, himself, to turn in at the door, was, by a sudden and violent jerk of the car, thrown backward off the platform to the ground, sustaining serious and painful injuries. While there was an iron railing or protection guard at the rear of the platform, it did not extend across its entire length. There was the usual break at the center, intended, when not used as a passageway, to be spanned by a chain. But the chain was not up at the time in question, and through this open space plaintiff was precipitated to the ground. Sufficient time to board the car and reach a place of safety inside the caboose was not given the plaintiff before the train was started and the violent lurching of the car came. This was actionable negligence and defendant must answer for the damages occasioned.

The issue is one of fact, and we give conclusions merely, believing that a lengthy discussion of the testimony would serve no useful purpose. With regard to the quantum of damages, the sum allowed by the trial judge is deemed insufficient. Plaintiff is "left-handed." It was his left arm that was injured by the fall. The nature of the injury is thus described by the company's surgeon who attended him: "Dislocation of both bones of the forearm and the humerus

¹ Rehearing denied June 28, 1902.

² See Carriers, vol. 9, Cent. Dig. § 1159.

of the upper bone of the arm; one bone in front and the other behind the humerus." Asked how far did the two small bones of the lower arm pass above the elbow, he answered: "That is hard to say. The bones were so you could pull them up or down, whichever way you tried." He was put under the influence of chloroform, the arm operated on and then incased in plaster of paris. The doctor states it was rather an unusual injury. Plaintiff says the injury was at the elbow and the bones could be pulled backward and forward; that he suffered intense pain—far greater than he had ever before experienced. He is a young man 23 years of age, unmarried, but supports an aged mother. It is shown he is industrious, had worked for years at a large sawmill at an occupation which required the full use of the arm that was injured. He earned \$40 a month, but since the accident has not been able to continue at that work. Has had to engage in lighter labor at smaller remuneration. He lost considerable time in consequence of his injuries. Says the joint of the elbow which sustained the injury is abnormally large; that his arm has never fully recovered. Twelve hundred and fifty dollars, or an increase of \$500 over the sum allowed, is none too large for injury and damage of this character.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be increased to \$1,250, with legal interest from judicial demand, and as thus amended the same is affirmed at the cost of defendant in both courts.

(107 La.)

VON HOVEN et al. v. IMMANUEL PRESBYTERIAN CHURCH OF NEW ORLEANS. (No. 13,997.)¹

(Supreme Court of Louisiana. April 28, 1902.)

CHARITABLE TRUST—ENFORCEMENT—RELIGIOUS SOCIETIES.

1. Plaintiffs have a standing in court to compel a board of trustees to administer a fund in accordance with the will of the testator, who left it to enable the board to take care of their poor. Courts will interpose their authority as it may be needful to safeguard the fund.

2. There is higher authority in the church than that of the trustees of the church, whose privilege and whose duty it is to see that the fund left shall be used, as intended by the testator, in taking care of the poor of the church. Until that authority chooses to act and establish a condition of things that will insure a proper expenditure of the fund, it will remain intact in custodia legis.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Suit by Fred Von Hoven and others against the Immanuel Presbyterian Church of New Orleans. Judgment for defendant, and plaintiffs appeal. Reversed.

Omer Villeré and Edwin T. Merrick, for appellants. Benjamin Rice Forman, for appellee.

BREAUX, J. This suit was brought by plaintiffs, who allege that they are members of the Immanuel Presbyterian Church, and claim that the funds bequeathed by the late Casper Auch to that church are misapplied, and that his will is not executed in accordance with his last will and testament. Defendant appeared and excepted to the suit on the ground that, plaintiffs not being members of the church, they have no right of action. The court sustained the exception. There was evidence heard on the trial of the exception to sustain the averment that plaintiffs and their minor children are not members of the church, and that in consequence they have no interest in the fund before mentioned, and can have no concern in its distribution. During the trial of the issues which came up on the exception, testimony was also admitted regarding the management of this fund by the defendant corporation; and the question of the distribution also came up on the face of the petition, met as it was by an exception which gives rise to admission to some extent, at least, of facts charged regarding the misapplication of this fund. The funds were donated by Casper Auch to the several incorporated religious associations of the city of New Orleans in which religion is taught according to the form of the government and book of discipline of the Presbyterian Church.

The first question which presents itself for our decision is whether plaintiffs have sufficient interest to maintain their suit. A majority of their number have been recognized as members, and were accorded all the rights and privileges of members. The children of some of them were baptized in the church, and became its members. We are informed by the record that only communicants received by the session into the communion of the church in good standing, and contributing to its support, constitute the electors, and that failure to contribute for six months or more debars a member from the right to vote at any election until all arrears are paid. It further appears that all children born within the pale of the visible church are members, and are to be baptized; they are under the care of the church, and subject to its government and discipline, and when they arrive at years of discretion they are to exercise the duties of members. We understand that this embraces children born within the pale of the visible church, of parents who are communicants regularly received by the session. Before the contention among the members of this church arose, the membership of plaintiffs, except one, was not questioned. He was expelled irregularly, as we understand, and was afterward restored to membership. It is evident that plaintiffs, or at least several of them, were not prompt

¹ Rehearing denied June 28, 1902.

to contribute, and were perhaps debarred from the right to vote, under the act of incorporation to which we have referred. They none the less did not thereby lose their membership, and were entitled to be restored upon paying their indebtedness to the church, and can be heard in this case in behalf of the poor of the church.

Our learned Brother of the district court evidently bestowed close attention on this case. He heard the witnesses, and had good opportunity to form an opinion regarding the weight of the testimony. In his carefully prepared opinion he says that defendant had concluded itself from questioning the membership of plaintiffs; that "the testimony of witnesses which sets forth that there is a rule of presbytery which directs that, when a member has not been heard from for three years, that his name goes to the retired list, and that he is no longer a member of the church," seems somewhat too broadly stated. We infer that defendant has acted upon this rule, and that, in accordance with the view of its officers, the plaintiffs, in its view, are no longer members, although no regular trial has been had. We are not informed that the rule for the government of the sessions of the church enables its members summarily to dismiss a member without a hearing or trial, and, until proof is offered and admitted of such a rule, we are warranted in the conclusion that ex parte proceedings to get rid of delinquent or erring members are void. *Jones v. Nebraska* (Neb.) 44 N. W. 658, 7 L. R. A. 325. "The right of membership is a valuable privilege, of which no one should be debarred except for adequate cause shown" (Id.), contradictorily with the member against whom charges are brought. It occurs to us that defendant has less ground to stand upon than it would have if the suit were on the part of a member to be reinstated as a member of the church. Here the purpose is, as far as possible, to reinstate the amount of a fund; and, in so far as the action has that end in view, the complainants' right to be heard, we imagine, should not be denied unless it abundantly appears that plaintiffs are intermeddlers in a matter which does not in the least concern them. The defendant is bound by the following by-law: "The money bequeathed to this church by Casper Auch, deceased, shall form a poor fund. The interest and the revenue therefrom shall be for the benefit of the poor of this church, according to the wishes of the testator. The capital shall remain intact." The capital has not remained intact, and it does not seem that the defendant should of its own motion seek to reinstate the fund as far, at least, as possible, and that it should be slow in denying to plaintiffs, or any one else whom it has for a long period recognized as fellow members, and whom it has not regularly expelled, the right to be heard. The evidence discloses that the members of the church owed monthly dues in the sum of 25 cents, and, when

some of the members declared that they were unable to pay, these dues were collected by taking from the poor or Casper Auch fund. The testimony of the clerk of the session shows: "Q. Do you mean to say that you have fifty members who pay twenty-five cents every month? A. I don't say that. When they are not able to pay, they don't pay. They pay when they are able. I know several of them that are members of the church and are not able to pay, but the church pays for them out of the poor fund. Q. Mr. Rupert, how many members on that list have you got whose dues you pay out of the Casper Auch fund? A. I could not say. Q. About how many? A. Ten or fifteen. Q. Does your books show that? A. Yes." After having referred to this testimony, the learned judge of the district court directed the clerk of the court to forward a portion of his opinion to the presbytery, at Austin, and gave it as his opinion that it becomes the duty of this authority to see that "the legacy in question be properly administered, and that the funds be not misapplied," quoting further from his opinion, "and the courts are open to them, as to the heirs of Mr. Auch, to sue the Immanuel Presbyterian Church for the restitution of that fund which has been destined by Mr. Auch for the poor, when it is shown that said fund is being diverted into the treasury of the church for general purposes." We agree with the views of the learned judge, and think that it was proper to give notice to the higher authority as directed. Evidently the purpose of the testator was to help the poor in indigent circumstances, but not those who can maintain themselves by their work or business. It was to aid the unfortunate, without resources, who are suffering in extreme poverty. They have a right to aid from this fund.

We do not conceive that in order, as far as possible, to protect this fund, there is necessity of appointing a receiver in this case. The court, in the exercise of its equity powers, can, we think, find a temporary remedy. Without the appointment of a receiver, the fund can be judicially sequestered, and, if need be, placed in the judicial depositary of the court. The sequestration of the fund can be continued until it becomes evident that, through the presbytery before mentioned, or other lawful church authorities, the fund will be properly administered and expended in accordance with the will.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed. It is ordered, adjudged, and decreed that after the trial on the merits, if it be found that the will is not carried out in accordance with its terms, and the funds are not properly administered, they be sequestered on order of the court, and of its own motion, and the parties enjoined until further order of the court, and, if needful, that it be ordered deposited in the depositary of the court until such time as it

becomes evident that defendant will properly take care of and administer the fund. The case is remanded to be tried in accordance with the views before expressed.

(107 La.)

GOOTHYE v. DE LATOUR. (No. 14,615.)¹
(Supreme Court of Louisiana. May 12, 1902.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

1. Where the preponderance of evidence in a case depending on facts is in favor of the plaintiff, and there is nothing in the record affecting the credibility of his witnesses, the supreme court would act arbitrarily should it disturb the verdict of a jury and a judgment in his favor.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by Frank Goothey against Louis De Latour. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff seeks a judgment against defendant for \$25,000 as damages on the grounds that on the 21st of August, 1900, defendant willfully entered plaintiff's private premises and assaulted him with a pistol, then and there shooting at him with a loaded pistol, when a ball from said pistol shot by defendant entered petitioner's body through the left side of his breast, penetrated his left lung near his heart, thereby causing aneurismal varix of the heart, a permanent and painful injury, endangering his life; that ever since said shot he has suffered great pain, and was and is and ever will be prevented from transacting his ordinary business; he has also incurred expenses for physicians and medicines endeavoring to be cured of the wound; that he was laid up, and was still laid up, invalided, and unable to walk, and enduring constant physical and mental suffering; that his strength was undermined, and he was no longer able to work or earn a living in consequence of said wound and its immediate consequence; that petitioner was without fault, and contributed in no way to the said injuries; that the wound was inflicted upon him by defendant willfully and without provocation. The defendant, after pleading the general issue, averred that all his acts in the premises were done to protect his own life, and to save himself from serious bodily harm at the hands of plaintiff and his half-brother, Rudolph Elshman; that if he fired and discharged any pistol and wounded plaintiff, it was after he had been assaulted by plaintiff, who was aided and assisted by his said half-brother; that they, acting together, assaulted him both with their fists and a hoe, inflicting wounds of a serious and dangerous character upon his forehead and over his eye; that said wounds so inflicted were without cause or provocation, and plaintiff acted willfully and maliciously and without any

cause in assaulting him, and his acts and those of his half-brother, Rudolph Elshman (they acting together at the time), were malicious, wanton, and without any reasonable excuse therefor; that after he was assaulted, if he used a pistol, it was done to protect his life and to protect himself from serious bodily harm at the hands of plaintiff and his half-brother. Assuming the character of plaintiff in reconvention, he charged that plaintiff was indebted to him in a sum of money amounting to about \$24 or \$25, \$20 thereof being on a note which was then due and an open account; that on the 21st of August, 1900, he, for the purpose of obtaining a settlement and liquidation of the plaintiff to him, went to the place where he resided; that before reaching the house, and in an open field or square, he met the plaintiff and his half-brother; that without any cause, reason, or excuse, and without any justification, they then and there, acting together, willfully and maliciously assaulted him; that he was struck over the eye, cut in the face and over the forehead with a hoe; that at the time he was struck there was nothing left for him to do but to defend himself; that the cuts and blows received were of such a nature as to cause him to be sent to the Charity Hospital for treatment; that at the time of entering this field or lot he was assaulted by Rudolph Elshman, who struck him with his fist; that the plaintiff struck him with a hoe over his eye and forehead, thereby inflicting serious wounds upon his person; that he was knocked down, beaten, and stamped upon; that from the effect of said cuts, bruises, and beating he had been ever since unable, and was still unable, to attend to the ordinary business affairs of life and to his business; that he suffered both mentally and physically; that at the time of answering he was under the treatment of a physician; that from the effects of the cuts, beating, and bruises he had received at the hands of the plaintiff aided and assisted by his half-brother his sight had become impaired; that he had suffered damages to an amount of \$5,000. He prayed judgment for that amount, and for trial by jury. The case was tried before a jury, which rendered a verdict for the plaintiff and against the defendant for the sum of \$10,000 and costs of court. Defendant moved for a new trial. Plaintiff entered a remittitur for \$5,000. The court refused a new trial, and rendered a judgment against defendant in favor of plaintiff for \$5,000, and defendant appealed.

Joseph E. Generelly, Henriques & Dunn, Clegg & Quintero, and Joseph O. Daspit, for appellant. Louis P. Bryant, for appellee.

NICHOLLS, C. J. (after stating the facts). The defendant does not deny that the plaintiff was shot by him. The evidence establishes that fact, as also the fact that the wound inflicted was not only painful, but very dan-

¹ Rehearing denied June 28, 1902.

gerous, resulting in an aneurism, from which the plaintiff may die at any moment. The question submitted to us is practically one of law, for, if the facts be established, there can be no question as to what the law as applicable to the facts is. There are only three witnesses as to what took place at the moment,—the plaintiff and his half-brother, Rudolph Elishman, and the defendant. The shooting occurred in a truck garden belonging to and cultivated by the plaintiff and Elishman, in the Third district of New Orleans. The testimony shows that plaintiff had, for a number of years, bought the groceries he needed from the establishment of the defendant, who kept a small grocery with a small bar attached at or near the corner of Frenchman and Claiborne streets; that on the morning of the 21st of August, between 7 and 8 o'clock, Rudolph Elishman called at the grocery to make purchases for his brother; that just as he was about to leave the defendant invited him to take a drink with him, and the liquor was poured out into the glasses, but before it was drunk the defendant made a remark which displeased Elishman, and he threw the contents of his glass upon the floor, and left the establishment. Elishman testified: 'That as he was about to drink the defendant said that he had called two named parties negroes, and that he intended to see one of them the next day, and give him a piece of his mind. That upon his replying to him "that those were bad words to use," he retorted by saying, "You are a negro, too." That on witness saying, "Don't call me that. I am no negro,"—defendant replied, "How do you know you are no negro?" That witness said: "I am old enough to know. I only lost my poor mother a year and a half ago, and I can say she had no negro blood in her." That then it was he threw the liquor from the glass upon the floor and left. The defendant testified: That he and one of the parties whom Elishman testified he had called a negro were in the barroom when Elishman entered. That he commenced talking with this man about the other party, saying "that work ought to be stopped," when Elishman said, "I don't see why you should make such a remark about him." That he replied, "I made no remark about him; you are mistaken." That Elishman said, "You called him a negro." That he (defendant) said, "You are wrong." That with that Elishman got somewhat angry, turned his glass of whisky on the floor, and walked out, saying he would not put his foot in the house any more, and would not deal with him any more, and would not come there any more. That witness said: "I am very sorry for you. I did you nothing." That Elishman walked out, and talked a little to the other man. The person named by defendant as being present at the time of this occurrence was placed upon the stand by the defendant. He testified: That he was present in the barroom, but had stepped aside to read the newspaper. That the

parties had a little argument between them. How it began he did not know, but it was in regard to a difference of opinion between them on some subject which he (witness) did not fully understand. That he saw they were getting angry,—that is, Elishman got angry, and defendant was a little angry, too. They had little words, and he heard defendant say that he was not going to joke with Elishman and the other party to whom Elishman referred in his testimony as having been called a negro. That defendant did not (to witness' knowledge) call Elishman a negro. When asked what he meant by saying "not to his knowledge exactly," witness said: "He did not remember. He never heard defendant use that word to Elishman as a negro. That defendant had not called him (witness) a negro."

Whatever may have been the words used on the occasion, there is no doubt that unpleasant remarks were exchanged between defendant and Elishman, and that the parties parted in an unfriendly spirit. An hour or two after this, defendant entered the garden of the plaintiff, in which he and Elishman were planting seed. He had ridden there from his own establishment in a milk cart, the distance between the two places being about a mile and a half. Plaintiff testified that Elishman had not told him of what had taken place at the grocery, and he accosted defendant as he came towards him in a pleasant way, saying: "Hello, are you taking holiday?" That he said nothing, and witness said, "What is the matter, Louis?" and he answered, "I want to settle with that good-looking brother of yours." That Elishman was putting stakes down, and drawing a line on the bed. That defendant went to him, and said something "about a negro." De Latour spoke first. Elishman said, "If you repeat that over again, call me a negro again, you will see some trouble," and De Latour mentioned the word again, and said: "This is just as good a place as anywhere. You can take yon hoe,"—making a motion as if to draw a pistol. Elishman stooped and rushed him, to prevent his shooting. That witness ran up as quick as he could to prevent either one being killed, and there he got the load. Witness said: "Stop that, for God's sake! What is the matter?" Defendant looked at him, and he (witness) said, "What did I do to you, Louis?" And during that time Elishman had rushed him, and witness grabbed the pistol out of his hand. That the first shot Elishman got, and the second shot struck him (plaintiff) in the breast, near the heart. That he would not have prosecuted the man if he had done it accidentally, but he meant to do it,—was looking straight at him. That after he had taken the pistol from the defendant, his little son, who was present, asked him for the pistol,—asked him for it. That he gave it to him. That he took it home, and when called for by the police officer it was given to him. That after he was shot, Elishman asked him, "Are you

shot?" and he answered, "Yes; I am shot through my heart. Let De Latour go and take care of me. I have the pistol." That Eishman said, "You are shot, too?" and witness said, "Yes; I am badly shot. Let him go, and let the law have its course." He said, "No; give me the pistol, and I will finish killing him." That witness refused to let him have it, saying: "No; let the law have its course. I think he will pay for what he has done." Eishman testified that when defendant entered the garden he heard the plaintiff say to him, "Hello, you are taking holiday." That defendant answered, "No; not a d—d bit of it! I want to see your good-looking brother. I want to see him." That witness then said to plaintiff, "Yes; if you knew what that man called me this morning, you would not want to see him here. He called me a negro." That witness said, "Do you call me a negro again?" That defendant said, "Yes; I will call it to you again." Witness then said, "If you call me a negro again?" He did so, saying, "This place is as good as any damned place." Witness saw him pull his gun, and he said, "You take your hoe and help yourself." Witness stooped and caught him, and he was shot before he could throw him, and he next shot plaintiff. Witness did not have a hoe in his hand, and did not stoop to pick one up. He stooped to run into the defendant. Plaintiff said, "Louis, what did you shoot me for? Did you mean to shoot me?" and defendant answered, "Yes." That in the meantime he threw defendant down, and plaintiff said, "I am shot through my heart." That plaintiff had taken the pistol out of defendant's hand, and witness said: "Give me the pistol, and I will kill him," and plaintiff said, "No; I am shot through the heart. Let the man go. Let the law take its course." And witness pounded the defendant with his fist as much as he possibly could, when he saw that his brother was shot. That plaintiff did not pound him at all. That witness pounded the man for all he knew how. Witness denied that defendant was struck before he drew his pistol. Witness did not see his brother when he came up or when he was shot. Defendant's version of the affair is that he held a note for \$20, which plaintiff had given him for groceries; that when Eishman told him he would have no further dealings with him, he went out to plaintiff's to collect it; that, on entering the garden, Eishman and his brother were together, about 10 feet apart; that Eishman said, "Hello! I am glad to see you. I have not spoken to my brother yet. I am glad you came to explain." That witness said, "I don't see why you get angry. I have not done anything to get you angry." That Eishman then said to his brother, "Yes, Frank; that man called me a negro, and we just lost our mother;" and with that, witness got two licks in the face with a hoe; and, with that, he (witness) drew his pistol, and he got a lick on the side of the neck;

and with that, another shot went off, and Mr. Goothye hollered, "I am shot," and witness threw away his pistol, and with that they stamped him.

Defendant does not pretend to say that he went to see Eishman with the view of making explanations. He says he went there on a "business principle." He did not go with the intention of bringing on a difficulty. According to him, Goothye and Eishman had hoes in their hands when he approached them. The latter held, also, something else. He did not know whether it was a stick or not. He had the hoe in one hand, and the stick in the other. He says he was first struck by Eishman with his fist, and then by plaintiff on the neck with a hoe, which staggered him; that the two blows came almost at the same time; that as he was staggering from this blow he drew his pistol and fired; that when he fired the second shot he was clinched with Eishman. On cross-examination he said that Eishman first struck him with his fist which did not exactly stagger him, that he then struck him with a hoe,—on the side with a hoe; that he fired at Eishman. Being asked whether Eishman had a hoe, he answered, "He was stooping to pick up a hoe." He stated that when plaintiff struck him with a hoe he was about five feet off, holding the hoe by the end of the handle. Defendant testified that he had made the night before an engagement with several of his friends to take a trip that morning to Milneburg by the train; that he missed the 9 o'clock train, and, having missed it, rode out to Goothye's place to collect the note. Two witnesses testified that they were upon the road near plaintiff's place. They heard two shots, and, looking to where they came from, saw the defendant upon the ground, and Eishman pounding his face by moving a hoe up and down, holding it near the blade. They knew nothing and saw nothing before the shots were fired. There is no doubt that defendant was pretty badly beaten, but nothing indicates that he was cut by a hoe. The evidence shows that the defendant was at the mercy of the plaintiff and his brother. They had ample opportunity and means to have killed him, had they been so inclined. The testimony of the defendant and that of the two brothers is utterly irreconcilable. If defendant's version is correct, he is unfortunate in having it opposed by a preponderance of testimony given by witnesses whom the jury heard and believed in preference to himself. It is also unfortunate for him that he should have selected as the day for collecting the small note due him by the plaintiff that upon which a difficulty with Eishman had occurred, and that he should have selected as the place for collecting it that at which Eishman was at work, and that he should have gone to the place armed with a pistol. He did not stop when he reached plaintiff to present the note, or speak to him of the debt, but passed on to Eishman.

Plaintiff testified that, his brother not having spoken to him of what occurred at the store, he was surprised when defendant passed him as he did; that he stopped working, dropped the hoe he had in his hand, and looked after him. It is impossible for us to reverse the verdict of the jury, supported as it is by the approval of the judge. It would be a purely arbitrary act on our part to attach more credibility to the testimony of the defendant than to that adduced by the plaintiff. The plaintiff is a man 49 years of age,—a married man, with a wife and 11 children dependent on him for support. He is a hard-working, industrious man, rendered unable to perform physical work by the act of the plaintiff, and liable to die at any moment from the effect of the wound inflicted upon him. Both parties seem to belong to the humbler class of citizens. Neither, we imagine, is possessed of any great means. The theory upon which the case was decided places the defendant before the court as guilty of a deliberate act of wrong, working fearful injury.

We do not feel warranted in disturbing the verdict and judgment. It is hereby affirmed.

(107 La.)

HENNESSEY v. STEMPER. (No. 13,705.)
(Supreme Court of Louisiana. June 16, 1902.)

PLEDGE—RIGHTS OF PARTIES—RES JUDICATA.

1. The pledgee owes an account to the pledgor for all amounts collected on the claim against third persons left with him as collateral security, and, when called upon to account, it devolves upon him to show what has become of the pledged securities. Those under whom defendant holds having failed to account, she is held liable for the amount at which it appears the security was sold, and which amount had not previously been credited to plaintiff's account.

2. The questions of pledge and prescription were decided in the prior suit between the same parties, which is reported in 26 South. 1004, 52 La. Ann. 449.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by James M. Hennessey, liquidator and individually, against Mary G. T. Stempel, guardian. Judgment for plaintiff. Defendant appeals. Affirmed.

William S. Benedict and Andrew J. Murphy, for plaintiff. E. Howard McCaleb, for defendant.

BREAUX, J. This is an action of the pledgor against the pledgee to compel the latter to account for the amount at which he sold the note pledged to him as security for a loan. It is well settled that the pledgee is bound to account to the pledgor for all amounts collected on the claims against third persons left with him as collateral security, and, when called upon for an accounting, it is for him to show what has become of the pledged security. In this instance the de-

fendant, who inherited the right and obligation of the pledgee, refused to account, averring that the note was discounted, and that it was the property of those from whom she holds; that it was not transferred in pledge; and that in consequence she owes no account. The testimony as to whether the note was discounted and became the property of the McCans, under whom defendant holds, or was transferred to them in pledge, is conflicting. The weight of the testimony and the circumstances show that it (the note) was deposited as a collateral security. One of the entries in the books of the late firm sets out that this note was to be held as security for all indebtedness to the firm. Witnesses have by their testimony identified this note as one pledged more particularly to secure one of the loans, which was for \$1,500; and we infer that, in addition, it was to be held as security for any other amount which might become due by the borrowers to the firm in question.

We have examined the books of McCan & Son, introduced in evidence. They had been called for by plaintiff, by whose counsel they had been examined. They were offered in evidence by defendant, and admitted by the court. Having been called for and examined by plaintiff, they were admissible in evidence. *Edison Electric Light Co. v. U. S. Electric Lighting Co.* (C. C.) 45 Fed. 55; *Waller v. Stewart*, 4 Cranch, C. C. 532, 29 Fed. Cas. p. 94 (No. 17,109). Defendant's objection is that, although admitted in evidence, they were not considered by the lower court. In view of this complaint, we have brought to bear our most careful attention in examining them. Our attention was, in the first place, arrested by the following entry in the stub of the check book, showing that on August 14, 1884, John Hennessey & Bro., in liquidation, received check 1,272 from D. C. McCan & Son, on the note of A. Sorrell (the note which defendant claims was discounted): quoting from the entry: "Balance of note to be retained for bal. if any notes due us by Hennessey & Bro." Fifteen hundred dollars is the amount for which the check was issued. The amount of the A. Sorrell note was \$5,535. This has not the appearance of a discount and acquisition of the last-mentioned note by McCan & Son, as it expressly mentioned that the balance was to be retained as security for other notes due by plaintiff. The entries, as relates to the amount collected on this note, deposited as collateral security afterward, were all made in the name of McCan & Son, and not as if retained as security for other notes. The bookkeeper (Levy) of this firm testified that he then kept note of these items of collection. We excerpt the following from his testimony: "After the death of Charles P. McCan [of the firm], as I was not aware of the accounts, he having kept the cash account, I placed them to the account of D. C. McCan pending any settlement of the account." If, as we infer, the

note was to be held as collateral security, as before mentioned, there was no good reason to carry the sums collected, as was done. They should have been carried to the credit of plaintiff's account. The principle is clearly laid down that it is the duty of the pawnee to render account of all collections derived by him from the pledge. Story, Bailm. p. 809. We understand that no account was rendered as required, and that it does not appear with any degree of certainty that plaintiff was indebted to the firm in question after they had collected sufficient to cover the loan in question. We excerpt the following from the testimony of the witness McMurdo: "Q. What was the result, then, of your investigation of these books? A. I found, as I stated just now, that a good many notes discounted by D. C. McCan & Son, and charged in toto to John Hennessey & Bro., had never been placed to their credit when paid." We have not found that proper credit was given at any time, although, as per entry before referred to, the note was deposited to secure Hennessey's indebtedness. The original agreement was in 1884. In 1885 the following is the entry in the books: "Jno. Hennessey & Bro. credited by discts. A. Sorrell's note, \$5,535. Jno. Hennessey & Bro. charged to discts. A. Sorrell's note paid \$5,535,"—although there is no evidence that this note was ever paid. Some time afterward it was sold for \$2,500 for account of the first holders, the McCans. No part of this amount is shown to have gone to the credit of plaintiff on indebtedness for which it had been given as collateral. An amount sufficient in addition was collected on this note to pay the \$1,500 borrowed by Hennessey & Bro. at the time the note in question was deposited as security to pay it, as well as other indebtedness. This court has already substantially determined that the note was held as a deposit, and that balance due thereon was not prescribed.

By reason of the law and the evidence being in favor of plaintiff, the judgment is affirmed.

(107 La.)

McAYEAL v. MURRELL, Sheriff, et al.
(No. 14,381.)

(Supreme Court of Louisiana. June 16, 1902.)

TAXATION—CERTIFICATE OF PAYMENT—ANTE-DATING APPEAL.

1. The giving of a certificate by the sheriff and tax collector, stating that the poll tax was properly paid for the year previous to that in which the certificate is issued, when such is a fact, is not antedating the certificate within the meaning of article 198 of the constitution of 1898.

2. The court, after hearing, considered the issues, arrived at the conclusion that it was without jurisdiction, and dismissed the appeal. (Syllabus by the Court.)

Appeal from judicial district court, parish of Acadia; Conrad De Baillon, Judge.

Action by John A. McAyéal against Joseph L. Murrell, sheriff, and others. Judgment for plaintiff, and defendant Murrell appeals. Dismissed.

Barry & McCain, for appellant. John J. Robira, for appellee.

BREAUX, J. Relator instituted proceedings by mandamus to compel the sheriff and tax collector of Acadia parish to let him have a certificate showing that he had paid his poll tax for 1901.

The respondent sheriff, in his answer, says that he is willing to furnish a receipt to plaintiff, but declined, as he asserts, "to antedate the receipt so as to make it appear that it was issued prior to January 1, 1902." The facts of the case are that relator desired to vote at a municipal election held in one of the municipalities within the limits of the parish. As no one is permitted to vote at any election who has not paid his poll taxes for the two years preceding the year in which he offers to vote, he sought to furnish the required evidence that would enable him to exercise the privilege of voting. One of the requisites is to exhibit his poll-tax receipt. The sheriff and tax collector refused to issue the required receipt, urging, as his reason for refusing, that he would have to antedate it; and, as the penalty is severe against antedating the certificate (article 198 of the constitution of 1898), he chose to decline to give it. During the trial in the district court, the judge of the district court ordered the clerk to furnish to the sheriff a list of those whose poll taxes he (the clerk) had retained from the mileage, and per diem of those who had rendered service as jurors in 1901. Among those who had thus paid the poll tax, was the relator. The sheriff was ordered by the court in this case to furnish to the commissioner of election a certificate setting out the poll taxes retained by the clerk, including the name of John A. McAyéal, the relator, and made the mandamus absolute. We do not think there is anything in this order which in the least contravenes the article of the constitution directed against antedating a certificate, and this is the extent of respondent's interest in the matter.

Relator, in the year 1901, paid his poll tax for the year 1901. The sheriff, after having received the list of jurors that had paid from the clerk's office, had no cause to antedate anything. He is only to certify to the facts as they were, without the least change of dates; that is, in 1902 he is to issue his certificate showing that, by the return in his office from the clerk's office, the voter in 1901 had paid the poll tax for 1901. The respondent scarcely has an interest to stand as an appellant. Relator's right to vote is personal, and not one in which respondent can be much concerned to oppose.

But there is no question here of the constitutionality or legality of a tax, and in

consequence it is not apparent that this court has jurisdiction. Having examined the record closely, we take occasion to say that an examination of the record has resulted in convincing us that the judgment is legal. None the less, we have determined to dismiss the appeal on the ground of the want of interest of the appellant and the want of jurisdiction of this court. We are equally as certain that the defendant was entitled to a certificate showing that he had paid his poll tax. It leaves the relator in possession of all the rights to which he is entitled, and no more would be obtained were we to directly affirm the judgment.

The appeal is dismissed at respondents' costs.

MONROE and PROVOSTY, JJ., concur in the decree dismissing the appeal for want of jurisdiction.

(107 La.)

STATE v. WASHINGTON et al. (No. 14,482.)

(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—SERVICE OF JURY LIST—NEW TRIAL—IMPEACHING EVIDENCE.

1. Service of the list of talesmen on an accused before the completion of the panel, and before the drawing to complete the panel had commenced, is compliance with the law requiring service.

2. In general, a new trial will not be granted to admit testimony to impeach a witness on the former trial, but as this case presents exceptional features, and is entirely out of the ordinary, it is remanded for a new trial.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermilion; Minos T. Gordy, Jr., Judge.

George Washington and Joseph Sonier were convicted of murder, and Sonier appeals. Reversed.

S. P. Watts, for appellant. Walter Gulon, Atty. Gen., and J. Nelson Greene, Dist. Atty. (Lewis Gulon, of counsel), for the State.

BREAUX, J. George Washington and Joseph Sonier were jointly charged and indicted for murder by the grand jury of the parish of Vermilion. Joseph Sonier presented a motion to the court for severance. It was allowed. The case of Washington was called and tried, and he was found guilty. The case of Sonier was then called, and he also was tried and found guilty as charged, "without capital punishment." He made application for a new trial, which was overruled. He was then sentenced to serve at hard labor in the penitentiary for the term of his natural life. He appeals.

In the first bill of exceptions taken by the defendant Sonier, it is stated that no certified list of talesmen jurors had been served. The per curiam of the bill shows that the objection was overruled because the law does not require a certified list of talesmen to be served, and, besides, that service had been made as soon as possible in the regular course of the trial, and the court, so far as practicable,

had complied with the statute which requires service of the names of jurors on the regular panel. We copy the words of the court embodied in the bill: "Which objections were overruled by the court for the reason that the law does not require a certified list of talesmen to be served upon the defendant, and that counsel for defendant, by instruction of and in the presence of the court and defendant, was handed a list of the said talesmen by the sheriff before the completion of the panel, and before the drawing from the talesmen to complete the panel had commenced." We have not found that the statute requires that any further service be made than was made in this instance.

We take up in the second place the following additional ground urged for a new trial before the district court, and again pressed on appeal before this court, viz., that George Washington, in testifying against the defendant here, "thought it necessary to adhere to a statement made by him on the trial of his own case in order to escape the death penalty," and defendant annexes the affidavit of George Washington to his motion. This affidavit presents, for reasons apparent in a moment, a serious question. It sets up that it was the impression of Washington, received from his attorney, that he was called upon to answer for manslaughter, and not for murder, and that he was told by his attorney that he had "such an arrangement with the district attorney as would, in the end, reduce the crime to manslaughter"; "that the consideration he was to receive for turning state's evidence was the penalty for manslaughter, on condition of his implicating Joseph Sonier, the defendant here," as one of the murderers of Joseph Ozone; that, when he went on the stand as a witness in his own behalf, he testified as before declared, and repeated this testimony afterward when he appeared before the court as a witness in the case against Joseph Sonier, "believing, as I did, that it was part of the programme before my penalty could be reduced," and "in thus testifying that he swore to a falsehood, but only did so to save his own life, and that he makes the affidavit" for the sole purpose of repairing the injury against Sonier, and the wrongful infliction of punishment. The name of the young attorney who defended Washington, whose case is not before us, is signed by him as witness. The trial judge, in his narrative of the case, embodied in the bill overruling the motion for a new trial, says that the motion for a new trial was overruled because the court considered that there was ample evidence to warrant the conviction; that the facts and circumstances "of the case showed the guilt of the accused" beyond any reasonable doubt, and that, while it is shown by the affidavit annexed to the bill that George Washington recanted his testimony given against Sonier, still the court, considering all the facts and circumstances, refused the new trial; that the testimony of Washington "against the defendant was corroborated by

every material fact and circumstance connected with the case; that the sworn declaration annexed to the bill was obtained at a time and place of which the court has no knowledge, and probably under such circumstances as might show that it was extorted or influenced. The declaration is not supported by any fact or circumstance connected with the case." In reference to the attempt of the witness to impeach his own testimony, we are not inclined to think that it presents ground of itself sufficient to grant a new trial. As a question of law, new trials are not usually granted to hear testimony to impeach the testimony heard on the trial. By this affidavit affiant seeks to discredit his own testimony. The principle that such affidavit of itself is not sufficient to justify a new trial has the support of authorities. *State v. Young*, 34 La. Ann. 346; *State v. Fahey*, 35 La. Ann. 9; *State v. Diskin*, Id. 46; *State v. Burt*, 41 La. Ann. 787, 6 South. 631, 6 L. R. A. 79; *State v. Garig*, 43 La. Ann. 305, 8 South. 934. But this case presents an exceptional feature. The name of the attorney for George Washington, the affiant, in the case in which he was convicted, appears as a witness. It may be mere inadvertence or downright thoughtlessness, growing out of the idea that he was signing as a witness to the mark. Be it as it may, we think that, in the interest of justice, it is advisable to set aside the verdict and sentence of the court. The issues, as relates to the affidavit, are in such shape that we feel constrained to send the case back to the district court for further proceedings. We have given these issues our most careful consideration. In addition to what we have already stated, it has occurred to us at times while considering the issues that perhaps the young member of the bar, not familiar with the desperate plans, shifts, and artifices to which persons called upon to defend themselves in capital cases will sometimes resort, had permitted his client to talk to him too much about the advisability of turning state's evidence, and that the young man failed to stop him when he should have stopped him; that subsequently, having heard this talk, he preferred not to deny the statement, although it had assumed the shape it has, and although it did not strictly accord with the facts. We have found no motive for the signature. At the same time, we cannot pass unnoticed the fact that the witness is an officer of the court, and that no counter affidavit has been made. Without denial of any kind, made in the manner such denials should be made in criminal proceedings, we feel that there is only one alternative left, and that is to remand the case for a new trial. We have always, after our study of this part of the case, returned to the question which we have not answered to our satisfaction: Why did he sign, and why did he add the weight of his name as an officer of the court to, this affidavit? The proceedings to this point had been regularly conducted. The

issues were clearly before us. At the end of the case this signature confronts us, and compels us, we think, to direct that another trial be had, in order that it may not appear in future proceedings that one who stands in the relation to the court that attorneys do in any manner gave countenance to an agreement such as stated in the affidavit.

The law and the evidence being with the defendant, it is ordered, adjudged, and decreed that the verdict and sentence in this case are annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that the case be remanded for a new trial.

(107 La.)

STATE v. BLANCHARD. (No. 14,469.)
(Supreme Court of Louisiana. June 18, 1902.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS
—BILLS OF EXCEPTIONS.

1. The circumstances of each case must determine what declarations form part of the *res gestæ*, and what do not; there being no fixed rule determining the question. The declarations must be made shortly after the act, and before sufficient time has elapsed to enable the accused to conceive some narrative that may help him in his defense.

2. Bills of exceptions in criminal cases must be complete and full, in order to put a disputed question at issue, so that the court can pass upon it on appeal.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Frank D. Chrétien, Judge.

George P. Blanchard was convicted of murder, and appeals. Affirmed.

Joseph E. Generelly, for appellant. Walter Gulon, Atty. Gen., and J. Ward Gurley, Dist. Atty. (Lewis Gulon and S. A. Montgomery, of counsel), for the State.

BREAUX, J. The defendant was charged with having murdered Eugene Jones. He was tried, and the jury returned a verdict of guilty, without capital punishment. Two bills of exceptions bring up the grounds upon which he bases his appeal. We will consider the grounds as if embodied in one bill of exceptions.

Five witnesses on behalf of the state testified, in substance, that the defendant had shot the deceased without provocation. The defendant pleaded self-defense, and sought to prove that he had suffered blows at the hands of the deceased. In support of this plea, defendant called a witness who said that upon hearing noise, passing through his door, he saw the defendant coming toward him; that he was covered with blood. When he was about to state what was defendant's answer to his question regarding the cause of his condition, the district attorney objected. The ground of his objection was that it was not part of the *res gestæ*. The court sustained the objection; stating,

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 810.

as shown by the court's narrative embodied in the bill of exceptions, that the defendant had left the place of the difficulty, and had walked a whole block away from the scene of the trouble; that no one was pursuing him, and there was nothing connecting this fact which defendant sought to prove with the difficulty; that he had cooling time, and any declaration of the defendant would have been self-serving. The position of the defendant is that the judge of the district court erred in fixing arbitrarily any time or distance in which evidence should be admitted or excluded as part of the *res gestae*, and that he also erred in considering it as a self-serving declaration, and, further, that the testimony of the excluded witness was corroborative of the testimony of the defendant, and was also admissible on that ground. We do not conclude that it was the intention to take time that had elapsed since the shooting, and the distance from the place, as absolutely controlling in passing upon the question as to whether or not a declaration of the defendant is admissible, and proof of the soiled condition of his clothes, with blood. We understand that the declaration stood alone, and that there was nothing connecting it and the blood to which reference has been made with the crime charged. The declaration had passed from the condition of the impulsive and spontaneous to the narrative following the act. In other words, it was not part of a continuing transaction,—a continuous utterance of instinctive words. There is no inflexible rule. It has been decided that the facts of each case are to be considered, as to whether or not they fall within the rule. There is no question that the declarations must be made recently after the act, and before sufficient time has elapsed to enable the party to conceive some narrative that may go toward helping him in his defense.

Defendant, through his counsel, further contends that the evidence of Norris, the excluded witness under the court's ruling, was corroborative of defendant's testimony. In reference to this point, our attention is called by defendant's counsel to the fact that counsel who defended him in the district court did not make the exclamation part of his bill, but that from the testimony of defendant it appears that he said to this witness (Norris) that he had been assaulted and was forced to shoot. The statement of Norris, or rather the statement of what he would have shown by his testimony, not having been embodied in the bill of exceptions, we have nothing before us upon which to base a ruling. The statement of defendant as to what he said to witness Norris cannot be considered for the purpose of a ruling. The narrative of Norris himself of Blanchard's utterances to him comes to a complete stop at the point of interruption by the district attorney and nothing was afterwards added to throw light upon the subject. We copy

from the bill of exceptions: "Q. What did Blanchard tell you immediately after the shooting? A. He said, 'That man—' And here the bill of exceptions comes to an end. It devolved upon the defendant to complete the statement, in order to have the point reviewed on appeal, and then it would have been possible for us to determine whether it was corroborative of the statement of defendant or not. As it is, we are without information upon which to base our action upon the subject. One is expected to bring up a bill sufficiently complete to enable the court to act. We note that the defendant, without stating other grounds, moved for a new trial, and made the evidence part of the motion. Although this brings up the testimony of the defendant and of all the other witnesses who have testified, the defendant's testimony as to what he said to witness Norris is not to be considered (for reasons already stated) in passing upon the objection.

After attentive consideration, we have arrived at the conclusion that there is no alternative left us, except to affirm the sentence and judgment of the district court. For reasons assigned, the verdict, sentence, and judgment of the district court are affirmed.

(107 La.)

STATE v. MEAUX. (No. 14,483.)

(Supreme Court of Louisiana. June 16, 1902.)
CRIMINAL LAW—APPEAL—RECORD—CONCLUSIVENESS.

1. A certain question was propounded to a witness who had been called to the stand by the defense. The state objected, and the objection was sustained. A bill was reserved, but no note of the testimony offered, or of the judge's ruling, was taken down at the time. Subsequently, on writing up the bill, counsel for the accused stated the ruling of the court to have been thus and so. Thereupon, in the "per curiam" part of the bill, the judge declared he made no such ruling. *Held*—The rule is, in such case, to accept and act upon the statement of the judge. *State v. Moore*, 33 La. Ann. 68.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermillion; Minos T. Gordy, Jr., Judge.

Azorle Meaux was convicted of shooting with intent to kill, and appeals. Affirmed.

S. P. Watts, for appellant. Walter Guion, Atty. Gen., and J. Nelson Greene, Dist. Atty. (Lewis Guion, of counsel), for the State.

BLANCHARD, J. The accused was prosecuted for shooting with intent to kill, convicted, and sentenced to three years at hard labor. He appeals. The only bill of exceptions found in the record recites that on the trial of the case a witness was called to the stand to prove that the shooting in question was accidental; that he was asked to state whether or not the shooting was accidental; that the district attorney objected to the question; and that the trial judge, in sustaining

the objection, said:—"Unless the defendant can show that he had a right to have his pistol with him on the date charged in the indictment, no evidence will be allowed to prove that the shooting was accidental." To this, the trial judge, in the "per curiam" part of the bill, says he made no such ruling as that set forth. No note of the testimony and ruling made at the time was annexed to the bill.

Judgment affirmed.

(107 La.)

**GRIGGSBY CONSTRUCTION CO. v.
FREEMAN, Tax Collector, et al.**
(No. 14,288.)¹

(Supreme Court of Louisiana. April 28, 1902.)

TAXATION—ASSESSMENT—FAILURE TO FURNISH SCHEDULE—PROPERTY SUBJECT—DOUBLE TAXATION—PROPERTY IN TRANSITU.

1. A taxpayer who has been twice requested by the assessor to furnish a list of his property for assessment is by express provision of the revenue law estopped from thereafter contesting the correctness of the list of property made by the assessor as best he could.

2. Blacksmith tools and commissary store goods kept by a corporation as part of or in connection with an outfit for doing construction work are liable to taxation.

3. A bridge tax levied under authority of the constitution on all the property generally in a ward is not a local assessment, even though for the imposition of it a vote of the taxpayers of the ward is required.

4. It is not double taxation, within the constitutional prohibition, to tax the same thing in two jurisdictions, where each has a right to tax it.

5. The prohibition of our revenue law against taxing property twice in the same year does not apply to taxation in another state.

6. What degree of permanency the presence of property within the taxing jurisdiction must have, before the property can be said to be no longer in transitu, and therefore to be liable to taxation, is more a question of fact than of law. In this case a contractor's outfit, consisting of mules, scrapers, etc., brought here from another state to be used in the construction of a railroad bed, on which work it was likely to be occupied for several months, at least, is held to be taxable.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Natchitoches; Charles V. Porter, Judge.

Action by the Griggsby Construction Company against J. W. Freeman, tax collector, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jack & Fleming, for plaintiff. Walter Gulon, Atty. Gen., and W. A. Wilkinson, Dist. Atty. (Lewis Gulon and Chaplin, Breazeale & Chaplin, of counsel), for the State.

PROVOSTY, J. By section 1 of Act 170 of 1898 (the revenue law of the state) it is provided that taxes are levied "on all property situated within the state of Louisiana except such as is expressly exempted from taxation by law," and that "the term property, as herein used, means and includes

* * * all movable and immovable, corporeal and incorporeal articles or things of value owned and held and controlled within the state of Louisiana by any person whatsoever." By section 7 of the same act it is made the duty of the assessors "to put upon the assessment list all property subject to taxation within their respective districts or parishes." By section 12 of the same act, property omitted from the assessment roll must be assessed on a separate roll. By section 14 it is made the duty of every taxpayer to fill out a list of a prescribed form, and to make oath to same, and to return same to the assessor before the 1st day of May of each year; and it is provided that "any refusal, neglect or failure from any cause whatsoever to comply with this provision of this act, shall act as estopping the taxpayer from contesting the correctness of the assessment list filed by the assessor." By section 19 it is provided that, in case the taxpayer fails or refuses to furnish said list of his property within the time prescribed, the assessor "shall himself fill out said list from the best information he can obtain." In making his assessment for the year 1901 the assessor of the parish of Natchitoches called upon the plaintiff's agent to furnish, as required by law, a list of its property situated in the parish and subject to taxation. The plaintiff is a Texas corporation, having its domicile at Dallas, Tex. It operates in that state and in adjoining states in the construction of dams, dikes, levees, railroad beds, and other earth work, and for that purpose has outfits, consisting of mules, scrapers, wagons, commissary store goods, tents, etc., which it sends to the places where work is to be done. At the time when its agent was thus called upon by the assessor, plaintiff was doing grading work for the Texas & Pacific Railroad in the parish of Natchitoches, and the property sought to be assessed was a construction outfit and other movables necessary or convenient in the doing of that work. The agent questioned whether said property was liable to taxation in Louisiana, and asked for time to consult counsel. A second attempt was made to get from the agent a list of the property of plaintiff, and, this second attempt proving equally fruitless, the assessor, as required by law, made out a list of the property as best he could, and put same on his roll. Plaintiff failing to pay the tax thus assessed, the tax collector proceeded to enforce payment by seizure of some of the mules assessed, and plaintiff brought this suit, enjoining the seizure.

We shall consider only the grounds insisted on in the brief, and shall take them up in the order in which they are presented in the brief:

1. That the assessment includes property not belonging to plaintiff, and for the taxes on which plaintiff is not responsible: Suffice to say that plaintiff, having been called upon by the assessor to furnish a list of its prop-

¹ Rehearing denied June 20, 1902.

erty, and having failed to do so, is, by the express terms of the revenue act (section 14), "estopped from contesting the correctness of the assessment list filed by the assessor."

2. That the blacksmith tools, etc., and the merchandise were exempt from taxation: The goods in a commissary store are property, and as such are liable to taxation; and so are tools, etc., of a blacksmith, unless they are the tools by which the taxpayer earns his living, which these are not.

3. That a part of the taxes demanded, namely, the bridge ward tax, is not a tax, properly speaking, but a local assessment, and that plaintiff's property, not sharing in the benefits of this assessment, cannot be made to pay same. The essentially characteristic feature of a local assessment is that it is levied on particularized property, and not on property generally. *Charnock v. Levee Dist. Co.*, 38 La. Ann. 327. This feature is the corollary of what in theory, if not in actual practice, is the fundamental principle of the law of local assessment,—that the tax should be levied on each particular piece of property in proportion to the benefit it is to derive (not supposedly, only, but actually) from the expenditure of the avails of the tax. *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. The mere localness of the tax is not necessarily a distinguishing feature. Nor is the fact that the tax was imposed only after consultation of the taxpayers. Consultation of the taxpayers might have been dispensed with by the framers of the constitution in authorizing the imposition of the tax; and, on the other hand, local assessments may be, and every day are, levied without consultation of the contributors. As this tax, though local, is levied on property generally, and irrespective of special benefit, we conclude that it is not a local assessment.

4. We find it difficult to reduce this ground to any single proposition; or, in fact, to be positive exactly what the contention is; so that we prefer to transcribe here the statement of it as found in the brief. This statement is as follows: "We now contend that the exaction of these taxes, under the peculiar facts and circumstances of this case, would be in violation of the spirit of the law, in that it would operate a double taxation upon the plaintiff's property. It is disclosed by the record that this identical property, then situated in Gregg county, Texas, was duly assessed to this company in January, 1901, and that it was not removed from that place to this parish until the latter part of April of that year, and then only for the purpose of doing certain temporary work in the parish of Natchitoches, and was not assessed until the 24th of June of that year. *Southern Ins. Co. v. Board of Assessors*, 49 La. Ann. 401, 21 South. 913. It is further shown with reasonable certainty that this tax so assessed in Texas has been subsequently paid and discharged. Now, whilst it is a general rule,

both here and elsewhere, that personal property is liable to be taxed wherever it may be situated (by which is meant that the situs, rather than the domicile, controls in such cases), yet the question in this case is whether this property, under the circumstances of the case, had any such situs, and, if so, whether it is to be freed from taxation here by reason of its prior assessment in the state of Texas. We know of no adjudicated case in this state in which this question has been presented, and it occurs to us that under the spirit of the law, at least, this property should not be held liable. Section 7 of Act 170 of the Acts of 1898 places the nonresident, in such matters, precisely on the same footing with that of the residents of the state. His burden is not made heavier than that of the citizen, and, inasmuch as no citizen could be held liable for double taxation in this state, there is no reason why the nonresident should be made to pay a double tax,—one in his own state, and the other here. The words of the section in this regard are, 'No property shall be taxed twice in the same year,' and it is clear, therefore, that double taxes could not be collected in this state from either a resident or a nonresident in the same year. What difference, therefore, does it make, in the intendment of the law, whether this double taxation should be brought about by an assessment in Texas, and also by an assessment here? To say the least, it would operate a hardship on the nonresident which the resident could never be required to undergo. Besides this, it is sought to tax the nonresident for the whole year, when in point of fact his property had only been within the jurisdiction of the state and parish about two months when the assessment was made, on the 24th of June, 1901, and about six months when it was seized by the sheriff. The supreme court, in *State v. Board of Assessors*, 47 La. Ann. 1544, 18 South. 519, whilst indorsing the doctrine that the actual situs of personal property determines the state in which same is taxable, further says, 'But it has never been decided that tangible personal property could not be assessed at the owner's domicile, notwithstanding its actual situs was abroad. In some other state or country.' It would seem from this that, according to the opinion of the court, that if the property had been assessed at the place of the owner's domicile, where its situs then was, that this assessment would govern, and bar another assessment in another state." If by this is meant that a state cannot tax property that has been taxed once already in the same year in another state, the contention is not sustainable. In the case of *Coe v. Town of Errol*, 110 U. S. 524, 6 Sup. Ct. 477, 29 L. Ed. 718, the supreme court of the United States said: "If the owner of personal property within a state resides in another state, which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the

right of the state in which the property is situated to tax it also." "It is not double taxation, within the constitutional prohibition, to tax the same thing in two jurisdictions, where each has a right to tax it." 25 Am. & Eng. Enc. Law (1st Ed.) p. 68.

If it is contended that this right which the state had to tax this property, the state has consented to forego, and that this is the meaning of the provision of the revenue law against taxing property twice in the same year, we have no hesitation whatever in saying that again the contention is not well founded. To abstain from taxing property because it has paid taxes to another sovereign might be well enough in altruistic philosophy, but has no place in any revenue system based on sound principles. Taxation and legal protection must go together. If this property enjoys the benefit of the protection of the laws of this state, it must, under sound principles of taxation, pay its just quota towards defraying the expense of the administration of those laws; and to let it off from the payment would be an invidious discrimination against the other property of the state, which would then have to bear that much more than its just and equal share of the expense of the administration of the laws. By this prohibition our lawmakers have not intended to make an excursion into the domain of sentiment, but have intended that property taxed in a parish should not be taxed again in the same or in another parish for the same year, or, in other words, have intended to give statutory expression to the principle of equality and uniformity in taxation,—a principle not abraded by taxing a second time property already taxed by another sovereign.

If the contention is that this property, having been brought here but recently, and being here but temporarily, has not such a situs here as will justify its taxation,—and we assume that this is the main reliance of the learned counsel for plaintiff,—a question is raised on which we find the law to be in a condition of considerable uncertainty. Property in transitu may not be taxed, and property having a situs may, but at what point does property pass from a stage of transit to that of such permanency as will justify taxation? By what characteristics is a state of transit to be distinguished from a state of permanency? For the solution of this question no rule has as yet been formulated, and perhaps, in the nature of things, none can be, the question being one more of fact than of law; and the adjudications do not furnish much assistance. If property is to remain in the state for a short time only, it would seem harsh and unjust to make it pay as much as if it was to receive or had received an entire year of protection. On the other hand, as was observed by the supreme court of the United States in the case of *Brown v. Houston*, 114 U. S. 633, 5 Sup. Ct. 1096, 29 L. Ed. 261, "when the assessor of taxes goes his round, how is he to distinguish be-

tween those goods which are taxable and those which are not." In the case of *State v. Mayor, etc., of City of Charleston*, 2 Speer, 719, the complainant lived outside of the city of Charleston, but had his place of business in the city, and, to attend to his business, went daily into the city with his carriage and coachman; also he had a slave, whom he sent every day into the city to do jobs wherever employment could be found for him. Under the city regulations, the slave had to wear a badge, and this badge had to be furnished by the city. The slave coachman and the carriage and horses were held not to be taxable, but the other slave was held to be taxable. In the case of *Kelley v. Rhoads* (Wyo.) 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904, a herd of sheep was held to be taxable which was being driven in the direction of market across the state, but slowly, so as to permit the sheep to graze as they went; the main purpose being to graze the animals and put them in condition for market; the moving towards market being merely incidental. The court distinguished the case from one where the moving towards market would have been the main purpose, and the grazing a mere incident. In the case of *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377, a circus was held not to be taxable. In *People v. Niles*, 35 Cal. 282, the court said, arguendo: "It must appear that the property is being, to some extent, kept or maintained in said county, and not there casually or in transitu, or temporarily, in the ordinary course of business or commerce." On the other hand, the supreme court of the United States, in the case of *Brown v. Houston*, supra, and this court in the same case (33 La. Ann. 843, 39 Am. Rep. 284), seem to have regarded the fact that the property had been brought to the state for "use" as being a determinative circumstance. In the instant case the property was not in course of transportation, but was here for use, and for a use likely to be of some duration,—possibly a full year,—and for the time being was incorporated in the bulk of the property of the state. It was distinguishable from the rest of the property of the taxing district in no respect except in the intention of the owner to remove it at some future time more or less distant. Under these circumstances, its situs approached nearer to permanency than did that of the sheep in the Wyoming case, or that of the coal in the *Brown v. Houston* case.

The judgment appealed from is affirmed, with costs.

(107 La.)

Succession of MARKS. (No. 14,431.)¹
(Supreme Court of Louisiana. May 26, 1902.)
PRODUCTION OF BOOKS—APPEAL—DISMISSAL.

1. The trial judge, according to the circumstances of the case, has discretion to assign for the production of books, papers, etc. (for

¹ Rehearing denied June 30, 1902.

which a subpoena duces tecum is taken out by one of the parties litigant on his adversary), another day than the one fixed for the trial of the cause.

2. It not appearing that irreparable injury can result to the complaining party from the order herein made to produce books, the appeal from such order is dismissed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Ferdinand Marks. From an order, on oppositions by forced heirs to the accounting of the executors, to compel August Heidenheim and others to produce certain books, the executors and others appeal. Dismissed.

Dinkelspiel & Hart, for August Heidenheim and Eli Wise, testamentary executors of the succession of Ferdinand Marks, and the Ferd. Marks Insurance Agency, Limited, appellants. Boatner, Dodds & Boatner and Howe, Spencer & Cocke, for appellees.

BLANCHARD, J. Oppositions by forced heirs were filed to the final account of the executors. In support of the same, opponents applied for a subpoena duces tecum on the executors, and on the president and manager of the Ferdinand Marks Insurance Agency, Limited, to produce certain books, papers and accounts described in their motion, which application was in due form and supported by affidavit. The granting of the order was contested by the parties against whom the same was directed and a hearing was had, resulting in the following order or judgment being entered up: "Ordered, that the executors, Eli Wise and August Heidenheim, produce and deposit in court, all the papers, books, accounts, etc., called for by movers, which pertain to the affairs of the succession of the deceased, as set forth in the motion, on Monday, March 24, 1902, there to remain subject to the orders of the court, for examination by movers; with the option of the said executors to permit free and full examination of said books, etc., by movers or by their counsel, otherwise than by production and deposit in court, at such times and places as will not interfere with the business of said executors, and as will be reasonable and fair to movers. It is further ordered, that August Heidenheim, president and managing officer of the Ferd. Marks Insurance Agency, Limited, be required to produce in open court the books, papers, etc., called for by movers in their motion, on such day as the oppositions may be fixed for trial, upon movers causing said president and managing officer to be notified of the day and hour when such oppositions to the account are fixed for trial. Judgment rendered in open court March 20, 1902. Judgment read and signed in open court March 21, 1902. T. C. W. Ellis, Judge." Whereupon, the executors and the insurance agency, alleging error to their prejudice and irreparable injury, applied for a suspensive appeal to this court from the judgment. The

order of appeal was granted and the transcript lodged here. It is met by a motion to dismiss on the ground that the judgment appealed from is simply an interlocutory order which cannot work irreparable injury and from which no appeal lies.

Ruling—It will be observed the order appealed from fixed "Monday, March 24, 1902," as the day the executors were to produce the books. Objection is raised to this that nothing shows that day was the day assigned for the trial of the case, and it is urged that it is only for the day of the trial the books can be ordered produced. In support of this Code Prac. art. 473, is cited. That article and other articles of the Code of Practice on the same subject-matter underwent careful consideration in *Murison v. Butler*, 18 La. Ann. 300, and the construction there arrived at meets our approval. There it was held that Code Prac. art. 473, in directing the books to be produced "on the day fixed for the trial of the case," is directory merely, and that the trial judge, according to the circumstances of the case, has discretion to assign for the production another day than the one fixed for the trial of the case. It is found that the judge's order in the instant case carefully tracks the law and the jurisprudence. With regard to the motion to dismiss, *Horton v. Thornhill*, 14 La. Ann. 142, covers the case. The appeal there was from an order to produce books similar to the one here and the like motion to dismiss was made. The court, after a review of the case, dismissed the appeal, saying: "We are unable to say that the order complained of can work an irreparable injury which will sustain the appeal." So say we here.

It is, therefore, ordered that the appeal be dismissed at the costs of the appellants.

(107 La.)

STATE v. WILLIAMS. (No. 14,480.)
(Supreme Court of Louisiana. June 16, 1902.)

HOMICIDE—EVIDENCE—DECLARATIONS OF DECEASED.

1. On trial of a party charged with murder, the unsworn statements of the party alleged to have been killed are admissible in evidence only in exceptional cases. Before they are introduced, the district attorney should establish the state of facts making them admissible. Where they are sought to be introduced as part of the *res gestae*, the facts going to make them such should be established by testimony of parties cognizant of them. The admissibility of the statements themselves being the very issue for decision, no part of them can be used as furnishing the basis and foundation on which they are to be admitted.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Pointe Coupee; L. B. Claiborne, Judge.

Willie Williams was convicted of murder, and appeals. Reversed.

The defendant, sentenced to be hung under a conviction for murder, appealed. He rests his right to reversal upon the following bill

of exceptions: "Be it known that on the trial of the above styled and numbered cause, the corpus delicti not having been proven or admitted, and no evidence having been introduced to prove the homicide of Alfred Hebert, alleged in the indictment to have been committed by the defendant, Willie Williams, the state put upon the stand one T. W. Noble, who testified as follows: Witness was well acquainted with the deceased, Alfred Hebert, and resided in the same house with him. Witness knew of his own knowledge that, on the night of the alleged homicide, said Alfred Hebert was standing on guard at Fordoche station, in the parish of Pointe Coupee, near the railroad track, for the purpose of preventing some one in the village of Fordoche from escaping or passing beyond the limits of the village of Fordoche. Witness, prior to the affray in which said Alfred Hebert had been mortally wounded, had last seen said Alfred Hebert at 10 o'clock on the night of the alleged homicide. At the time when the alleged homicide was committed, witness was in bed in his house, which was situated very near the station, and had heard a train arrive at and leave the station at some time between the hours of 2 and 4 a. m. on the night of the alleged homicide, and, a few minutes after the arrival of the said train, the deceased, Alfred Hebert, entered the room in which witness was sleeping, badly shot through the head. The state then offered to prove by the witness that the deceased, Alfred Hebert, on entering the room of witness as aforesaid, told witness that while he was standing on guard at said railroad station, a few minutes previously, a train arrived at the station, and a convict jumped off the train and walked up to said Alfred Hebert, and asked him if he was a railroad man; that said Alfred Hebert replied that he was not, whereupon said convict jumped upon said Alfred Hebert, and took his pistol away from him, and shot him with it through the head, and inflicted the wound with which said Alfred Hebert was suffering at the time of said conversation with witness. The defendant objected to this testimony of witness as to said declaration of said Alfred Hebert, made to witness out of the presence of the accused, on the ground that the same was hearsay, and that no foundation had been laid for the introduction of the same as a dying declaration. The court overruled the objection, and allowed the testimony to be introduced on the ground that it was a part of the *res gestæ*, to which ruling of the court defendant excepted, and reserved this, his bill of exceptions, and tendered the same for the signature of the court. By the Court: The objection on the part of the accused to the testimony of T. W. Noble was overruled on the following grounds: Noble had already testified without objection that Hebert, the deceased, who resided with him, and who had left him shortly after 10 o'clock at night to stand guard near the depot, had come in some time between 2 and

4 o'clock of the same night, badly wounded in the head. The witness was then asked to tell what Hebert said, and this was the question objected to on the ground that statements of deceased, made out of the presence of accused, were not admissible, as stated above. When this objection was made, the jury was retired, and the matter argued out of the presence of the jury. The witness was examined out of the presence of the jury, and the following facts elicited, to wit: That just as Hebert came in wounded, and waked witness, he, witness, distinctly heard the noise or rumbling of a train just pulled out from the station, and going east. That Hebert said the man who shot him had jumped on the freight train, which was just pulling out; that he, Hebert, had been standing on the narrow space between the main track and the switch when the freight train pulled in; that, as the train slowed up, a convict jumped out from between two of the cars and confronted him, Hebert; that the convict asked him if he was a railroad man, and, when answered in the negative, then jumped on him, Hebert; that he, Hebert, drew his pistol, but was unable to use it on account of the superior strength of the convict; that after a desperate struggle the convict took the pistol from him, and shot him, Hebert, in the head, and then jumped on the freight train, which was just pulling out. The court, being of the opinion that this evidence established circumstances and declarations closely connected with the fact then under investigation, decided to admit the said testimony as part of the *res gestæ*. The jury was called in, and, after the witness Noble had testified to the fact that he heard the rumbling of the departing train as the wounded man was speaking to him, the question was again asked him as to what Hebert said, and objection again made as aforesaid, and on the same grounds as aforesaid; the court overruled the objection, and permitted the evidence to go to the jury." To this ruling of the court, the accused, by counsel, excepted, and tendered the above, his bill.

John Yoist and William C. Carruth, for appellant. Walter Gulon, Atty. Gen., and Albin Provosty, Dist. Atty. (Lewis Gulon, of counsel), for the State.

NICHOLLS, C. J. (after stating the facts). The state having offered in evidence the unsworn statements and declarations of Hebert, the party alleged to have been murdered, defendant's counsel objected that they were not admissible, being hearsay. Such declarations and statements are in a criminal cause admissible only in exceptional cases, and under special circumstances and conditions. The objection having been *prima facie* well grounded, it should have been sustained unless the facts and circumstances were such as to have made them admissible under the special facts and circumstances

referred to. They were not offered in this case as dying declarations, but as being part of the *res gestæ*. The court admitted them as being so without any statement as to what the facts and circumstances were which made them such. We cannot accept the judge's conclusions on this subject without recital of any facts in support of the same. As matters appear on the face of the bill of exceptions, the objection should have been sustained. It appears from Noble's testimony that he had not seen Hebert from 10 o'clock at night—the time at which he left the house they were both occupying—until he returned to the house, badly wounded, between 2 and 4 o'clock in the morning. Noble knew nothing himself of what had occurred in the meantime. Hebert, out of the presence of any one, gave to Noble a narrative statement of what had occurred. In the course of it he stated that the man who shot him had jumped on the freight train, which was just pulling out; that he, Hebert, had been standing on the narrow space between the main track and the switch when the freight train pulled in; that as it slowed up a convict jumped from between two of the cars; that it was this convict who had shot him at that time and place; and that the convict, after shooting him, had jumped on the freight train, which was just pulling out. Noble testified to the fact that just after Hebert came in, wounded, and waked him, he distinctly heard the noise or rumbling of a train which had just pulled out from the station, and going east. This testimony of Noble's was a link in the direction of establishing the fact that the statements of Hebert were part of the *res gestæ*, but *per se* it did not establish the fact. Noble showed the time the statements were made with reference to the pulling out of the train; but the time at which Hebert was shot, with reference to that same fact, remained still to be ascertained in order to furnish the data upon which was to be tested the admissibility of the statements as *res gestæ*. Had testimony been adduced on that subject, these two facts combined might have laid the foundation for the introduction in evidence of the declarations. We would then have known whether they, and the act with reference to which they were made, bore such relations to each other as to cause the former to fall under the operation of the rule governing the admissibility of unsworn statements as part of the *res gestæ*. Proof that Hebert's declarations were made simultaneously, or almost so, with the departure of the freight train, would still leave open for ascertainment the time those statements were made with reference to that at which he was shot. The facts by and from which the admissibility of the statements as *res gestæ* are to be tested have to be "testified" to by persons cognizant of them. The admissibility itself of the statements being the very question at issue for decision, no part

of them are to be used for the purpose of determining it. Counsel very correctly say: "There being no foundation for the admission of the declaration, it was used as its own foundation, and was itself the basis on which it was admitted." The statements should not have been admitted in evidence under the circumstances in which they were offered.

For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court thereon, herein appealed from, be, and the same are hereby, set aside, avoided, annulled, and reversed, and the cause is reinstated, and remanded for further proceedings according to law.

(107 La.)

VICKSBURG, S. & P. RY. CO. et al. v.
GOODENOUGH, Tax Collector,
et al. (No. 14,239.)¹

(Supreme Court of Louisiana. April 14, 1902.)

PARISH—TAXATION.

1. The fact that property taxpayers of a parish have authorized the levying of a five-mill tax on all the property in a parish, including that within the town therein, in favor of a particular railroad enterprise, is no constitutional obstacle to the imposition at the same time in favor of the same enterprise of a five-mill tax on all the property within the town by the vote of the property taxpayers therein.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lincoln; R. B. Dawkins, Judge.

Action by the Vicksburg, Shreveport & Pacific Railway Company and others against W. E. Goodenough, tax collector of Ruston, and others. Modified.

The plaintiffs alleged: That they were owners of certain property in the town of Ruston, which they described. That that town had caused said property, through its tax collector, Goodenough, to be seized and advertised for sale for a five-mill tax levied for the year 1900 in favor and in aid of the Arkansas Southern Railroad Company, as assignee and transferee of the Alexandria, Junction City & Shreveport Railroad Company, a corporation formerly organized and doing business under the laws of Louisiana, with its domicile at Ruston. That by act of consolidation and transfer by authentic act of March 10, 1899, all the property, rights, and franchises of the said Alexandria, Junction City & Shreveport Railroad Company were purchased and acquired by the Arkansas Southern Railroad Company, a corporation organized and doing business under the laws of Arkansas, with its domicile in Junction City, in said state. That said tax so sought to be levied and collected by the seizure and sale of their property was illegal, null and void, and in violation of the laws and constitution of the state of Louisi-

¹ Rehearing denied June 24, 1902.

ana, for the following reasons, to wit: First. Petitioners show that all the property, including their own, situated within the limits of the town of Ruston, La., and advertised for sale as aforesaid, is subject to parochial taxation by the parish of Lincoln, in which said town of Ruston, La., is located; that on December 7, 1897, pursuant to a petition from the taxpayers of Lincoln Parish, La., the police jury of the said parish ordered an election to be held in said parish of Lincoln on January 11, 1898, to test the sense of the property taxpayers of the said parish as to the levy and collection of a five-mill tax for 10 years for and in favor of said Alexandria, Junction City & Shreveport Railroad Company; that said election was held as ordered; that said tax was carried, and that on January 17, 1898, the said police jury of the parish of Lincoln, by Ordinance No. —, promulgated the result of the said election, declared carried and levied said five-mill tax on all the property, real and personal, situated within the limits of Lincoln parish, for 10 years, to begin whenever said Alexandria, Junction City & Shreveport Railroad Company should be completed and in operation to the town of Ruston, in the said parish of Lincoln, state aforesaid. Petitioners show that the said railroad was completed to the town of Ruston on the — day of September, 1899; that pursuant to its said ordinance the police jury of Lincoln parish levied a five-mill tax on all property, real and personal, situated within the limits of the said parish, for the year 1900, including the property of petitioners now seized and advertised by the tax collector of the town of Ruston, La., as aforesaid; that they have paid to the sheriff and ex officio tax collector of the parish of Lincoln, state aforesaid, the said five-mill tax levied by the police jury of the parish of Lincoln for the year 1900, for and in aid of the said Arkansas Southern Railroad Company, as assignee and transferee of the Alexandria, Junction City & Shreveport Railroad Company, on all the property owned by petitioners within the limits of said parish, including that portion of petitioner's property now seized and advertised for sale by the tax collector of the town of Ruston, La., as aforesaid, in order to collect an additional five-mill tax for the year 1900 in aid of the same railroad enterprise, to wit, the said Arkansas Southern Railroad Company, assignee and transferee of the said Alexandria, Junction City & Shreveport Railroad Company; that this attempt by the town of Ruston to collect a second and additional five-mill tax for the year 1900 on the property of petitioners in aid of said Alexandria, Junction City & Shreveport Railroad Company is in violation of and without warrant and authority in the laws and constitution of the state of Louisiana, and for the reason that two special taxes, each for five mills, for 10 years, cannot be levied on the same property in favor of

the same enterprise. Second. Petitioners show that, even if legal,—which is specially denied,—said five-mill tax has not been levied according to law, in that no legal ordinance was passed by the trustees of said town of Ruston, La., levying and ordering said tax collected. Third. That no notice that said taxes were due and delinquent, or demand for the payment of the same has ever been made according to law. Fourth. Petitioners show further that the said tax collector of the town of Ruston, La., is demanding, in addition to said five-mill special tax, penalties thereon at the rate of 2 per cent. per month on the amount of the principal of said tax so sought to be collected from petitioners; that the demand and exaction of said penalty is illegal, and without warranty or authority in law; that, unless restrained by order of this court, the said W. E. Goodenough, tax collector of the town of Louisiana, will, on July 6, 1901, sell petitioners' said property, as hereinbefore shown, to pay said illegal five-mill special tax and the illegal penalties demanded thereon; that the sale of petitioners' said property will work an irreparable injury; and that a writ of injunction is necessary to protect petitioners' rights in the premises. In view of the premises petitioners prayed that the said W. E. Goodenough, tax collector of the town of Ruston, La., and the town of Ruston, La., through its executive officers and mayor, Z. L. Everett, and said Arkansas Southern Railroad Company, be duly cited to appear and answer hereto according to law; that a writ of injunction issue, forbidding and restraining the said W. E. Goodenough, tax collector of the said town of Ruston, La., from proceeding further with the advertisement and sale of petitioners' property to pay said illegal five-mill special tax and penalties thereon in favor of the said Alexandria, Junction City & Shreveport Railroad Company, as hereinbefore set forth; that upon final trial the said five-mill special tax and penalties sought to be levied and collected by the town of Ruston, La., on petitioners' said property situate in the limits of the town of Ruston, La., be declared to be illegal, null, and void, and without effect; that the injunction sued out herein be perpetuated and sustained in all its parts, and that the said W. E. Goodenough, tax collector of the town of Ruston, La., and the said town of Ruston, La., be forever prohibited from proceeding further in the advertisement and sale of petitioners' said property to pay said alleged five-mill special tax and the penalties demanded thereon. Prayed also for all further orders and decrees necessary in the premises, for all costs, and for full and general relief.

An injunction was ordered, and was issued as prayed for. The defendants excepted: First. That the court had no jurisdiction over the subject-matter alleged in plaintiffs' petition, and that there was no law granting to courts authority to inquire into the matter of

Irregularity of elections or matters affecting the election, its promulgation, and the levy of the tax, unless Act No. 106 of the general assembly of 1892 grants such authority, and in that event the right of action is limited to 90 days. Second. In the event that the court holds Act No. 106 of 1892 is applicable to elections held under article 270 of the constitution and Act No. 202 of 1898, then, in that event, defendant town of Ruston pleads the prescription of 90 days as a bar to plaintiffs' action in this case, and as a bar to their right to recover, or sustain their demand. Third. The town of Ruston averred that more than a majority of her citizens in number and in property in public mass meeting assembled before the Arkansas Southern Railroad survey was made, and before the line was located, offered and proposed to the manager and president of said railroad and its promoters that if they would run said railroad through Lincoln parish and through the town of Ruston, and establish its depot within the corporate limits of the town, they would get for the road the right of way, depot grounds, and vote to said road a five-mill parish tax and a five-mill town tax, and pay them \$5,000 in money, which proposition was submitted to the officials of said railroad through the chairman of the mass meeting, and by said officials accepted; that more than a majority of the citizens of Ruston petitioned the town authorities to hold said election; that said election was legally held on April 25, 1899, pursuant to said agreement and petitions and call, and that only three votes were cast against the tax and only \$2,250 worth of property against it; that said election was legally promulgated in April, 1899, and tax ordered, levied, assessed, and collected as soon as the said railroad reached the town of Ruston; that the said railroad reached Ruston and established depots in December, 1899, and had been in operation ever since; that plaintiffs had full notice and knowledge of the election, acquiesced in the election, and they influenced others to vote; that they had legal notice that the tax was due, and came forward in person or through agents and paid all their town tax, except the five-mill railroad tax; that this they refused to pay, and were thereby estopped from denying legal notice if not properly served; that plaintiffs had stood silently by, and with full knowledge of all the facts, for more than two years from date of election, and permitted the Arkansas Southern Railroad Company to build the railroad, establish its depots and workshops, and expend large sums of money in good faith on the promises of the citizens and the five-mill tax voted by Ruston, and that plaintiffs, as well as the town of Ruston, had reaped the benefits of an enhanced value of property, and increase in trade and freights and population, and were therefore estopped at this late date from denying the legality, irregularity, or constitutionality of the tax, or of the special election, or the assessment

and collection of the tax, or from contesting the tax or its collection upon any other ground. Fourth. Plaintiffs' petition disclosed no legal cause of action, and no ground for injunction. They prayed that these exceptions and pleas be sustained, and that plaintiffs' suit be dismissed, and the injunction dissolved, with costs, and with legal and statutory damages. These exceptions were referred to the merits.

The defendants, under benefit and reservation of their exceptions, answered. After pleading the general issue, they admitted that the property of the two plaintiffs in this case was advertised for sale to enforce the payment of the five-mill special tax voted in favor of the Arkansas Southern Railroad Company by the town of Ruston on April 25, 1899, and averred that said proceeding was legal and necessary, for the reason that plaintiffs had refused to pay said taxes, of which they had due and ample notice; that said special tax by the town of Ruston, in addition to the special tax from the parish of Lincoln, was demanded as an indispensable condition precedent to Arkansas Southern Railroad Company building its line of railway into Ruston; that said tax was explicitly and publicly promised and pledged by the citizens of Ruston in mass meeting assembled; that the election was legally called, advertised, and held, and resulted in an overwhelming majority in number of votes and value of property in favor of said tax, there being but three votes and \$2,250 of property cast against it; that the result of said election was properly promulgated, and tax levied and ordered collected in accordance with law; that the Arkansas Southern Railroad was completed to Ruston in December, 1899, and all its obligations and duties under its contract with the people of Ruston were faithfully and fully performed, and under said contract it was entitled to the tax of five mills for the year 1900, and that said tax had been cheerfully and promptly paid by all of the property holders in the town of Ruston except these plaintiffs and a few others who have enjoined in another suit on the docket of the court; that but for said tax and other inducements the Arkansas Southern Railroad would never have been built to and through the town of Ruston; that the building of said road had largely increased the population and the business, and enhanced the value of all the property in the town of Ruston; that both of plaintiffs own a large amount of property within the corporate limits of said town; they have received and enjoyed immense benefits from the building of the Arkansas Southern Railroad, and it would be manifestly unjust and inequitable to permit them to enjoy the benefits and repudiate the obligations which their fellow property holders had voluntarily assumed; that said tax was voted under article 270 of the constitution of 1898 and Act No. 202 of 1898; that it was legal and consti-

tutional, and was voted with a full knowledge of all the facts, and plaintiffs stood aloof and made no opposition or contest in the time prescribed by law, nor until the Arkansas Southern Railroad Company had accepted in good faith, and acted on the promulgated result of said election. And, assuming the attitude of plaintiffs in reconvention, these respondents averred that the injunction sued out herein was wrongful, improvident, and without legal cause; that respondents had been damaged thereby in delay, expense, trouble, and attorneys' fees in the full sum of \$500 special damages. They prayed (defendants W. E. Goodenough, tax collector, and Z. L. Everett, mayor, of the town of Ruston) that the demands of plaintiffs be rejected, that the injunction be dissolved, and that the tax collector be ordered to proceed with the sale enjoined to enforce the payment of the special tax voted in favor of the Arkansas Southern Railroad Company, and that respondents have judgment against plaintiffs in solido for the sum of \$500 special damages, and for costs and general relief.

The parties entered into the following statement of facts: "(1) It is agreed and admitted that the plaintiffs are property owners and taxpayers of the town of Ruston and the parish of Lincoln, state of Louisiana, and residents of the parish of Ouachita, in said state. (2) That plaintiffs are the owners of the property situated in the town of Ruston, La., as described in their petition and in the advertisement of tax sale by W. E. Goodenough, tax collector of the town of Ruston, La., a copy of which is attached to the petition. (3) That at the date of the filing of the petition herein the town of Ruston, La., through its mayor and town authorities, and more especially its tax collector, W. E. Goodenough, had seized and advertised for sale on Saturday, July 6, 1901, all the property belonging to the plaintiffs situated in the town of Ruston, La., to pay a certain five-mill special tax levied by the said town of Ruston, La., for the year 1900, in favor of and in aid of the Arkansas Southern Railroad Company, as assignee and transferee of the Alexandria, Junction City & Shreveport Railroad Company, together with penalties thereon at the rate of 2 per cent. per month on the amount of the principal of said tax sought to be collected from plaintiffs, in addition to other costs of seizure. (4) That plaintiffs had, previous to the institution of this suit, paid all other state, parish, municipal, and special taxes demanded by the state of Louisiana, the parish of Lincoln, and the town of Ruston, for the year 1900, on all of their property within the limits of the parish of Lincoln and the town of Ruston, state of Louisiana, at the following rate of levy, to wit: To the sheriff and ex officio state tax collector of the parish of Lincoln: State tax, 6 mills; parish tax, 6½ mills; schools tax, 1½ mills; Ruston district school tax, 4 mills; special tax levied by the parish

of Lincoln in aid of the Arkansas Southern Railroad Company, as the assignee and transferee of the Alexandria, Junction City & Shreveport Railroad Company, 5 mills,—total rate of levy paid to the sheriff, 23 mills. To the town of Ruston: Town tax for special purposes, 4 mills; special waterworks and electric light tax, 5 mills,—total rate of levy for the year 1900 by plaintiffs on property situated within the limits of the town of Ruston, La., 32 mills. (5) That all of plaintiffs' property within the limits of the town of Ruston, La., and advertised for sale as aforesaid, is subject to parochial taxation by the parish of Lincoln, in which parish the said town of Ruston, La., is situated. (6) That on December 7, 1897, on the petition of the taxpayers of Lincoln parish, La., the police jury of said parish ordered an election to be held in said parish of Lincoln on January 11, 1898, to test the sense of the property taxpayers of said parish as to the levy and collection of a special five-mill tax for ten years, for and in favor of the Alexandria, Junction City & Shreveport Railroad Company. That the said election was held as ordered, and said tax carried by a legal majority; and that on January 17, 1898, the police jury of the parish of Lincoln promulgated the result of said election, declaring the same carried, and levied the said special five-mill tax on all the property, real and personal, situated within the limits of Lincoln parish (including that situated within the limits of the town of Ruston), and for ten years, to begin whenever said Alexandria, Junction City & Shreveport Railroad Company should be completed and in operation to the town of Ruston, in said parish of Lincoln; and that at the said special election held by the parish of Lincoln on January 11, 1898, the property taxpayers of the town of Ruston participated in said election, voted thereat. (7) That on the — day of —, by notarial act, passed before W. R. Roberts, a notary public within and for the parish of Union, state of Louisiana, the Arkansas Southern Railroad Company, one of the defendants herein, acquired all the property rights, franchises, and credits of the Alexandria, Junction City & Shreveport Railroad Company, including the said special five-mill tax voted by the property taxpayers of the parish of Lincoln, first above set forth. (8) That said railroad was completed to the town of Ruston on the — day of —; and that the police jury of Lincoln parish levied the said five-mill special tax in aid of said railroad company on all property, real and personal, situated within the limits of said parish for the year 1900, including the property of the plaintiffs seized and advertised by the tax collector of the town of Ruston, La., as hereinabove set forth. (9) That plaintiffs have paid to the sheriff and ex officio tax collector for the parish of Lincoln, state aforesaid, the said five-mill special tax levied by the parish of Lincoln for the year 1900 for and in aid

of the Arkansas Southern Railroad Company, as assignee of the Alexandria, Junction City & Shreveport Railroad Company, on all the property owned by plaintiffs within the limits of said parish, including that portion of the plaintiffs' property seized and advertised for sale by W. E. Goodenough, tax collector of the town of Ruston, La., as above shown. (10) That the said five-mill special tax voted by the property taxpayers of the parish of Lincoln in aid of the said Alexandria, Junction City & Shreveport Railroad Company, and now owned by the Arkansas Southern Railroad Company, was levied for the first time on the tax roll of 1900, and is still due and collectible for each of the nine years succeeding the year 1900. (11) That the said special five-mill tax in favor of the Alexandria, Junction City & Shreveport Railroad Company (now owned by the Arkansas Southern Railroad Company) sought to be levied by and collected by the town of Ruston, La., by the seizure and sale of the plaintiffs' property, is also sought to be levied for a term of ten years, from the year 1900 to the year 1909, both inclusive. (12) That the Arkansas Southern Railroad Company is the assignee and transferee and owner of all the property, rights, franchises, and credits of the Alexandria, Junction City & Shreveport Railroad Company, including the five-mill special tax levied by the parish of Lincoln for a period of ten years beginning with the year 1900 in aid of the said road, and the said special five-mill tax sought to be levied and collected by the town of Ruston for a period of ten years from the year 1900, in aid of the said Alexandria, Junction City & Shreveport Railroad Company. (13) That on the — day of March, 1899, on petition of the property taxpayers of the town of Ruston, but which petition was not signed by either of the plaintiffs herein, the mayor and council of said town ordered a special election to be held by the taxpayers of said town of Ruston on April 25, 1899, to test the sense of the property taxpayers of said town as to the levy and collection of a special five-mill tax for ten years for and in favor of the Alexandria, Junction City & Shreveport Railroad Company, since acquired by the Arkansas Southern Railroad Company; that said election was duly advertised, and held as ordered; that plaintiffs did not vote at said election; and said tax carried by a majority in number and amount, and on May 2, 1899, the mayor and council of the town of Ruston promulgated the result of said election, declaring the same carried, and levied the said special five-mill tax on all the property, real and personal, situated in the corporate limits of Ruston for ten years, to begin whenever said company should complete and put in operation its railroad to the town of Ruston; that said road was completed and put in operation on the 4th day of December, 1899, and said special tax was levied for the year 1900, and collected from all the tax-

payers of Ruston, resident and nonresident, except the plaintiffs in this suit and the plaintiffs in the suit of M. A. Laurence et al. v. W. E. Goodenough et al., now pending on the docket of the district court of Lincoln parish, which latter suit has eight plaintiffs, and enjoins the collection of less than one hundred dollars of tax; that plaintiffs were duly notified by the tax collector of the town of Ruston, La., that all town and special taxes for 1900 were due and unpaid, and on December 26, 1900, plaintiffs made a tender to the tax collector of all taxes due except the tax enjoined herein, which plaintiffs refused to pay, and the said tender was accepted by the tax collector, leaving the special tax of five mills in aid of the railroad herein enjoined to be collected. This September 10, 1901. Stubbs & Russell, Attys. for Plaintiffs. F. W. Price, A. A. Gunby, Attys. for Defendants."

The district court rendered judgment in favor of the plaintiffs sustaining the injunction sued out against the defendant Goodenough, tax collector, to the extent of preventing the defendant from attempting to sell the property of the plaintiffs for the purpose of collecting the 2 per cent. penalty; and it further ordered that "In all other respects the injunction be dissolved, with permission to the defendants to proceed to the collection of the special tax of five mills. It is further ordered that the demand in re-convention be rejected, and that defendants pay costs. Done, read, and signed in open court this 10th October, 1901." The plaintiffs appealed.

Defendants moved in the supreme court to amend the judgment by allowing 5 per cent. interest on the taxes enjoined from the date they fell due (January 1, 1901), and by rendering judgment against plaintiffs in favor of defendants for \$100 damages.

Stubbs & Russell (Francis P. Stubbs, Jr., of counsel), for appellants. Fred W. Price, for appellees town of Ruston and Arkansas Southern R. Co. Farrar, Jonas & Kruttschnitt and Andrew Augustus Gunby, for appellee Arkansas Southern R. Co.

NICHOLLS, C. J. (after stating the facts). The main issue in this case, as appears by the agreed statement of facts accompanying this opinion, is as to the constitutional right and power and the extent of the constitutional right and power of the taxpayers of the town of Ruston, in Lincoln parish, to tax themselves in aid of a railroad enterprise, independently of the action of the taxpayers of the parish of Lincoln, under the provisions of article 270 of the constitution of 1898. The question is whether, after the taxpayers of the parish of Lincoln, as such, had voted in favor of a five-mill tax in aid of the construction of a railroad upon all of the property of that parish, including that within the town of Ruston, the taxpayers of the

town of Ruston, as such, had the right and authority to vote in favor of a second five-mill tax in aid of the construction of the same or another railroad upon all the property in the town of Ruston. The plaintiff urges that they had no such right, and that the power of the taxpayers of the town to tax themselves for such a purpose was exhausted when the taxpayers of the parish had exercised their right of having a five-mill tax levied for that purpose on all of the property in the parish. They object that the taxpayers of the town cannot be made to contribute a ten-mill tax in aid of the construction of a railroad when those of the balance of the parish are to contribute only a five-mill tax for the same road or for other roads.

Article 232 of the constitution of 1898 declares that the state tax on property for all purposes whatever, including expense of government, schools, levees, and interest, should not exceed in any one year six mills on the dollar of its assessed valuation, and, except as otherwise provided in this constitution, no parish, municipal, or public board tax for all purposes whatsoever shall exceed in any one year ten mills on the dollar of valuation: provided, that for giving additional support to public schools and for the purpose of erecting and constructing public buildings, public school houses, bridges, wharves, levees, sewerage work, and other works of permanent public improvement, the title to which shall be in the public, any parish, municipality, ward, or school district may levy a special tax in excess of such limitation whenever the rate of such increase and the number of years it is to be levied and the purposes for which the tax is intended shall have been submitted to a vote of the property taxpayers of such parish, municipality, ward, or school district entitled to vote under the election laws of the state, and a majority of the same in numbers and in value voting at such election shall have voted therefor. Article 270 declares that the general assembly shall have power to enact general laws authorizing the parochial, ward, and municipal authorities of the state, by a vote of the majority of the property taxpayers in number entitled to vote under the provisions of this constitution, and in value, to levy special taxes in aid of public improvements or railway enterprises: provided, that such tax shall not exceed the rate of five mills per annum, nor extend for a longer period than ten years: and provided, further, that no taxpayer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward or municipality to be affected for property the year previous. The article of the constitution of 1879 corresponding to article 270 of that of 1898 was article 242. It read as follows: "The general assembly shall have power to enact general laws authorizing the parochial or municipal authorities of the state under certain circumstances by a vote of the ma-

jority of the property taxpayers in numbers and in value to levy special taxes in aid of public improvements or railroad enterprises, provided that such tax shall not exceed the rate of five mills per annum, nor extend for a longer period than ten years." The general assembly in 1898 passed a law known as "Act No. 202," entitled "An act authorizing the parochial, ward and municipal authorities of the state by a majority vote of the property tax payers, including woman property tax payers, in number entitled to vote under the provisions of the constitution of 1898, and in value, to levy special taxes in aid of public improvements or railway enterprises," when "authorized by a vote of a majority of the property tax payers in number entitled to vote under the provisions of the constitution and in value, provided that such tax shall not exceed the rate of five mills per annum, nor extend for a larger period than ten years, and provided further that no tax payer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward or municipality to be affected for property the year previous." The second section provided that the petition shall be signed by the property taxpayers of such parish, ward, or municipality, and shall designate the object and amount of the taxes to be levied each year, and the number of years it shall be levied. The seventh section provided that the police jury of any parish, for said parish or any ward therein, or the municipal authorities of any municipality, shall, when the vote is in favor of the levy of said taxes, levy and collect annually, in addition to other taxes, a tax upon all taxable property within said parish, ward, or municipality, an amount sufficient to pay the amount specified to be paid in said petition, and such police jury and municipal authorities shall have the same authority and right to enforce the collection of such special tax as may be authorized by such election as is or may be conferred upon them for the collection of other taxes, which taxes so collected shall be paid for the purposes named in said petition, and paid over, when collected, by the proper officers, to the treasurer, for the person or corporation entitled thereto, after deducting lawful commission for collecting same. The taxes referred to in article 232 of the constitution as parish, municipal, or public board taxes, are those which are levied by the political bodies named in their regular, general, and well-recognized powers of administration. The constitution, after ordaining that no parish, municipal, or public board tax shall exceed in any one year 10 mills on the dollar, added by way of proviso that any parish, municipal corporation, ward, or school district may, for certain purposes, specially enumerated, levy a special tax in excess of the said limitation, whenever the rate of such increase and the number of years it is to be levied and the purposes for which the tax is intended shall

have been submitted to a vote of the property taxpayers of such parish, municipality, ward, or school district entitled to vote under the election laws of the state, and a majority of the same shall have voted therefor. It will be seen that the action of the taxpayers at the election here provided for is not to constitute these various local authorities public agencies to carry out the expressed will of the taxpayers in respect to matters outside of their regular, ordinary, legislative authority and functions, but to simply furnish additional means to those which might be deemed necessary to carry out properly and successfully certain specified objects already falling under and within their general jurisdiction. The taxes to be levied and collected were still to be parish taxes, municipal taxes, and public board taxes, and to be utilized and administered upon by the local authorities in their respective capacities. The taxes to be levied and raised under article 270 of the constitution are for purposes which are withdrawn entirely from within the jurisdiction of these local authorities acting in their general legislative capacities. Any action extended for the purpose of affording aid to public improvements of the character referred to in article 270 of the constitution and for railway enterprises would be extended not to the parish or municipalities or wards, through authorities acting for and in behalf of the corporate bodies, but by the property taxpayers of the parishes, those of the municipalities, and those of the wards supposed to be specially interested and affected thereby. To the property taxpayers within certain territorial limits identical with those of certain recognized political subdivisions was granted "local option" in respect to furnishing the aid authorized to be extended by article 270 of the constitution. The taxpayers within the parish limits, those within the municipal limits, and those within the ward limits were each vested with local option power of limited taxation for local benefit in respect to the particular subject of extending aid for railway enterprises. The elections to be held within these different territories to ascertain the will of the taxpayers on this subject are not initiated by these authorities, but called by the parochial authorities at the instance of taxpayers residing anywhere within a parish when aid is sought to be extended by the taxpayers of the parish at large, and by the city or town authorities when the aid is sought to be extended by the taxpayers of a city or town. The elections held are parish elections or city elections, as the case may be; the votes are cast and the result announced under different sets of officials; so, also, are the taxes levied, collected, and distributed. Where a taxpayer within a city votes at a parish election, he votes as a parish taxpayer; when he votes at a town election, he does so as a city taxpayer; when aid is sought to be extended by the parish taxpay-

ers, the interests of particular towns within the parish limits are only incidentally considered and concerned. The benefit to the parish as a whole is the object in view. When aid is sought to be extended by the city, it is the interest of the taxpayers of that particular city, and the benefits to be received by them, which controls the situation.

Counsel for defendants, in their brief, say: "The source and object of these special taxes are so essentially different from those of ordinary governmental taxation that entirely different rules of interpretation have been and must be applied to the two cases. A local assessment is not a tax, but a consideration for the enhancement of the value of the property of the community. This court has expressly decided that a local assessment is not a tax *eo nomine*, and is not governed by the provisions of the constitution on the general subject of taxation, but is levied entirely independently of all said provisions. *Munson v. Board*, 43 La. Ann. 15, 8 South. 906." They refer the court in support of the position taken by them in this case to *Town of Mansfield v. Police Jury*, 47 La. Ann. 1257, 17 South. 792; *Fullilove v. Police Jury*, 51 La. Ann. 359, 25 South. 302; *Wilson v. Board*, 133 Ill. 443, 27 N. E. 203; *Adams v. Savings Inst.*, 136 N. Y. 52, 32 N. E. 622; *State v. Lancaster County Com'rs*, 6 Neb. 214; *Jones v. Hurlburt*, 13 Neb. 131, 13 N. W. 5; *Irwin v. Loire*, 89 Ind. 540; *Todd v. City of Laurens*, 48 S. C. 395, 26 S. E. 682; *City of Iola v. Merriman*, 46 Kan. 49, 26 Pac. 485; *Scott v. Hansheer*, 94 Ind. 1; *U. S. v. Macon County Court (C. C.)* 75 Fed. 259; *Adams v. Savings Inst. (Sup.)* 20 N. Y. Supp. 12; *Board v. Bitting*, 9 N. M. 588, 58 Pac. 395; *State v. Common Council (Wis.)* 71 N. W. 87; *Railway Co. v. McCleave*, 108 Ill. 368; *Board of Education of City of Huron v. National Life Ins. Co.*, 36 C. C. A. 278, 94 Fed. 324; *Railroad Co. v. Klein*, 52 Neb. 258, 71 N. W. 1099; *Campbell v. City of Indianapolis*, 155 Ind. 186, 57 N. E. 920; *Ætna Life Ins. Co. v. City of Burrton (C. C.)* 75 Fed. 962. The plaintiffs rely principally upon the substitution of the word "and" in article 270 of the constitution of 1898 for the word "or" in article 242 of the constitution of 1879, which bore upon the same subject-matter, and the fact that Mr. Justice Miller, the organ of the court in *Bank v. Baillio*, 47 La. Ann. 1471, 17 South. 880, in construing article 209 of the constitution of 1879, gave weight to the use of the word "or" instead of the word "and" in reaching his conclusions; saying: "The alternative, we think, marks the limitation for the town or parish, not the aggregate of the tax of both. Each is entitled to levy a tax up to ten mills." In the original opinion in that case the court said: "If the view prevailed that the parish and town tax together was intended to be subject to the ten-mill limitation, then the tax of either might exclude or leave little

scope for the tax by the other." In the opinion on rehearing allusion was again made to the disjunctive "or" as indicating an intention in that article to deal with parish taxation and municipal taxation separately. The court in that opinion said: "If, as stated in the original opinion, the limit was applicable to the aggregate of parish and town taxation, there would be no specific limit on each, and hence no guide for each to observe. The parish might attempt to tax up to the ten mills, and so might the town. In that contingency the aggregate taxation could not be maintained, and the courts would have to distribute the tax between the parish and town, —a function legislative in character, not judicial." We do not give to the expressions of the organ of the court in that case the force and scope that plaintiffs attach to them. The word "or" is frequently used as having the same meaning as "and," particularly in permissive affirmative sentences. We are satisfied with the conclusions reached in that case and the basis upon which they were really based.

There is nothing unusual in the fact that the taxpayers within a particular territory should have to pay taxes at the same time to different taxing political organizations for the same purpose. We have had in this state for years levee taxes, levied simultaneously by the general assembly on the property of the state by parishes on the property of the parish, and by municipalities on the property of the city. We have now taxes levied for general school purposes by the state, and special local purposes by subordinate local organizations. In levying these taxes these bodies do not act jointly, but independently of each other. Plaintiffs' special objection seems to be leveled at the fact that the same railroad company should have received aid from both the parish taxpayers as a whole and the taxpayers of one of the towns through which it passes; but that fact does not reach the legal question involved. If the taxpayers of the town had the legal right and power to tax their property in aid of a railroad enterprise, notwithstanding the fact that the taxpayers of the parish had also consented to tax their property to aid in the construction of a railroad enterprise, they were left free to exercise their right and power in the special direction they might think best for their local benefit and interest. There was no constitutional or statutory restriction or limitation upon their action. They were the best and only judges as to what was most needed for their local requirements, and, if local interests, in their judgment, would be best subserved by contributing to the construction of the same railroad to which the parish taxpayers as a whole had consented to contribute, was simply a matter of fact arising out of special local conditions, playing no legal part whatever in the premises.

The plaintiffs, property taxpayers in the

town of Ruston, enjoined the enforcement, with interest and penalties, upon their property, of a five-mill tax levied in aid of the construction of a railroad through that town by the Junction City, Alexandria & Shreveport Railroad Company. The district court rendered judgment in favor of the plaintiffs, sustaining their injunction to the extent of preventing the defendants from attempting to sell the property of plaintiffs for the purpose of collecting the 2 per cent. penalty. It decreed that in all other respects their injunction was dissolved, with permission to the defendants to proceed to the collection of the special tax. It furthermore rejected the demand filed in reconvention, and that defendants pay costs. Plaintiffs appealed, and defendants prayed that judgment be amended by allowing 5 per cent. interest on the taxes from the date they fell due, and awarding them \$500 for damages. We think the judgment appealed from should be amended so as to allow legal interest on the taxes from the date they fell due. We do not think damages should be allowed. See Railroad Co. v. Traylor, 105 La. 748, 30 South. 117.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as it perpetuates plaintiffs' injunction restraining the tax collector from payment of the taxes claimed, with legal interest thereon from the date at which payment thereof became due, and it is now ordered, adjudged, and decreed that plaintiffs' injunction in that respect be dissolved, with permission granted to the defendants to proceed with the collection of the tax claimed, with legal interest thereon from the date that payment thereof became due, and that, as so altered and amended, the judgment appealed from is affirmed; appellants to pay the cost of the appeal.

(107 La.)

SALLES et al. v. JACQUET et al. (No. 14,857.)¹

(Supreme Court of Louisiana. May 26, 1902.)

SUPREME COURT—JURISDICTION.

1. The test of jurisdiction in an action of boundary is the value, not of either or both of the contiguous estates, but of the property which lies between the contested lines; and, where it is patent upon the face of the record that such property is worth less than \$2,000, this court must take notice of its want of jurisdiction and dismiss the appeal.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; T. Don Foster, Judge.

Action by Jean M. Salles and others against Belizaire Jacquet and others. Judgment for defendants, and plaintiffs appeal. Dismissed.

Edward Simon, for appellants. James E. Mouton, for appellees.

¹ Rehearing denied June 21, 1902.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 173; Boundaries, vol. 8, Cent. Dig. § 132.

MONROE, J. This is an action of boundary, in which the plaintiffs claim to be the owners of a tract of land in the parish of St. Martin which they allege measures eight arpents front on Bayou Teche, and is worth "over three thousand dollars," whilst the adjoining tract, the boundary of which is in dispute, measuring one arpent front on the bayou, is said to be worth \$500. From the evidence adduced, it appears that the strip of land in contest has but a fraction of an arpent front, and from both the evidence and the pleadings it appears that the value of this strip is much less than \$2,000. When this case was here before, the suspensive appeal which had been taken was dismissed because the appellees had not been cited, but it was said, "There is no reason why they [the appellants] should not yet be allowed a devolutive appeal, if applied for within the legal delays." It is certainly unfortunate that, in taking the devolutive appeal as thus suggested, they should not have considered the question with which they are now confronted; but it is patent upon the face of the papers that the value in dispute is less than \$2,000, and this court must take notice of its want of jurisdiction. "In an action of boundary between the owners of two contiguous estates, the test of jurisdiction is not the value of either or both of the adjacent estates, but the value of the strip of land included between the two contested lines." *State v. Lapeyrolerie*, 38 La. Ann. 264. The case thus cited affirmed that of *Lombard v. Belanger*, 35 La. Ann. 811, and in a later case it was said: "The burden of proof is not on the appellee to show want of jurisdiction, but on the appellant to prove the existence of jurisdiction as defined in the constitution. In an action looking to the fixing of boundary lines, it is incumbent on the appellant to show that an amount is therein contested exceeding two thousand dollars, in order to maintain his appeal here." *Hite v. Hinsel*, 39 La. Ann. 113, 1 South. 415.

For the reasons given, it is ordered that the appeal herein be dismissed.

(107 La.)

STATE v. McQUEEN. (No. 14,291.)¹
(Supreme Court of Louisiana. April 14, 1902.)

CRIMINAL LAW—OBJECTIONS TO EVIDENCE—NEW TRIAL—SURPRISE.

1. There is no error in overruling the objection to a question propounded to a witness on redirect examination that "it is not redirect examination," when the question objected to is reasonably proper in order to explain the testimony given on the cross-examination which has preceded.

2. Or in refusing a new trial, applied for on the ground of "newly discovered evidence," when, upon the hearing of the application, the witnesses named fail to furnish such evidence.

3. Or in refusing a new trial, applied for

on the ground of "surprise," when the alleged surprise is said to have resulted from testimony given by a witness who was re-examined, at the request of the jury, with the consent of the counsel for the defendant, after the case had been submitted, and where no suggestion of surprise, objection, or application for relief was made at the time.

4. Or in refusing a new trial, applied for on the ground that a witness had testified as an expert without having first established his qualifications in that respect, where no such objection was made at the time, and no bill reserved, and where the alleged expert testimony, if any there was, was elicited by questions propounded by defendant's counsel.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Joshua G. Baker, Judge.

George McQueen was convicted of an assault with intent to maim, and appeals. Affirmed.

Adams & Otero, for appellant. Walter Gulon, Atty. Gen., and J. Ward Gurley, Dist. Atty. (Lewis Gulon, of counsel), for the State.

MONROE, J. The defendant was convicted of having committed an assault upon, and having disabled the right eye of, the prosecuting witness, with the intention to maim, disable, and disfigure, and he appeals from a sentence of imprisonment at hard labor.

It appears that Dr. C. H. Tebault, Jr., had been examined on behalf of the prosecution, and had been cross-examined by the defendant's counsel, and that upon a redirect examination by the district attorney it was objected by the counsel for the defendant that the questions propounded were "neither suggested nor justified by the cross-examination, nor provoked by any matter elicited therein," and, the objection having been overruled, a bill of exceptions was reserved. The bill itself does not recite the questions which were objected to, but, from the report of the testimony, which is annexed, it appears that upon the cross-examination the witness was asked the following questions, to wit: "Q. What size bottle is that? A. An ounce or an ounce and a half. Q. I perceive that sulphuric acid burns by contact? A. Yes, sir. Q. You spoke of two eyes being affected. She was not burned in the left eye? A. Yes, sir, a few drops of the acid had gotten on the lid, without getting into the eye. It was what we call the 'first degree.' Q. You—with reference to the trouble of closing the eye—you say there is a possibility, after further treatment, of her eye being closed? A. Yes, sir; the closing will be difficult. It will not close like the healthy eye it was. Q. It will answer all purposes that nature intended the lid to perform? A. Yes, sir. Q. You say the probability is in that direction? A. Yes, sir." And that the state then asked the witness, "What is the condition of the eye to-day?" to which the counsel for the defendant objected that it was not redirect examination. The argument which is now presented goes somewhat further, and seems

¹ Rehearing denied June 28, 1902.

² 3. See Criminal Law, vol. 15, Cent. Dig. §§ 2304, 2305.

to relate to other questions to which no objection was interposed. As the matter appears in the record, we find no error in the ruling of the trial judge. Whether it was competent on re-examination to propound any questions which might have been propounded on the examination in chief, or whether the district attorney was limited to such questions as were necessary to draw out an explanation of the meaning of the statements made by the witness on cross-examination, the particular question to which the objection was urged was, legally speaking, unobjectionable. No other bill was reserved prior to the verdict, but a motion for new trial was filed upon the ground that the applicant was informed and believed that he would be able to prove by three medical men, named by him, that the right eye of the prosecuting witness was not permanently disabled, and that the evidence had been newly discovered, etc.; and a supplemental motion was filed, alleging, as additional reasons for setting aside the verdict, that the testimony of Dr. Tebault—given upon the occasion of the jury's returning into court, after they had retired to consider their verdict, in answer to questions propounded by the jurors, and upon cross-examination—took the defendant by surprise upon a material matter, to wit, upon the question of the permanency of the disablement of the eye of the party injured, "which," as the motion recites, "in view of the testimony previously delivered by said Tebault, could not reasonably have been anticipated, and which, by reason of the stage reached in the trial, could no longer be contradicted or overcome"; and "that there was error in permitting the prosecution to examine the said C. H. Tebault, Jr., M. D., as an expert in respect of the permanence of the disablement inflicted, etc., for the reason that there was no preliminary examination as to the qualifications of the said Tebault with a view to satisfy the court that the said witness thus called as an expert had the requisite qualifications and knowledge to allow him to testify in that behalf." Upon the bill taken to the denial of this motion the judge a quo made the indorsement: "The verdict was fully justified by the evidence, and Dr. Tebault was recalled at the request of the jury, and with the consent of the defendant." The testimony of the witnesses who were heard upon the application for new trial fails to show that the eye of the prosecuting witness was not permanently disabled. On the contrary, it clearly establishes that the vision is seriously impaired, and, though the witnesses are unable to state the cause, they testify that the impairment might have resulted from the injury which the defendant is charged with having inflicted, as it might have resulted from other cause, and, as this ground of complaint has not been referred to in the argument, we presume that it has been abandoned. It was admitted in the argument, and appears from the statement of the trial judge, that "Dr. Tebault was recalled

at the request of the jury, and with the consent of the counsel for the defendant." It nowhere appears, nor is it claimed, that the learned counsel pleaded surprise when the testimony was given, or made any application for delay or relief, and the record does not inform us of the character of testimony given.

As to the objection that Dr. Tebault was not qualified to testify as an expert with respect to "the permanence of the disablement inflicted," etc., we find, upon examining his testimony, that the questions of the counsel for the defendant upon cross-examination were the first that were propounded to the witness upon that subject, and that those that were subsequently asked by the district attorney were germane to the cross-examination. We also find that Dr. Tebault was called in immediately after the injury had been inflicted, and that he found that his patient had been so badly burned with sulphuric acid that part of the lid of one eye had been destroyed, so that grafting became necessary; and, whilst he did not profess to be an oculist, we take it that he was competent to testify, as a practitioner of medicine, whether permanent disfigurement was likely to result or not, the oculists summoned by the defendant testifying that the lid is a part of the organ known as the eye. Beyond this there was no objection made at the time, and no bill reserved, on the ground that the witness, not having qualified as an expert, was undertaking to give expert testimony.

Judgment affirmed.

(107 La.)

Succession of SCHMIDT. (No. 14,053.)

(Supreme Court of Louisiana. June 21, 1902.)

ADMINISTRATION—SERVICES OF PHYSICIAN.

1. The services of the physician who attended the deceased for six months previous to his death being shown by the evidence to be of a value greater than the sum for which he was placed on the account of the administratrix, the account is ordered amended so as to allow him larger compensation.

2. This claim thus allowed is privileged, as coming under the head of expenses of last illness.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

In the matter of the succession of Richard R. Schmidt. Appeal by Max Levy from a judgment dismissing his opposition to the account. Reversed.

Bernard Titcher, for appellant. Saunders & Gurley, for appellee.

BLANCHARD, J. This appeal is by Dr. Max Levy from a judgment dismissing his opposition to the account filed by the administratrix.

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 946.

He claimed \$1,500 for professional services rendered the deceased for a period of six months previous to his death, and averred that the amount thus due him is privileged, as coming under the head of expenses of last illness. He was put down on the account of the administratrix for \$500 only, and was not rated as a privileged creditor. It is explained that the succession being solvent and there being funds to pay all debts, they were not ranked. The inventory showed assets of the value of \$63,535, of which \$28,500 is real estate, and \$35,035 personal property. The provisional account shows debts aggregating \$36,761.80, and it is explained that there are still other debts. Allowing for these other debts and for depreciation of property under the inventoried value, as shown by the return of sales of the personal property, the value to the widow and heirs of the estate is about \$20,000. A widow and three young children survive the husband and father. These are to be supported, and the children educated.

In fixing the allowance for professional services the means of the patient—his ability to respond—is to be taken into consideration. The dead man was a sufferer from Bright's disease. He was attended by Dr. Levy for about two years prior to his death, and all his bills were paid except for the services rendered from May 1, 1900, to the time of death, October 30, 1900. The testimony shows that opponent, for the services rendered prior to May 1st, charged and was paid at a higher rate than as shown on the bill forming the basis of the present opposition. It further shows that the doctor's services were arduous and his attention unremitting; that the patient was exacting in his demands; that much of the physician's time was thus taken up; that his visits were prolonged, his patient insisting upon his remaining. He was called upon at all hours of the night, and often during the day his visits to his patient necessitated the sacrifice of his office practice—giving up his office hours to the demands of the sick man. It is explained that the sufferer's condition became very much more grave from about the 1st of May, 1900, and this circumstance justifies, perhaps, the claim that what may be called his last illness began at that date. It is shown that the sick man suffered great pain and required special treatment for his relief. A part of this treatment was Turkish baths administered, and he required his physician to attend him at the establishment where the baths were taken. Later, when his condition got so bad he could not go to the baths outside, this treatment had to be administered by his physician at his (the sick man's) residence, and the giving of the baths occupied each time about one hour and a half to two hours. In fact it is shown that the treatment applied to the sick man was much out of the ordinary. A brother of the dead man, who lived in the same house with him, testified in corroboration of

the evidence given by the doctor himself. So did three physicians of note called as witnesses on his behalf. We are of the opinion that the district judge erred in dismissing the opposition in toto and that opponent is entitled to larger compensation than the \$500 for which he was put down on the account. We think, all things considered, his claim should be increased to \$900.

It is, therefore, ordered that the judgment dismissing the opposition of Dr. Max Levy be avoided and reversed, and it is now adjudged and decreed that the opposition be sustained to the extent of increasing the allowance made to him for professional services from \$500 to \$900, with legal interest from the date of the filing of the provisional account, and that the said account be amended in this particular—costs of the lower court and of this court, in this behalf, to be borne by the succession, appellee. It is further ordered, etc., that for the \$900 herein allowed, appellant be recognized as a privileged creditor of the estate.

(107 La.)

FRANK et al. v. FRANK. (No. 14,358.)
(Supreme Court of Louisiana. May 26, 1902.)

ADMINISTRATOR'S ACCOUNT—EVIDENCE.

1. The bill of exceptions taken by plaintiff to the ruling of the court rejecting evidence offered to prove that the judgment of one of the opponents was for a community debt was well taken. It was not offered for the purpose of enlarging or diminishing the judgment, but to ascertain whether the debt covered by the judgment was a community debt or not. The judgment, less credits sustained by the facts, is charged to the community.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Avoyelles; James M. Edwards, Judge ad hoc.

Opposition of Louis Frank and others in the account of Emile Frank, administrator of the succession of Adolph Frank. From the judgment, A. J. Mayer, as creditor, appeals. Modified.

Joffrion & Joffrion and H. C. Edwards, for appellant. Joseph Clifton Cappel, for appellees Louis Frank and others. William Harris Peterman, for appellee Emile Frank.

BREAUX, J. The account of Emile Frank, administrator of the succession of Adolph Frank, was opposed on several grounds. The district court considered these grounds after trial, and rendered judgment homologating the account.

On appeal, we understand that the appellant particularly complains of the judgment in so far as relates to item 2 of the account, covering a charge against the administrator of \$595.25, which should be increased, opponent contends, to the sum of \$758.86.

With reference to this claim, opponent's contention is that debts contracted during the marriage are due by the community, and that the debt in question was contracted during the community. We are informed by the tes-

timony annexed to, and forming part of, a bill of exceptions, which was admissible in evidence, and which was in our view illegally excluded, that the wife in this case died in June, 1891; that the indebtedness was incurred by the community a year prior to her death. This excluded testimony showed what was the consideration of the judgment, and the date the debt became due, the basis of the judgment, in order to ascertain whether or not it had been contracted during the existence of the community. The district court excluded this testimony on the ground that it was verbal, and that it could not be admitted to affect the judgment. We think this objection is met by a decision, cited *infra*, in which the court held that a bill of exceptions, taken by the plaintiff to the ruling of the court in admitting evidence to prove that a judgment was for a community debt, was not well taken. The court said that it was not received for the purpose of enlarging or diminishing the judgment, but to ascertain a fact raised in the pleadings, to wit, whether the debt on which the judgment was found was a community debt or not. *Baird v. Lemee*, 23 La. Ann. 424. This is precisely the issue before us for decision. The testimony showed that it was a community debt. Although the testimony was excluded in the lower court, it is now properly before us in accordance with agreement of counsel. This enables us to decide the issues without remanding the case, to admit the testimony which was excluded as before stated.

There is also a question regarding the amount of the claim which item 2, before referred to, covers. The administrator was originally charged with \$595.25. The judgment of the district court increased the amount to \$612; added the sum to the amount of the inventory. The following explains the error: A judgment offered in evidence shows that the indebtedness was originally the sum of \$922.25, and that this sum is subject to a credit of \$165.75, thus reducing the amount due to \$756.50. The judgment is the highest evidence of the debt, and, in the absence of other evidence, of the credit to which the party indebted is entitled. Correction is made to correspond with the terms of this judgment. Other questions were presented, but we do not take it that they are insisted upon. Our examination has not led us to the conclusion that, even if they had all been pressed, the result would have been different.

For reasons assigned, the judgment appealed from is amended by increasing item 2 of the account, wherein the administrator charged himself with \$595.25, being proceeds of judgments collected by him, to the sum of \$756.50. It is further ordered and adjudged that the judgment owned by appellant for principal sum of \$400 is further amended by decreeing that it is due by the community which existed between Adolph Frank and Caroline Gaspard, his wife, both deceased. It is further ordered and adjudged that the

judgment of the district court be amended so as to recognize the judgment in favor of appellant for the principal sum of \$400, with interest, as due by the community which existed between Adolph Frank and Caroline Gaspard, his wife, both deceased. See reasons on rehearing. It is further ordered, adjudged, and decreed that appellees pay costs of appeal.

On Application for Rehearing.

(June 23, 1902.)

On rehearing the decree is amended by more specifically setting forth that the second ground of opposition relates to an independent item. As to this item, appellant asked that the administrator be charged with the amount of the certain judgment of which he is the owner, obtained by George L. Mayer against Adolph Frank, and being for the principal sum of \$400 with 8 per cent. interest from November 3, 1883; and that the judgment be recognized as a debt of the community between Adolph Frank and his deceased wife, Caroline Gaspard. Appellant's claim is unquestionably a debt. The opinion handed down is changed so as to make it appear beyond all question that the judgment obtained by George L. Mayer against Adolph Frank, as above detailed, and revived in the name of Alfred J. Mayer, appellant, being No. 7,098 of the docket of the Tenth judicial district, court of Louisiana, be recognized as before indicated; and the administrator is ordered to place this claim on his account as due, as before mentioned. As this amendment involves a mere matter of detail, and as appellee does not object to its being made without further argument, we therefore dispose of the matter finally at this time. It is ordered and decreed that the opinion and decree heretofore handed down be, and the same is hereby, amended so as to conform to the foregoing.

As amended, the judgment heretofore handed down is affirmed.

(107 La.)

AIKEN v. ROBINSON. (No. 13,904.)
(Supreme Court of Louisiana. June 21, 1902.)

RES JUDICATA.

1. Exception of *res judicata* sustained.
(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by Mrs. C. M. Aiken against Mrs. John H. Robinson. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff prayed for judgment for \$2,575, with interest. She alleged that on the 18th of August, 1897, she having been applied to by John H. Robinson, acting on his own behalf, as well as on behalf of his wife, for a sum of money wherewith to take up and pay certain mortgage notes, a judgment, taxes, and insurance, due by certain real es-

tate standing in the name of said husband and wife, she so consented, and advanced therefor and paid to the holders of the said securities standing upon the property the sum of \$5,151; that through error or inadvertence the mortgage given to secure said loan of \$5,150, so to be used and so used as aforesaid, was not signed by the wife of the said John H. Robinson, who thereafter sought to take advantage of same, and prevent any recourse of petitioner against the property so benefited on behalf of his said wife; that, in an action instituted in the civil district court and appealed to the supreme court, a determination was had of the subject-matter then at issue, and the court in said cause decided that inasmuch as no written power of attorney to the said John H. Robinson had been produced to the notary, authorizing him to sign on her behalf, and as she had not signed said mortgage, her property was not liable or responsible for the undivided one-half of the said sum of \$5,150, but that petitioner, who had so paid the mortgage, which she had no interest otherwise to discharge, was entitled to reimbursement of the amount of such payment as an ordinary creditor of the said Mrs. John H. Robinson, for whose benefit the same was paid, and the right to claim the same was reserved in the premises. Petitioner set out the various claims which she paid, declaring that her moneys were used in taking up and paying the mortgages and liens resting on the property, all of which would appear in a notarial act passed before Edward Rightor, notary, on the 18th of August, 1897; that Mrs. John H. Robinson, the defendant, was duly authorized to contract the several items of indebtedness so paid by petitioner, and the consideration thereof inured to her separate use and benefit, and, without payment thereof, her interest in said property had been seized and sold therefor. Respondent set up as against plaintiff's demand an exception of no cause of action, based upon two judgments. The first of these judgments was declared to be the judgment of the supreme court in the matter entitled "Mrs. C. M. Aiken v. John H. Robinson," and "Mrs. Blanche Mallet, Wife of John H. Robinson, v. Mrs. Catherine M. Aiken," consolidated on the docket of said court under No. 13,180 (27 South. 134, 530), wherein the same identical parties were litigating, and the same identical matters, things and facts were set up for determination, and were finally decided in favor of exceptor. The second judgment pleaded in bar was the judgment of the civil district court for the parish of Orleans in the cause entitled "Mrs. Catherine M. Aiken v. Mrs. Blanche Mallet" (No. 61,712 of the docket of that court), rendered on May 2, 1900, and signed on June 11, 1900, where it is declared the same parties and the same issues of fact and law were then and there on trial, and so decided. This exception was by the district court referred to the merits. Defendant

answered, filing first the general issue. Further answering, she specially denied that the plaintiff, either at the time of the passage of the act of mortgage before Edward Rightor, notary public, described in plaintiff's demand, or at any other time or place whatsoever, ever paid any notes or obligations or other indebtedness due by respondent; but, on the contrary, defendant expressly averred and showed that each and all the payments made upon the occasion of the passage of the above-mentioned act of mortgage were made by respondent's husband, John H. Robinson, with his own funds, which were without connection with, or any species of relation to, respondent. Respondent further denied that her husband ever had any species of authority whatsoever, as her agent, representative, or otherwise, to act on her behalf in any of his said dealings or transactions with said plaintiff, and specially that there was ever at any time in the contemplation of said plaintiff or of her representative, W. P. Curtis, named in her said demand, any thought or intention of any act of mortgage in which respondent was to join with her said husband, but that, on the contrary, the act of mortgage described in said plaintiff's petition was made directly to, and solely and exclusively with, respondent's said husband, John H. Robinson, as his sole act and for his sole account. Respondent expressly averred that she was in no manner party to the said act, was never authorized or consented thereto, and was without legal knowledge of or connection with the same. Further answering, respondent specially showed that, all and singular, the foregoing facts had been expressly passed upon and decided, as respondent herein contended, in the certain causes No. 13,180 of the supreme court of this state, entitled "Mrs. Catherine M. Aiken v. John H. Robinson et al.," reported in 52 La. Ann. 925, 27 South. 134, 529, and in division A of this court, in the certain cause entitled "Mrs. Catherine M. Aiken v. Mrs. Blanche V. Robinson" (No. 61,712 of the docket thereof), all as was expressly set forth in the exception of *res judicata* hereinbefore filed by respondent and exceptor, and which was now expressly renewed. In view of the premises, respondent prayed that there be judgment in her favor and against the said Mrs. Catherine M. Aiken, that her exceptions of *res judicata* herein be maintained, and that the said plaintiff's demand might be dismissed at her costs, and for all such further and general aid, remedy, and relief as the nature of the case might require, or law and equity permitted. The court rendered judgment in favor of the defendant, sustaining the plea of *res judicata*, and plaintiff appealed.

William S. Benedict, for appellant. William S. Parkerson, for appellee.

NICHOLLS, C. J. (after stating the facts). The judgment of the supreme court, which

the defendant in this case urges to support her plea of *res judicata*, is that which was rendered by us in the cause entitled *Mrs. C. M. Aiken v. John H. Robinson, and Mrs. Blanche V. Mallet, wife of John H. Robinson, v. Mrs. Catherine M. Aiken*, consolidated as No. 13,180 on the docket, and which is reported in 52 La. Ann. 925, 27 South. 134, 529. The syllabus to that case is as follows: "The fact that money borrowed by the husband in his individual name, and for which he gave his individual note, securing the same by mortgage on his wife's property, was employed by him in paying notes of his wife secured by mortgage on her property, created no liability by the wife, either personally or through her property, to the lender. The payment by the husband of notes of the wife secured by mortgage on her property extinguished the mortgages, and constituted her husband her creditor, but without subrogation to the rights of the mortgage creditor." The plaintiff in that suit is also the plaintiff in the present suit. The former suit was the enforcement through executory process of a special mortgage which had been executed by John H. Robinson, the husband of the defendant, upon certain real estate in New Orleans, of which Robinson and his wife each owned separately one undivided half. The indebtedness to secure which the mortgages were given was evidenced by the personal note of John H. Robinson. The wife of Robinson enjoined the seizure and sale of the property, averring that she was the owner of one undivided half of the same; that the indebtedness to satisfy which the property was advertised for sale, if due at all, was the sole and exclusive debt of her husband; and that she was not liable or indebted to Mrs. Aiken as surety or indorser, or in any way, or for any amount whatever. She prayed that the sale of the property be enjoined, and for such other further aid and remedy and relief as the nature of the case might require, and law and equity permit. The district court rendered judgment recognizing that Mrs. Robinson was the owner of one undivided half of the property, but adjudged the same to be subject to the mortgage executed by John H. Robinson to an amount equal to one-half of the indebtedness for which the property was mortgaged. It ordered that the mortgage be enforced as against the moiety of the property belonging to John H. Robinson, subject to a dedication of the sum so decreed to be due by his wife. Mrs. Robinson appealed, and the judgment rendered by this court on that appeal is that set up as *res judicata*. After that judgment had become final without objection, the plaintiff instituted a suit in the civil district court on the 20th of March, 1900, against Mrs. John H. Robinson, alleging that she was indebted to her for the sum (1) of \$1,900; (2) for the sum of \$250; (3) for the sum of \$142.50; (4) a certain sum paid to the Security Brewing Company, as per its judgment, bearing judi-

cial mortgage. Plaintiff alleged "that the whole constituted one-half of an entirety of fifty-one hundred and fifty dollars paid by petitioner's agent, William P. Curtis, to John H. Robinson and his wife, in taking up and paying mortgages and claims then resting upon the property of defendant, and her said judgment to the various creditors named and others, as would appear by reference to an act passed before Rightor, notary, under date of the 18th of August, 1897, and under which the said John H. Robinson made his note secured by mortgage upon the said property of which petitioner became owner. To this demand the defendant pleaded *res judicata*, the basis of the exception being the judgment of the supreme court above referred to. The district court on May 1, 1900, sustained this exception, and rendered judgment ordering, adjudging, and decreeing "that defendant's exception of *res judicata* be maintained, and that plaintiff's suit be dismissed, with costs, reserving to plaintiff her right to demand in any appropriate form of action any indebtedness which defendant may be liable for, should there be any such in reality." This judgment was not appealed from. On the 19th of June, 1900, the present suit was instituted by plaintiff against Mrs. Robinson. The demand which was met by an exception of *res judicata* has been hereinbefore stated, and which, as also stated, was sustained; judgment to that effect having been rendered on April 19, 1901.

The only difference between the allegations of plaintiff in her petition of 20th March, 1900, and those in her petition of the 19th of June, 1900, consists in her declaring in the former that the amount claimed by her from defendant was paid by petitioner's agent, William P. Curtis, to John H. Robinson and his wife, the defendant, in taking up and paying mortgages and claims then resting upon the property of said defendant and her husband to the various creditors named and others, while in the present suit she declares that on the 18th of August, 1897, being applied to by John H. Robinson, acting on his own behalf as well as on behalf of his wife, for a sum of money wherewith to take up and pay certain mortgage notes due by certain real estate standing in the name of the said husband and wife, she so consented, and advanced therefor, and paid to the holders of the claim, the sum of \$5,150, but that, through error or inadvertence, the mortgage given to secure said loan of \$5,150 so as to be used as aforesaid was not signed by the wife of the said John H. Robinson, who thereafter sought to take advantage of same, and prevent any recourse by petitioner against the property so benefited on behalf of his wife. In the first of these two petitions the money is said to have been "paid to John H. Robinson and his wife" in taking up and paying certain claims, and in the second the money is said to have been advanced "to John H. Robinson, acting on his own behalf and in

behalf of his wife." The plaintiff, referring in her petition to the judgment of this court in suit No. 13,180, declares that the court therein held that "plaintiff, having paid the mortgages, which she had otherwise no interest to discharge, was entitled to reimbursement of the amount of such payment as an ordinary creditor of Mrs. John H. Robinson, for whose benefit the sum was paid, and the right to claim such sum was reserved in the premises." There is error in this statement. The court did not hold that the plaintiff had paid the mortgage and other claims due by Robinson and by his wife, but, on the contrary, they were paid by the husband, John H. Robinson, though with moneys borrowed from Mrs. Aiken for that purpose; that by the payment so made by him, the husband, not Mrs. Aiken, became a creditor of the wife; that he was not a mortgage creditor, however, and, though the claims paid by him were mortgage claims, he was not entitled to subrogation. So far from holding that the plaintiff paid these debts, we said that we noted the fact that Mrs. Aiken's agent, Curtis, did not actually place the money loaned by Mrs. Aiken into the hands of John H. Robinson, but gave checks amounting to the aggregate of the mortgage debts to the creditors holding the mortgages, and that in the act Curtis approved, as last holder, of these notes, and, declaring they had been paid, authorized the erasure of the mortgages. We do not think the mere method of payment changed the actual facts. There is no doubt that Mrs. Aiken loaned John H. Robinson \$5,000, and received from him in representation of that loan the note which he executed; at the time of the execution of the mortgage executing the note. We made no reservation in the judgment in favor of Mrs. Aiken, but simply announced the legal situation and its results as matters were placed before us. We found the situation to be that the husband, John H. Robinson, had borrowed personally for his own account, not pretending to act either as negotiorum gestor, or agent of his wife, \$5,000 from Mrs. Aiken, and, in representation of the loan to him, gave her his personal note, which he secured by special mortgage on property of which one half belonged to him and the other half separately to his wife; that with the money borrowed the husband paid and extinguished a number of mortgage claims, some of which were due by him and secured by mortgage on his property, and the others due by his wife and secured by mortgage on his property; that the notes were surrendered to the notary, and the mortgages authorized to be canceled; that through these transactions Mrs. Aiken became the creditor of John H. Robinson personally to the full amount of the amount loaned to him, which debt to her was evidenced by his individual note to her, secured by mortgage,—the mortgage being valid to the extent it was granted on property belonging to himself, and invalid in so far as it

was granted on his wife's property; that through these transactions John H. Robinson himself, not Mrs. Aiken, became the creditor, but not the mortgage creditor, of his wife, to the extent that he had paid her debts legally owing by her. See *Reddick v. White*, 46 La. Ann. 1207, 15 South. 487; *Succession of Kernan*, 105 La. 603, 30 South. 239; *Succession of Landry*, 25 La. Ann. 183.

We are of the opinion that the demand of the plaintiff made herein, when brought, was closed by the prior judgments, and that the plea of *res judicata* was properly sustained. The judgment appealed from is therefore affirmed.

(107 La.)

PHARR v. GALL et al. (No. 14,088.)¹
(Supreme Court of Louisiana. April 14, 1902.)

EVIDENCE—RES INTER ALIOS ACTA—COVENANT OF WARRANTY—RIGHT OF ACTION.

1. An instrument of writing, though *res inter alios acta*, may be admitted in evidence as part of the same transaction, or as a contemporaneous memorandum to be read in connection with the oral evidence.

2. As such document only goes in for what it is worth, and not as making full proof of the contract of the parties, its presence in the case cannot serve as ground for objection to parol evidence.

3. A vendee who has been evicted only on paper has no right of action on the warranty of the sale.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; T. Don Foster, Judge.

Action by Elias A. Pharr against Jasper Gall and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas H. Thorpe and Andrew Thorpe, for plaintiff. Broussard, Dulany & Broussard, for defendants.

PROVOSTY, J. This case was before us on exception of no cause of action. See 104 La. 700, 29 South. 306, where a full statement of the petition will be found. Plaintiff bought an undivided half of a lot of ground and of a sawmill plant established on it, and one-half of another lot of ground, of Jasper Gall, one of the defendants, with full warranty of title. The sawmill sale was in 1878, and the other in 1882. The property belonged to the community of acquets and gains existing between the vendor and his wife. The wife died in 1888, and her heirs, who are the other defendants in the case, accepted her succession unconditionally. The property passed to plaintiff subject to a mortgage, to which Jasper Gall had consented, both on it and on the remaining half; that is, on the property as a whole. In 1895, under a judgment which before the death of Mrs. Gall had been taken on this mortgage, the entire property was seized and advertised for sale. The heirs of Mrs. Gall, except the wife of plain-

¹ Rehearing denied June 23, 1902.

tiff, sued out an injunction against the sale; but this injunction was withdrawn, and the property went to sale. At the sale it was acquired by the agent of the seizing creditor for \$9,400, and on the next day was sold to plaintiff by the same agent for \$8,320.80, of which \$3,000 was cash, and the balance on credit, secured by the reserve of vendor's privilege. Plaintiff complains that he was evicted, and he brings this suit on the warranty. Defendants claim that, before the withdrawal of the injunction, they and the plaintiff entered into an agreement by which plaintiff was to pay the mortgage debt, and take the other half of the property, and that the injunction was withdrawn, and the sale was allowed to be made, and plaintiff became the purchaser, all in pursuance of this agreement, and that plaintiff was, in point of fact, not evicted. The record leaves no doubt whatever in our minds as to the correctness of this contention of defendants. The only question is as to whether the objections of plaintiff to the reception of the evidence by which the agreement has been proved should not have been sustained.

The chief of this objectionable evidence is the following document:

"State of Louisiana, Parish of Iberia.

"November 7, A. D. 1895.

"We, the undersigned heirs of Mrs. Francis Xavier Riggs, deceased, wife of Jasper Gall, and said Jasper Gall personally, by these presents agree that in order to settle the mortgage claim of Lucius D. Hopkins against Jasper Gall on the following described property, to wit, lot No. 4 of square No. 5, and lots 2, 3, and 4 of square No. 3, and lots 6, 7, 8, and 9 of square No. 2, according to a plat made by F. G. Broussard, surveyor, dated November 8, 1868, which was mortgaged to Mrs. Jane Bendell, widow of Harry Hopkins, on the 30th day of June, A. D. 1883, by said Jasper Gall, for the sum of four thousand dollars, money borrowed, and for which Jasper Gall subscribed his certain promissory note to the order of Mrs. James Bendell, widow of Harry Hopkins, with eight per cent. interest per annum from date, and which said note was transferred to said Lucius D. Hopkins, who obtained a judgment against said Jasper Gall, and which said judgment was sought to be enforced by the seizure of the sawmill property and lands belonging thereto, as described in said act of mortgage fully heretofore mentioned herein, and now fully described per copy of act of mortgage hereto annexed, of which seizure of said property was enjoined. They, and each of them, consent and agree to the withdrawal by their attorneys of the injunction suit pending against the execution of the property as described in the act of mortgage hereto annexed, and specified herein. And they and each further consent that Elias A. Pharr should acquire full and complete title to the property fully described in the mortgage act hereto attach-

ed, upon his liquidating the debt due Lucius Hopkins, and that, inasmuch as such judgment claim of Lucius D. Hopkins ranks first against said mortgaged property, they consent that said Elias A. Pharr should cause such legal steps to be taken as will give him legal title to the mortgaged property in question, and they, and each of them, release him or free him from the judgment of any sum to them, either by them, or any except to Lucius D. Hopkins, including the necessary costs to liquidate the judgment against the said mortgaged property; the intent being that said Elias A. Pharr should acquire all title to the mortgaged property for which a judgment was obtained by Lucius D. Hopkins, in so far as subscribers are concerned; it being well understood that Elias A. Pharr pays all costs accrued before and after seizure, and all costs that may be due or unpaid; and said Pharr to have the mortgaged property in question at whatever sum he bid it in,—whether above or below the amount said mortgaged property would sell for. And the said Pharr to settle all costs.

[Signed] Amelia Gall.

"To assist and authorize my wife,
"Elias A. Pharr.

Jasper Gall.

Alzema Curtis.
John C. Curtis.

To authorize and assist my wife,
"Sylvanus Gall.
"Mary Lemaire.
"Leon Lemaire.

"To aid and authorize my wife.

"Clara P. Young.
"To authorize and assist my wife.
"C. Young."

The reception of this document in evidence was objected to on the ground that the document was *res inter alios acta*; the plaintiff not having been a party to the same, except to authorize his wife. We think the document was admissible as part of the circumstantial evidence in the case. The testimony is to the effect that a proposition was made to plaintiff, and was accepted, and was afterwards embodied in this document, and the document handed to him for him to get his wife's signature thereto, and that he did so. The document, not having been signed by plaintiff, does not, *proprio vigore*, prove anything against him; but it is at least a contemporaneous memorandum, the accuracy of which he cannot well gainsay, and as such it was admissible in connection with the oral testimony.

To the direct proof of the agreement by oral evidence, plaintiff objected on the ground of "the agreement being in writing, admitted in evidence, and speaking for itself." The agreement between plaintiff and defendants was not in writing, but was verbal, and therefore was provable by oral evidence. The "agreement in writing" referred to in this objection is the same agreement objected to above as having been *res inter alios acta*. There is presented here a dilemma. If this

document is *res inter alios acta*, it cannot stand as an obstacle in the way of other proof of the agreement between plaintiff and defendant. If, on the other hand, it is not *res inter alios acta*, but is the act of plaintiff, then there is an end of plaintiff's case. The evidence was properly admitted, and it shows conclusively that plaintiff was evicted only on paper. If the eviction had been more serious, plaintiff would hardly have to let five years and six months go by before bringing his suit.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed.

BREAUX, J., takes no part.

(107 La.)

ANDRUS et al. v. BOARD OF DIRECTORS OF PARISH OF ST. LANDRY.

(No. 14,165.)¹

(Supreme Court of Louisiana. April 28, 1902.)

PARISH SCHOOL BOARDS—DISTRIBUTION OF FUNDS—HIGH SCHOOLS—DEFICIT IN FUND—DISBURSEMENT OF SCHOOL FUND.

1. The law, as contained in sections 7 and 10 of Act No. 81 of 1888, is to be construed as meaning that the parish boards of school directors shall distribute the school funds to the several districts in their respective parishes ratably, in proportion to the number of persons in such districts between the ages of 6 and 18 years, provided that such boards, with the sanction of the state board of education, and when suitable sites and buildings have been otherwise supplied, may establish such central or high schools as may be necessary, and for their maintenance may draw upon the general school funds before apportioning the same to the several districts.

2. Where a particular school district has been apportioned less than its share of the fund, it is entitled to be made good by deduction in the next apportionment of the amount of the deficit from the amounts which would otherwise be apportioned to those districts which have received the excess.

3. It is the duty of the parish board to limit itself, in the matter of incurring debt, to the revenue of the calendar year in which the debt is contracted, and to so keep its accounts that the revenues of different years may be distinguished as separate funds.

4. Disbursements by the treasurer of the school fund of a parish otherwise than on warrants drawn by the president and countersigned by the secretary of the parish board of school directors are positively prohibited by law.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Edward T. Lewis, Judge.

Action by S. O. Andrus and another against the parish board of directors of the parish of St. Landry. Judgment for plaintiffs, and defendant appeals. Modified.

R. Lee Garland, Dist. Atty. (Edward Benjamin Du Buisson, of counsel), for appellant. White & Thornton, for appellees.

Statement of the Case.

MONROE, J. The plaintiffs, Scott O. Andrus and Rufus A. Pickett, residents of ward 4 of the parish of St. Landry, and fathers of educable children attending the public schools therein, complain that the parish school board is distributing and is about to distribute the school fund in violation of law, by giving more to some districts than to others, and by devoting to the maintenance of the Opelousas and Washington high schools, in wards 1 and 5, a portion of said fund, the whole of which should be used for the support of the district schools. They further complain that the board has violated the law by contracting debts in excess of the revenues of the years for which they were contracted, and particularly by incurring a debt, bearing interest at the rate of 8 per cent., to the St. Landry State Bank, for obligations of former years, by issuing negotiable evidences and diverting funds of the current year in part payment thereof, and by similarly diverting the sum of \$533.10 to the payment of a debt to the treasurer; and they allege that, unless restrained, said board will in like manner divert a further sum of \$5,000 to the payment of the debt due to the said bank. The prayer of the petition is that the defendant board be enjoined "from further operating or continuing the Opelousas and Washington high schools, or appropriating any of the school funds therefor, until due reparation has been made to the various other school districts of the parish, and particularly to that in which petitioners reside, and that they be also enjoined from making any further appropriations out of the current funds of any year to the payment of the debts of any preceding year, and particularly out of the funds of 1901, to the payment of the St. Landry State Bank. They further pray that the defendants be ordered to distribute the school funds for the remainder of the year and in future years ratably to the various districts in the parish, and in such way as to make due compensation to the districts, and particularly that of petitioners, for the discrimination shown in favor of the Opelousas and Washington high schools. They further pray that the defendants be ordered * * * to cease any payments under the null and void contract with the St. Landry State Bank; * * * to take such proceedings as may be legal and necessary to recover all the sums wrongfully paid out of the current funds of this year for debts of preceding years, and particularly the amount paid to the St. Landry State Bank and the treasurer," etc. After hearing upon a rule nisi, the injunction issued as prayed for, and, the defendant having pleaded the general issue, there was a trial upon the merits, resulting in a judgment ordering said defendant "to apportion the school funds of each year to the several districts of the parish in proportion to the number of persons in the districts between the

¹ Rehearing denied June 30, 1902.

ages of six and eighteen years," prohibiting it from "using or appropriating for the purposes of high schools at Opelousas and Washington any of the funds apportioned to districts other than the ones in which they are situated," and in all other respects dissolving the injunction and rejecting plaintiffs' demands. From this judgment the defendant has appealed, but it complains only of so much of the judgment as limits the expenditure for the maintenance of the high schools to the proportion of the school fund accruing to the wards in which those schools are established. The plaintiffs, on the other hand, have answered the appeal, and pray that the judgment be amended in the following particulars: "First. That sufficient be held back out of the per capita amounts due to wards 1 and 5 (Opelousas and Washington high schools) to reimburse ward 4 to the amount it should have received in the apportionment already made for 1901 and subsequent years until final decision, viz., \$807.40 and \$1,101,—a total of \$1,908.40. Second. That all contracts with the St. Landry State Bank by virtue of which payments of money loaned in 1900 were to be paid out of the funds of 1901 be declared null and void as of date May 31, 1901, when this suit was filed, and the school board, through its treasurer, be held for that amount. Third. They pray for reasonable attorney's fees for suing out the injunction, and for all orders necessary and proper, and for general relief and costs," etc.

We find the following admissions in the record, to wit: "That the parish school board of the parish of St. Landry have never made during any year any apportionment of the school funds in proportion to the number of persons in each ward or district between the ages of six and eighteen years. That the total amount spent for teachers during the scholastic session 1900-1901 was, for ward 1, \$4,970; for ward 2, \$780; for ward 3, \$1,100; for ward 4, \$1,320; for ward 5, \$3,535; for ward 6, \$1,850; for ward 7, \$2,060; for ward 8, \$1,715; total, \$17,330. That out of the total of these amounts there was spent after the 1st of January, 1901, for the First ward, \$3,220; for the Second, \$360; for the Third, \$595; for the Fourth, \$630; for the Fifth, \$2,170; for the Sixth, \$950; for the Seventh, \$1,030; for the Eighth, \$950. That the amount of \$2,800 spent on the high school situated in the First ward is included in the amount above given for the expenditure of that ward. Of this \$2,800, \$2,100 was spent after the 1st of January, 1901. That the sum of \$1,560 spent for the high school proper in the Fifth ward is included in the amounts charged against that ward; and, of said amount, \$1,170 was spent after the 1st of January, 1901. It is further admitted that students from any portion of the parish who are qualified to enter are admitted to both of the high schools."

It appears from the evidence that the total

number of educable children in the parish during the period covered by these admissions was 15,188, and hence that the per capita expenditure was approximately \$1.14, or, if we first deduct from the whole fund the sum of \$4,360 expended for the high schools, that the per capita available for the other schools was 90 cents. Including the amount expended for the high schools in wards 1 and 5, the distribution of the fund, as made and as proposed to be made, is as follows:

Wards.	No. of Pupils.	Total.	Per Capita.
1	2,819	\$4,970	\$1.76
2	1,752	780	.45
3	1,040	1,100	.70
4	1,835	1,320	.70
5	2,778	3,535	1.27
6	1,136	1,850	1.63
7	1,925	2,060	1.07
8	1,797	1,715	.90

Excluding the amounts expended for the high schools, the distribution, as made and as proposed, reduces the per capita allowance to wards 1 and 5 to 76 and 69 cents, respectively. Upon the other hand, it is shown that the total number of pupils "in high-school studies" during the period under consideration was 75, from which it follows that the per capita expenditure was \$58.13. It also appears from the evidence adduced that what may be called the "fiscal year" (that is to say, the year from which the revenue of the board takes its designation) is coincident with the calendar year, beginning upon the 1st of January, whilst the scholastic year, as regulated by the board, begins in October, and continues as far into the next calendar year as the funds will permit. It further appears that but little of the revenue becomes available during the early months of the calendar year by which it is designated, and that the greater proportion of such revenue is actually collected by the board during the next year. Thus the state taxes, including the poll tax, for a particular calendar year, are not exigible until the month of December, and do not become delinquent until the 1st of January of the year following. Hence, as we understand the testimony, the board may find itself without means derived from the revenue of the year to pay the salaries of the teachers, as they fall due, for the earlier months, constituting the last months of the preceding, or the later, constituting the first months of what may be called the current, scholastic year. And in order to obviate this difficulty, and to relieve the teachers of the hardship of waiting for or discounting their salaries, the board has been in the habit of borrowing the money with which to pay the salaries earned during a particular calendar year upon an informal pledge of the revenues of such year, thereafter to be collected, and of paying the interest thereon, which the teachers would otherwise be obliged to pay. At the meeting of the board January 7, 1901, the finance committee reported an indebtedness of \$11,966.75, of which there was

due to the St. Landry State Bank \$10,159.75, to the assessor \$307, to the treasurer "about \$700," and to "miscellaneous account" \$800. In September following, when this case was tried, the treasurer testified that he had in his hands, to the credit of the board, a balance of \$203.86, which had been left after the payment of the obligations which had then matured. Whether the obligations for the year 1900 had been paid exclusively from the revenues of that year collected in 1901 is not clearly shown, nor does the contrary appear. The treasurer states, however, that he had paid to the bank some \$9,000 on certificates which had been issued to the teachers, but for which no warrants had been drawn by the board, and that he did this, as he had done before, without objection from the board, and because he thought it was proper in order to save interest.

The law applicable to the subject is to be found in the following statutory provisions, to wit (Act No. 81 of 1888, § 7, referring to the parish board):

"They shall apportion the school fund to the several districts in the parish in proportion to the number of persons in the district between the ages of six and eighteen years, and shall determine the number of schools to be opened, the location of the school houses, the number of teachers to be employed, their salary; and the said board is entrusted with seeing that the various provisions of the law are complied with."

"Sec. 10. That the parish school board shall have the authority to establish graded schools, and to adopt such a system in that connection as may be necessary to insure their success; central or high schools may be established when necessary. The ordinances establishing such schools adopted by the parish school boards shall be submitted to the state board of education, and no high school shall be opened without its sanction, and no such school shall be established unless the amount be donated for its site and suitable buildings are provided without any expense out of the school funds," etc.

"Sec. 59. That said treasurer shall pay out of the school funds entrusted to his charge only on warrants drawn by the president and countersigned by the secretary of the parish school board, and shall state against what school district fund it was drawn, which warrants shall be drawn by those officers only in virtue of appropriations regularly made by the parish board; the parish board shall make, annually, an estimate of the amount of the revenue for the year, appropriating the same as above required, and no warrant beyond the amount estimated shall be drawn for any one year. These warrants shall be numbered, and shall specify on their face to whom and for what they are given and the date of the appropriation made by the school board; the treasurer shall pay the warrants only to the extent of the amount to the credit, on his books, and in the order in which they are

presented, of school districts in behalf of which the warrants shall have been drawn; and said warrants shall be filed in his office as vouchers, and with the account kept by him as treasurer of the school fund, shall always be subject to the examination of any one who chooses to examine them. * * *

"Sec. 73. That the different boards of school directors shall not be empowered to make contracts or debts for any one year greater than the amount of revenue provided according to this act, it being the intent hereof that parties contracting with said boards shall take heed that due revenue shall have been provided to satisfy their claim, otherwise they may lose or forfeit the same, and no action or execution shall be allowed in aid thereof; and that the boards shall not exceed their powers in incurring debt."

Opinion.

As we interpret sections 7 and 10, from which the foregoing excerpts have been taken, the latter must be regarded as in the nature of a proviso which modifies the requirements of the former upon the subject of the apportionment of the school fund. The "high school" is well known in the public school system of this state, and in the legislation and literature concerning that system, as an institution in which scholars from the various common schools complete their public school education; and, if no other language had been used, the authority conferred upon the parish boards to establish "high schools" would suggest the idea of schools having a sphere of usefulness different from, if not wider than, that of the common schools of a single district. The language of the law is, however, "central, or high, schools," thus making "high schools" and "central schools" synonymous terms, and leaving no room for reasonable doubt that it was the intention to authorize the parish boards to establish not only such district schools as they might see proper, but with the concurrence of the state board, and upon the conditions specified, to establish central schools for higher education, to which the district schools may serve as feeders. And the authority to establish such schools, considered in connection with the general power and discretion vested in the school boards, carries with it the authority to maintain them from the general school fund. For if the construction insisted upon by the plaintiffs, and adopted by our learned Brother of the district court, be sustained, and it be held that the central or high schools, as well as the district schools, must depend for their support upon the proportion of the school fund allotted to the particular districts in which they are established, the results, as it seems to us, will be that the children in the less populous districts will be denied the advantages of the high-school education which it is the idea of the law to place within the possible reach of all the children of the parish, and, instead of being able to establish

such schools when or where "necessary," the boards will be able to establish them only in populous and comparatively wealthy districts. We take it, therefore, that the law is to be construed as though it read: "The parish boards shall distribute the school funds to the several districts in the parishes in proportion to the number of persons in such districts between the ages of six and eighteen years: provided, said boards, with the sanction of the state board of education, and when suitable sites and buildings have been otherwise furnished, may establish such central, or high, schools as may be necessary, and, for their maintenance, may draw upon the general school funds before apportioning the same to the several school districts." The admissions and the evidence recited in the statement of the case show that the defendant and its treasurer have administered the affairs of the schools in their parish and have handled the school fund without sufficient regard to the positive commands and prohibitions of the law. The board admits that it has never apportioned the fund as the law requires. The treasurer admits that during the year 1901 he paid out some \$9,000, for which, up to the date of the trial, in September, no warrants had been issued. There would seem to be no objection to the board's borrowing money to meet the obligations of a particular calendar year which mature before the revenue for the year comes into its hands, provided it keeps within the limits of such revenue; nor is there any objection to the board's paying the debt so contracted at the earliest possible moment, and thereby saving unnecessary expense in the way of interest, but why the treasurer should take it upon himself, and why he should be permitted, in the face of a direct and positive prohibition of law, to pay out thousands of dollars for which the board has issued no warrants, we are unable to understand; the reason assigned by the treasurer being wholly insufficient. The evidence leaves us in doubt as to whether, from the books of the board or of the treasurer, or both, it would be possible to distinguish the revenue of one year from that of another. And yet, if those revenues are not kept as separate funds, confusion and violation of the law are inevitable. The evidence also leaves it in doubt whether any debt was contracted in 1901 in excess of the revenue of that year, or whether any part of such revenue has been appropriated to the payment of debts previously contracted. And whilst we find nothing which reflects upon the integrity of any of the parties concerned, it seems to us that the manner in which their duties are discharged and their accounts kept leaves much to be desired. Assuming to be correct the view that we have expressed in regard to the authority of the defendant board in the matter of the establishment and maintenance of the high schools, the ward in which the plaintiffs reside has been apportioned 20 cents less per capita for the year

1901 than it was entitled to, and it ought to be made whole in that respect. *State v. Fay*, 36 La. Ann. 241.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, in so far as it purports to control the discretion vested by law in the parish board of school directors, defendant herein, acting with the approval of the state board of education, in the matter of the establishment and maintenance of central or high schools in the parish of St. Landry, and in so far as the said judgment denies the prayer of the plaintiffs that ward 4 of said parish be made good with respect to the deficit in the apportionment of the school fund for the year 1901; and it is further ordered, adjudged, and decreed that from any balance of revenue of said year still unexpended by said board, or, if such balance be insufficient, from the revenues of succeeding years, there be apportioned to the schools of said Fourth ward, in addition to the amount to which they may otherwise be entitled, the sum of \$367, and that said amount be deducted pro rata from the amounts apportioned or which may hereafter be apportioned to those other wards of the parish to which for the year 1901 there was apportioned, exclusive of the amount necessary to maintain the high schools in wards 1 and 5, more than 90 cents per capita to the educable children in such wards, as found in the foregoing opinion. It is further adjudged and decreed that in all other respects the judgment appealed from be affirmed; the plaintiffs to pay the costs of the appeal.

(107 La.)

Succession of OTERI. (No. 14,134.)

(Supreme Court of Louisiana. June 21, 1902.)

ADMINISTRATOR'S ACCOUNT—OPPOSITION—PARTIES.

1. Opposition to a provisional account filed by administrators of a succession, showing a certain amount of funds in their hands for distribution, must be confined to issues legally arising from the account. Issues cannot be raised with parties and as to matters not brought into court through the presentation of the account.

2. A person is not made a party to a proceeding by calling him into court simply as a witness.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

In the matter of the succession of Joseph Oteri. From the judgment, Salvador Scalzo and others, opponents, appeal. Modified.

Joseph Oteri died on the 14th of December, 1897. On the 19th of April, 1898, an inventory of the property of his succession was made by Fred Zengel, notary public. It showed cash to the credit of the deceased, in the hands of Woodward, Wight & Co., \$3,296.96; real estate, \$4,500; community inter-

est in said real estate, \$2,250; total amount of effects inventoried, \$5,546. On the 13th of May, 1898, letters issued to Joseph St. Amant and his wife, Lucy Oteri, as joint administrators of the succession. On the 31st of October, 1899, an annual account of their administration was filed. They charged themselves with the amount which figured in the inventory as being in the hands of Wight, Woodward & Co., \$3,296.96; and credited themselves with various disbursements, amounting to \$397.40; striking a balance of \$2,899.56. Evariste Blanc and E. P. Andrée opposed the account, and claimed as privileged creditors, as appraisers, to be placed therein each for \$10. The opposition was maintained and the account amended to that extent, and as so amended it was approved and homologated. On the 19th of June, 1900, a second inventory was made, under order of court, at the instance of the administrators, on the allegation that the former inventory had inventoried only one-half of the property as belonging to the succession, whereas it should have been inventoried as a whole. In this inventory the real estate was inventoried at a valuation of \$4,000, no mention being made of movables or money. Blanc and Andrée were appraisers. On June 25, 1900, the plaintiff in a suit in the United States circuit court entitled "V. Scalzo et al. vs. Joseph Oteri," suggesting that in that suit a final decree of that court had been rendered, and signed June 14, 1900, by that court, in favor of the plaintiffs therein against the succession of Oteri, and that by an account filed and homologated in said succession it appeared there remained in the succession the sum of \$2,899.56, and same should be paid over to them in part payment of their judgment, and further suggesting that there was on hand in the succession certain real estate, which they described, and further suggesting that there was other property belonging to the succession not yet inventoried or accounted for, the court at their instance ruled the administrators to show cause why an order of court should not issue, directing them to pay over to plaintiffs in rule the said sum of \$2,899.56 in part payment of their judgment, and why the real estate should not be sold for said purpose, and why, further, an inventory of the property not yet described should not be made and filed. On the same day, on the suggestion of H. & C. Newman that they were holders and owners of a promissory note for \$6,000 and interest, made and subscribed by Joseph Oteri, and secured, as to payment, principal, interest, and attorney's fees, by mortgage on the real estate inventoried, and that said note was due and unpaid, the court ordered the administrators of the succession to show cause why the property should not be sold for cash to pay the debts of the succession, and especially to pay the mortgage note. This last rule was made absolute, and the court ordered that, for the purpose of paying the debts of the succession (among them, that of the plaintiffs

in rule), the real estate be sold at public auction for cash. The court made the first rule absolute, in so far as to order the administrators to file an account of their administration of the succession. The property was sold on the 16th day of August, 1900, to H. & C. Newman, for \$2,800. On the 1st of August, 1900, the administrators filed an account and table of distribution of the funds in their hands, which they set down as being \$2,899.56. The account filed was as follows:

Cash on hand as per last account.. \$2,899 56

We propose to pay first the following law charges:

1. Costs paid the clerk of court....	\$ 1 80
2. " " crier.....	1 00
3. Fees paid Blanc & Andrée, first appraisal.....	20 00
4. Fees due civil sheriff.....	50
5. Costs due Blanc & Andrée, second appraisal.....	20 00
6. Fees due F. Zengel, notary, second inventory.....	25 00
7. Costs paid advertising, first account, Bee.....	2 10
8. Costs paid advertising, first account, T.-D.....	2 10
9. Commissions of administrators on amount of inventory.....	165 92
10. Rouse & Grant, attorney for succession.....	250 00
11. Rouse & Grant, attorney for defending suit of V. Scalzo vs. Succession in U. S. circuit court.....	500 00
12. Amount retained for future costs.....	25 00
13. Insurance premium on house December 23, 1899.....	23 40
14. Taxes of house for 1899, Jan'y 25, 1900.....	28 00
	<u>\$1,064 82</u>

Ordinary Creditors.

1. United States judgment, U. S. C. C.	\$1,125 40
And 5% from May 23, 1893.....	
2. Guy M. Horner, attorney fees....	300 00
3. Chas. H. Schenck on account....	577 85
4. Salvador Scalzo & Sylvester Rocco Florita, judgment of U. S. circuit court, No. 11,059, with 5% from June 11, 1885, less \$1,266.88 paid May 12, 1894.....	3,876 00
5. Randazzo & Di Christini, judgment, U. S. circuit court, No. 11,059, with 5% from June 11, 1885.....	3,497 82
Less \$1,203.54 paid May 12, 1894.....	
Costs due complainants in said suit No. 11,059, clerk.....	82 15
6. James D. Seguin, master's fee in Scalzo vs. Suc. Joseph Oteri, No. 11,059, U. S. circuit court..	900 00
7. Rouse & Grant, attorneys for administrators, defending suit of Scalzo vs. Suc. Oteri, No. 11,059, U. S. circuit court.....	500 00

[Signed]

Jos. St. Amant,
Lucy St. Amant,

Joint Administrators of Succession of Joseph Oteri.

Salvador Scalzo and Sylvester Rocco Florita, as representatives of the succession of Vincenzo Scalzo, and Ignacio Randazzo and Antonio Di Christini, the plaintiff in the suit of V. Scalzo et al. v. Joseph Oteri, filed an opposition to the account, as did James D. Seguin, Guy M. Horner, the United States, and the

Fidelity & Deposit Company of Maryland. The opponents first named (Scalzo et al.) alleged that they were creditors of the succession for over \$10,000, fixed by decree of the circuit court of the United States, which claim arose long prior to the death of Joseph Oteri, and that they were entitled to a right, privilege, and preference in the assets of the deceased then in the hands of the administrators, or those which were disposed of by him with the intent to avoid pursuit of their claim, for which they will hereafter assert their rights in this, their opposition to the account presented on the 1st day of August, 1900. They opposed the account filed, as to the amount sought to be paid therefrom: (1 and 2) Claims of Blanc and Andrée for \$20 as appraisers for the first appraisement, and \$20 for the second appraisement. They were entitled to only \$8 for each. (3) The claim of Zengel, notary, for \$25, making second inventory, as excessive. (4) Claim of Rouse & Grant for \$500. for defending the suit of Scalzo v. Oteri in the United States circuit court. Said charge is not a privileged claim, and, if the same is not excessive, it should be ranked as an ordinary claim, to be paid in common with the ordinary creditors of the succession. (5) The judgment in favor of the United States for the sum of \$1,125, as not being entitled to a preference over opponents' judgment. (6) Fee of Guy M. Horner for \$300, as not being a privileged claim, is subordinated to that of opponents. (7) Claim of Charles M. Schenck for \$580 should be subordinated to that of opponents. (8) Claim of J. D. Seguin, master in chancery, for \$900, should be placed among, and paid as, privileged claims. (9) Claim of Rouse & Grant, attorneys, for defending suit of Scalzo v. Oteri in the United States circuit court, should be subordinated to the privileged charges and to the judgment of opponents.

Having made opposition as above, these opponents proceeded to set forth and aver that they were advised and believed, and so charged, that the assets of this estate have been diverted through the instrumentality of the administrators herein; that said administrators have taken possession of a large part of said assets, and have detained the same for their own interest and for their own advantage, and for the advantage and benefit of the widow of the said deceased, Joseph Oteri, and that they have not had the assets so diverted and detained inventoried in the succession of the said Joseph Oteri, and that so much of said assets as have been converted into cash or otherwise disposed of should be accounted for by said administrators, and that so much of said assets as remained in kind, undisposed of, but in the possession of said administrators, should be inventoried in the succession of said Joseph Oteri, and the said administrators made to account for the same. "(1) These appearers and opponents aver that they are inform-

ed, advised, and believe that at the time of the death of said Joseph Oteri he possessed a large amount of premium bonds of the city of New Orleans, and other valuable negotiable securities, which came into the possession of his wife after his death, and that she diverted the same to the detriment and prejudice of these appearers. That they are informed and believe, and so charge, that, in addition to the securities above generally described, the said widow of Joseph Oteri came into possession of funds and credits of said Joseph Oteri, as well as valuable jewelry which was in the possession of said deceased at the time of his death, and which she has concealed from said estate, and diverted therefrom to her own use, and to the detriment and prejudice of these appearers and opponents, and the other creditors of said deceased. That the steamship Joseph Oteri, Jr., is and was the property of Joseph Oteri, Jr., long prior to his death, and that during his lifetime and at the time of his death he managed and operated the same as owner thereof, either personally or through charter. (2) That on or about the 13th day of October, 1890, during the existence of the indebtedness due these appearers and opponents, and with a view to defraud them, he caused a transfer of the said vessel to be made in the name of Mrs. Luella Oteri, his wife, as the owner thereof. That thereafter, on the 30th day of April, 1898, the said widow Oteri caused the transfer of the said title to be made from her to one William A. Powell, a British subject, to avoid the operation of the laws of the United States as against said vessel. (3) That subsequently, on or about the 9th day of September, 1898, the said William A. Powell made a retransfer of the said vessel to the said Mrs. Luella Oteri, as sole owner, she paying nothing therefore, and nothing having been paid by the said William A. Powell for said transfer previously made to him, and nothing paid for the original transfer in the name of Mrs. Luella Oteri, as the wife of Joseph Oteri, as heretofore recited, and all of which acts and doings in the original transfer from Joseph Oteri to his said wife, and from his said wife to William A. Powell back to the said widow Oteri, was done to injure and defraud the creditors of said Joseph Oteri, deceased, and particularly these appearers and opponents. (4) And your opponents, further opposing, say that they deny, as simulated and fraudulent, null and void, in law, the pretended mortgage given by the said Mrs. Luella Oteri, under date of February 7, 1900, in favor of Mrs. Widow Dominic Cefalu, for five thousand (\$5,000) dollars, recorded in the customs department of the United States customs department, book 1, folio 93, on said date; that said mortgage was effected solely and purposely to place said lien upon said vessel to the detriment of the rights of your opponents, and to deprive them of their right to subject said vessel, the property of said

decendent, Joseph Oteri, to the payment of your opponents' debt and judgment. Your opponents further aver and say that in the inventory herein there appears to be a piece of real estate, now under advertisement and sale, consisting of five (5) certain lots of ground, situated in the square bounded by Chippewa, Market, St. James, Felicite, and Annunciation streets, fully described in the inventory taken in this succession by Fred Zengel, notary public, under date of April 18, 1898, and in the supplemental inventory taken by said notary on the 13th day of June, 1900; that said property was acquired by Joseph Oteri, deceased, on the 14th day of February, 1884; that prior to that date the said Joseph Oteri, Jr., was and had been divorced from Luella A. Oteri, herein set forth as being the widow in community, as will more fully and at large appear in the suit of Oteri v. Oteri, No. — of the docket of the civil district court, division D,—judgment therein rendered granting final divorce on the 26th day of March, 1877. (6) Your opponents further declare and say that said property is in full ownership as the property of the estate of the said Joseph Oteri; that, if said Joseph Oteri remarried said Luella Oteri at any time, it was subsequent to the acquisition of said property by said Joseph Oteri, and constituted part of the said estate; and that, even so (said property acquired during the remarriage between Joseph Oteri and Luella Oteri), she had no right therein until after the payments of the debts due by the deceased and of the community of which she was a member, and the said property is amenable under the judgment of the United States circuit court aforesaid, and your opponents have a first lien and mortgage privilege thereon. (7) Your opponents do now aver and say that said property is presently advertised under an order of this court to be sold at the instance of H. & C. Newman Company, Limited, of New Orleans, who represent themselves to be creditors of said estate in the sum of six thousand (\$6,000) dollars, under a mortgage dated the 21st day of August, 1898, passed before W. D. Fahey, notary public. Said sale has not yet been effected, and the proceeds thereof cannot now be accounted for; but, in the interest of justice, it is right and proper to marshal the assets as far as may be, and to determine the indebtedness of the estate upon the filing of the account and disbursements, as applied for by the account herein opposed. That as to said indebtedness so claimed by the said H. & C. Newman Company, Limited, your opponents say that they are not the bona fide owners and holders of said note; that they are interposed at the instance of said administrators, and are used to enforce the payment of the same; that said note was among the papers and property of said Joseph Oteri at the time of his death; and that the action of said H. & C. Newman Company, Limited, in lending themselves to

a proceeding herein, and asserting that they are creditors of said Joseph Oteri, of the mortgage note nominally in their possession, is fraudulent and collusive. They act in concert and combination with said St. Amant and his wife, the widow of the late Joseph Oteri." They prayed that the account herein be amended in regard to the items hereinabove opposed; that the opponents be placed thereon, in accordance with the judgment of the circuit court of the United States in said No. 11,059, for principal, interest, and costs, and master's fees, as therein detailed; that the claim of H. & C. Newman Company, Limited, be rejected, and that the said mortgage operating upon the property of said deceased be canceled; that the said administrators be ordered and directed to inventory the property of said Joseph Oteri, Jr., diverted from said estate; that they be further ordered and directed to inventory and hold subject to the court's order the steamship Joseph Oteri, Jr.; and that in due course of proceedings a judgment be rendered herein directing the sale of all the property of said estate, and filing of tableau and distribution, with recognition of appearers' judgment, with interest and costs upon said tableau to be paid by preference and priority. Appearers and opponents further prayed for all necessary orders in the premises and for general relief.

Opposition to the fee of Seguin, as master in chancery, for \$900, was withdrawn by all parties, and payment of the same by privilege out of the funds in the hands of the administrators was consented to by all the opponents. Guy M. Horner was placed on the administrators' account as an ordinary creditor for \$300 for attorney's fees. He opposed the account, claiming to be placed thereon as a privileged creditor. The United States was placed on the account as an ordinary creditor by judgment for \$1,125.40, with legal interest from May 23, 1893. It opposed, claiming to be a privileged creditor for the amount of its judgment, interest, and costs, and prayed that the account be amended by placing the government's claim on it as such, in preference to all other debts in the account and tableau, and to be ranked after the charges numbered 1 to 14, inclusive, and the charge in favor of Seguin as special master. The Fidelity & Deposit Company of Maryland opposed the account, claiming to be placed thereon as a privileged creditor for premiums due to it for the year ending May 11, 1900, and that ending May 11, 1901, amounting together to \$70, as being the surety in the official bond of the administrators.

The district court rendered judgment maintaining the opposition of the Fidelity & Deposit Company of Maryland, and decreeing it to be a privileged creditor for \$70, to be taxed as costs; also that of James D. Seguin as a privileged creditor, to be taxed as costs. It maintained the opposition of the United States, and recognized it as a privileged cred-

itor for the amount, ranking all other claims save those placed on the account, and decreed to be privileged claims for costs and law charges. It rejected the demand of Guy Horner to be recognized as a privileged creditor. It dismissed the opposition of Salvador Scalzo and Sylvester Rocco Florita, representatives of the estate of Vincenzo Scalzo, and of Ignacio Randazzo and Antonio Di Christini, at their costs, reserving to them, however, all rights they may have against all parties charged with holding any property belonging to this estate, save H. & C. Newman, against whom their rights are reserved only against any surplus which may be in their hands after payment of their claim against Joseph St. Amant out of the proceeds of the note of Joseph Oteri, given as collateral security for said claim. In all other respects it dismissed the several opposition, and it ordered the account of the administrators to be amended so as to conform to the decree, and that as thus amended it be approved and homologated, and the funds distributed in accordance therewith. Ignacio Randazzo et al. opponents, appealed.

William S. Benedict and Lazarus & Luce, for appellants. Rouse & Grant, for appellee administrators. H. Garland Dupré and William B. Grant, for appellee H. & C. Newman. Limited. William Wirt Howe, U. S. Atty.

NICHOLLS, C. J. (after stating the facts). An examination of the record discloses the account filed on the 1st of August, 1901, by Joseph St. Amant and wife, joint administrators of the succession of Joseph Oteri, did not purport to be a final account of his succession, but simply recognized that they had at the time of the account the amount stated therein, \$2,899.56, which they proposed to distribute in the manner as shown therein. We think the correctness of that account and the distribution of the funds therein referred to, according to rights of parties interested, were the only matters which properly could have been raised and disposed of by the district court in opposition to that particular court. The real estate of the succession had not been disposed of when that account was filed, and we are not informed what became of the price. Having been sold in the probate proceedings to pay the debts of the succession, the price arising from the sale will have to be accounted for by the administrators in some future proceedings, in which all parties in interest should be brought into court in a regular and legal manner. We see, by a paper copied in the transcript, that H. & C. Newman became the purchasers of the property for \$2,800, but the firm of H. & C. Newman, Limited, are not before the court. The corporation was not brought before it as a litigant in answer to appellants' opposition, by making Charles Newman a witness.

Lerchard, from whom H. & C. Newman received the \$6,000 note as a collateral, is not before the court, nor is the widow of Joseph Oteri, nor are the parties legally concerned in the steamship Joseph Oteri. Appellants have not ruled the administrators into court, nor asked judgment against them, nor have they furnished the data on which a judgment against them could be based, even if one were desired. In their pleadings they say they reserve their rights, to be proceeded upon hereafter, and on the trial they referred to their present proceeding as being in the nature of a "bill of discovery." They placed matters in the lower court, and they have placed them before us in this court as in manner such as to make it difficult for us to know wherein they feel aggrieved, and what is the relief which they seek at our hands. We think that the only manner in which we can dispose of matters as they now are, in justice to all parties, is to limit our inquiry on this appeal to appellants' opposition, as affecting the funds in the hands of the administrators, as shown by their account, and to leave all other matters open and undisposed of, as of nonsuit.

Appellants say in regard to the claim of the United States: "The same was proved as a matter of fact. We apprehend the law gives the government a preference when an estate is insolvent." We do not concede this to be the case. As matters stand, the estate is apparently insolvent to a large amount. There is an express admission to that effect in the record. We think the disposition made of the claim was correct. *Richard v. Oviere*, 10 La. Ann. 723.

The claim of the Fidelity & Deposit Company for \$70 for premiums due to it as on its suretyship of the administrators' bond should be reduced to \$35. It was not a charge against the succession prior to the adoption of Act No. 76 of 1900. Since that date it is to be classed as an expense of administrators, and is secured as to payment by privilege.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court herein appealed from, in so far as it deals, on the opposition of the appellants herein, with the funds in the hands of the administrators shown by this account, and the distribution of the same, be amended by reducing the claim of the Fidelity & Deposit Company from \$70 to \$35, payment of said amount recognized as secured by privilege. As so amended, the judgment of the district court in that branch of the case is affirmed. It is further ordered, adjudged, and decreed that the judgment of the district court, in so far as it deals otherwise with the opposition of the appellants herein, is hereby annulled, and said opposition is dismissed as of nonsuit. Costs of appeal to be borne by the succession.

(107 La.)

STERRETT v. SAMUEL. (No. 14,155.)¹
(Supreme Court of Louisiana. May 12, 1902.)
SLAVE MARRIAGE—VALIDITY—DEATH—PRE-SUMPTIONS.

1. In 1864 two slaves with the consent of their owners were married—a minister of the gospel performing the ceremony. They lived together as man and wife and children were born to them. After being freed, they continued to live together as man and wife. *Held*—a legal marriage.

2. Where the husband's home was in the city of New Orleans, where his wife and only surviving child, a girl, resided, and he is shown to have left home in 1867 on shipboard bound for a nearby port, where yellow fever was raging, and the boat is shown to have left there for some other and more distant port, and neither the boat nor the man ever returned, or were heard of again, the lapse of 35 years and absence under such circumstances are sufficient to justify the conclusion that the man is dead.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Fanny Sterrett against Clinton Samuel. Judgment for plaintiff, and defendant appeals. Affirmed.

Carroll & Carroll, for appellant. Chaffe & Bowers, for appellee.

BLANCHARD, J. Defendant married, some years ago, the daughter of plaintiff. There was no issue of the marriage. The wife died in April, 1900, intestate. Some property, real and personal, had been acquired during the marriage and the same pertained to the community which existed between the spouses. The succession of the wife was opened by her mother (plaintiff herein), who represented herself as being the only living ascendant and only heir of the deceased. She declared her acceptance, pure and simple, of the succession, prayed to be recognized as the sole heir and, as such, sent into possession. On proof administered in support of her averments, there was judgment in accordance with this prayer. The estate consisted only of the wife's undivided interest in the community property. Some months later, she instituted the present suit against the surviving husband and partner in community for a partition of the community property. She prayed its partition by licitation since it was not susceptible of division in kind. Defendant answered admitting the existence of the community of acquets and gains between himself and his deceased wife, and that if plaintiff be the heir, as claimed by her, she is entitled to the partition sought, which can be effected only by sale of the property and effects. But he denied that plaintiff is the heir. He asserts his wife was not the legitimate daughter of plaintiff and Albert Sterrett, the putative father; denies that plaintiff was ever married to Albert Sterrett. He avers his wife to have had only the status of natural daughter of the plaintiff, and that

he, as husband, inherits in preference to the natural mother. He represents that even if the plaintiff were ever lawfully married to Albert Sterrett, and even if his dead wife were the issue of such marriage, proof is lacking that Albert Sterrett is dead, or that he left no children or other heirs entitled to inherit from his (defendant's) wife. In case his plea of no marriage between Albert Sterrett and the plaintiff be not sustained, and in case his contention that Albert Sterrett is not dead be denied, he claims in reconvention against the community certain sums due him by the community, asks recognition of same in the community settlement, etc. There was judgment sustaining the plaintiff's demand, decreeing the partition by licitation of the community estate, and adjusting the claims set up by the defendant against the community, sustaining the same in part and rejecting the same in part. Defendant appeals.

Ruling—These parties are people of color. Albert Sterrett and Fanny Wiggins (now plaintiff) were slaves in Alabama prior to the Civil War. The evidence establishes to our satisfaction, as it did to that of the trial judge, that they were married in or about the year 1854 in Alabama. The marriage took place in the dining room of the house of the owner of Fanny Wiggins, and was performed by a white minister of the gospel in the presence of the white people of the family. The couple thereafter lived together as man and wife, and a daughter, Susan, who became the wife of defendant, was born in about a year after the marriage. Another child was born, but it died in infancy. Albert Sterrett went to the war as the body servant of an officer in the Confederate army and afterwards, when peace was declared, he returned to his wife and child in Alabama, subsequently removing with them to New Orleans, where he took up his residence. He was a barber by trade and pursued his calling, in the main, upon steamboats. At the time of the yellow fever epidemic of 1867 he left New Orleans on a boat bound for Mobile. He was seen at Mobile by relatives and connections he had there and whom he visited. His boat then left Mobile, it is thought, for Havana. There is evidence that neither the boat nor crew were ever heard of afterwards. Certain it is that Albert Sterrett has never been seen or heard of since. This was 35 years ago. Satisfied, as we are, there was a legal marriage between Albert Sterrett and the plaintiff herein, and that defendant's wife was the legitimate daughter of the marriage, the question arises as to the disappearance and long absence of Albert Sterrett and the effect it is to be permitted to have on the issue here raised. Where a person's home was in the city of New Orleans, where his wife and only child, a girl, resided, and he is shown to have left home on shipboard bound for a nearby port, where yellow fever was raging, and the boat is shown to have left there for some other and more distant port, and neither the

¹ Rehearing denied June 23, 1902.

boat nor person ever returned, or were heard of again, the lapse of 35 years and absence under such circumstances are sufficient to justify the conclusion in a case like this that the man is dead. This court announced a similar doctrine in *Jamison v. Smith*, 35 La. Ann. 609—the facts of which are quite similar to those of the instant case. And in *Boyd v. Insurance Co.*, 34 La. Ann. 848, the court said:—“Absence, without being heard of, though not of sufficient duration to create a legal presumption of death, may yet be one of other attendant and supporting circumstances which, taken together, would satisfy the mind and conscience of the judge or jury that the party was dead. This is all that is required.” Again in *Succession of Vogel*, 16 La. Ann. 139, 79 Am. Dec. 571, the court held:—“A supposed loss of life by reason of a shipwreck, an earthquake, a war, a plague, an explosion, and like perils, is within the sound discretion of the judge to determine, founded on the facts of each particular case.” The record discloses with sufficient certainty that defendant's wife was the only surviving child of Albert Sterrett at the time of his disappearance.

With regard to the community settlement—the separate claims of the husband against the community and their adjustment—we see no reason to disturb the findings of the trial court.

Judgment affirmed.

(107 La.)

CITY OF NEW ORLEANS v. BILGERY
et al. (No. 14,179.)

(Supreme Court of Louisiana, June 16, 1902.)

INJUNCTION—ENFORCEMENT OF JUDGMENT—PETITORY ACTION—RIGHT TO APPEAL.

1. Defendant has no right to enjoin the execution of a judgment, in a petitory action in favor of the plaintiff, which is absolute and unconditional in its terms as to ownership and right of possession, and force plaintiff to await a decision upon unliquidated claims touching matters upon which the defendant had simply reserved his rights.

2. Where the district court has set aside an injunction which it had granted, upon the ground that it was an injunction against the execution of a judgment of the supreme court, absolute and unconditional in its terms, it should refuse an appeal to the party cast, and force him to apply to the supreme court for relief. When, however, it has in fact granted a suspensive appeal, it should not, so long as the order of appeals stands, oust the appellant from his possession, secured by his appeal, by placing the property in the hands of a private individual, styled a sequestrator, and enjoining the appellant from acts of possession; particularly is this the case where the sheriff had in his hands a writ of possession from the inception of the proceedings.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by the city of New Orleans against

Marie Bilgery and others. Judgment for defendants, and plaintiff appeals. Modified.

Arthur McGuirk, Asst. City Atty., for appellant. Rouse & Grant, for appellees.

NICHOLLS, C. J. The defendants recovered a judgment in the civil district court, decreeing them, in a petitory action, to be owners and entitled to the possession of certain real estate in the city of New Orleans, with the buildings thereon and the alleys around the same, known as the “Second Street Market,” together with rents and revenues. The city of New Orleans appealed to the supreme court. This court rendered the following decree: “It is therefore ordered, adjudged, and decreed that, in so far as the judgment appealed from condemns the defendant for fruits and revenues of the property in question, the same be annulled, avoided, and reversed; and that as to such fruits and revenues, for the period between May 30, 1894, and October 23rd, 1897, the demand of the plaintiffs be rejected; and that as to such revenues since October 23rd, 1897, said demand be rejected as in case of nonsuit. It is further ordered and adjudged that, in so far as said judgment decrees the plaintiffs to be the lawful owners of the property herein claimed, and entitled to possession thereof, the same is hereby affirmed. It is further ordered, adjudged, and decreed that all legal rights of the city, with respect to taxes upon said property since May, 1873, and with respect to any claim which it may have, arising out of the use made of said property, and of any franchise or privilege in connection therewith, be reserved. It is further ordered that the defendant pay the costs of the lower court, and that the plaintiffs pay the costs of the appeal.” The pleadings and facts in the case will be seen by reference to the report of the case found in *Ball v. City of New Orleans*, 52 La. Ann. 1550, 28 South. 109.

On the 7th of May, 1901, the city of New Orleans filed a petition in the civil district court, in which it averred: That the plaintiffs in that suit, pretending to act under said judgment, had issued a writ of possession, and were seeking to avail themselves of the provisions of said judgment without complying with all of its provisions respecting the payment of its just claims, and, on the contrary, refusing so to do. That the property was liable for the payment of the taxes from 1874 to 1900, inclusive, and that the amount thereof, with interest and penalties, far exceeded the value of the market, which it averred to be \$12,000. That it had a lien and privilege for said taxes, but that, owing to the bad faith of Joseph Bilgery, the ancestor of the defendants, the city had been lulled into the belief that he was the subrogee of, and exercising the rights and privileges of, one Joseph Raymond, who had by ordinance been given the privilege to op-

¶ 1. See Judgment, vol. 30, Cent. Dig. § 764.

erate a market upon said property, free from taxation, for a period of 25 years, under the terms and conditions stated in the ordinance, which was made part of its petition, and that at the end of said period it would revert to and become the property of the city. That the defendants, after surrendering possession of the market to the city in March, 1874, subsequently brought the action in which the said judgment was rendered, and were seeking to execute the same without accounting to the city for the taxes due, or complying in any respect with any of the terms of said decree, and especially of the payment by the city of the value of the franchise to operate a market exercised by the defendants. That the defendants were without means, and insolvent, and the city feared, if they obtained possession of the property, they would sell, transfer, or dispose of the same, to its irreparable damage; and that for the protection of its interests it was necessary that a writ of injunction issue in the premises. It prayed that an injunction issue, enjoining the present defendants from executing the writ of possession on the said judgment without paying or accounting to the city for the taxes due it from 1874 to 1900, inclusive, and without accounting to it for the franchise value of said property or in all respects conforming to the judgment in its entirety; and that they remain enjoined until further order of court. The injunction was ordered to issue, and was issued as prayed for. On the 7th of June, the city filed a supplemental and amended petition, in which it averred that in its petition for injunction it had inadvertently alleged that the taxes for the years 1897, 1898, 1899, and 1900, among others, were unpaid; that this allegation as to the taxes for said years was made in error; that they had been paid, under an order of the circuit court of the United States, by the receiver, in the cause entitled "Arturo del Orto v. New Orleans Contracting Company, Limited"; but with this exception it reiterated its former allegations. It further averred that the defendants were without right in the execution of the writ of possession, for the reason that the alleys Nos. 1 and 2 of said market, and the aisles and passageways between the stalls thereof, had been, and were still, dedicated to public use and benefit of all the inhabitants thereof, and had been continually so used, and not been used for any other purpose since 1873. That said dedication was made in the following manner, to wit: That the lands upon which the Second street markets, and alleys Nos. 1 and 2, connected therewith, are situated, and the aisles and passageways thereof, were acquired by purchase by Joseph Raymond from the Union National Bank by act, before M. T. Ducros, notary public, in New Orleans, dated February 27, 1873. That annexed to said act, and forming a part thereof, was a plan made by L. H. Pille, dated February 19, 1873, designating a part of said ground as alleys

Nos. 1 and 2. That the said act and plan and resolution of the board of directors of the Union National Bank, thereto attached, was intended to be and was a joint dedication by the vendor, the Union National Bank, and the vendee, Joseph Raymond, of the alleys Nos. 1 and 2, to public use, forever. That the title to said streets and alleys still remained in the public. That the public never had been divested thereof. That no divestiture thereof could have been made; the power to alienate property to public use vesting, if anywhere, in the sovereign alone. That the attempt of the defendants to seize the said property, and to take it out of the possession of the city, by whom it is held in trust for the use and benefit of the inhabitants thereof, impairs the obligation of the contract, in favor of said inhabitants, made by the vendor and vendee in the act between the Union National Bank and Joseph Raymond, passed before Ducros, in violation of section 10, art. 1, of the constitution of the United States. That said conduct of the defendants also was violative of the fourteenth amendment to the constitution of the United States, in that it divests the vested rights of the inhabitants of New Orleans in said alleys, aisles, and passageways, and is a taking of their property without due process of law. The city prayed that the writ of injunction be perpetuated. This petition was sworn to by Arthur McGuirk, assistant city attorney. The injunction prayed for was ordered to issue.

In the meantime, on May 31st, on application of the defendants, the city was ruled to show cause on June 7th why the injunction granted should not be dissolved for a number of assigned reasons, among them that the affidavit in support thereof was false in the following particulars, among others, viz.: First. That it was not true that the judgment was a conditional one. It was, on the contrary, absolute and unconditional, and the district court was without jurisdiction to enjoin a judgment of the supreme court. Second. It was not true that said property was liable, or that the defendants were liable for any taxes thereon. Third. It was not true that the defendants' ancestor, Joseph Bilgery, acted in bad faith, or that the city was in any manner led to believe that he was dealing with said property otherwise than as the absolute owner thereof. Fourth. It was not true that the defendants surrendered the possession of the property to plaintiff in March, 1874, or at any other time. On the contrary, it was forcibly taken possession of by the city in March, 1874, without right or authority, and was still withheld from them. Fifth. It was not true that defendants, or either of them, were insolvent, or that plaintiff would suffer any injury or damage whatever from their obtaining possession of the property to which the supreme court had declared them to be entitled as lawful owners. The city was also ruled to show cause at the same time why it should not be condemned to pay

damages in the sum of \$500 for the wrongful taking out of the injunction.

On the day before the trial of this motion to dissolve,—that is to say, on the 6th of June, 1901,—the defendants filed an answer to the city's petition for injunction, accompanied by a reconventional demand. In the answer they pleaded the general issue, followed by averments substantially those set out in the motion to dissolve. In their reconventional demand they averred that the property known as the "Second Street Market" was then in the possession of Luigi del Orto as receiver, appointed by the United States circuit court in the case entitled "Arturo del Orto v. New Orleans Contracting Company, Limited;" that said court had made an order discharging said receiver, which would become effectual on the 7th of June, 1901, when its possession would be relinquished by him; that they (plaintiffs in reconvention) were informed, and they therefore averred, it was the purpose of the city to take possession of said property as soon as said receiver would relinquish the same, and prevent them from resuming the possession thereof as they were entitled to do, under the judgment of the supreme court; that such action on the part of the city would work them an irreparable injury; and that an injunction was necessary to protect them in their rights. They therefore prayed that the city, her officers, agents, and attorneys, be enjoined and prohibited from taking possession of said market, or in any manner interfering with the possession thereof by the plaintiffs in reconvention, and that upon trial the injunction be made perpetual. The district court on the same day, "considering the reconventional demand and petition for injunction and affidavit in support of the same," ordered the city to show cause on June 7th why an injunction should not issue as prayed for. It further directed that, "until further orders of the court, the city should be restrained from taking possession of the Second street market, or interfering with the possession of W. J. McGeehan, hereinafter named. It then ordered that W. J. McGeehan be, and he is hereby, appointed to receive and collect the revenues of said market until the further orders of this court." On the 14th of June the defendants moved to dissolve the injunction granted to the plaintiff upon the filing of the supplemental and amended petition, on the same grounds which it had set up in their original motion to dissolve. The city on the same day (June 14th) answered the rules to show cause. It asserted the legality and validity of the injunction. It denied that it was seeking to enjoin the judgment of the supreme court. It averred that the district court was acting within its jurisdiction. That the grounds set up in the rule to dissolve were matters of defense, and could not be heard, and evidence adduced thereon, at a preliminary stage of the case, but had to be deferred until a trial on the merits. That the motion

to dissolve was really a general denial putting at issue both the law and the facts. That the injury to the city would be irreparable if the injunction were dissolved. That the real estate had never been out of the possession of the city; it still had possession. That the receivership in the United States court affected only the revenues of the market. That part of the real estate, alleys Nos. 1 and 2 and the aisles and passageways of the market, were dedicated to public use. It reiterated the allegations made by it in its different pleadings in the case. The record shows that, on the 14th of June, "the rules to dissolve the injunctions of the plaintiff, and that to show cause why the injunction prayed for by the defendants should not issue, came up for trial on issues of law; all issues of fact being referred to the merits." That, after hearing pleadings and counsel, the court, considering the law to be with the defendants and against the plaintiff, ordered and decreed that the rules taken out by the defendants be made absolute. It accordingly ordered and decreed that the injunction which issued under the order made by it on the 6th of May, as well as the injunction which issued under the order of the 7th of June, be dissolved and set aside at the costs of the plaintiff. It further ordered and decreed that an injunction issue under the order then made in the answer and reconventional demand of the defendants, and that W. J. McGeehan, previously appointed to collect the revenues of the market in controversy, do turn over all the funds in his hands to the defendants."

The city moved for a new trial on the ground that the judgment rendered was contrary to law and the evidence in this: First. That it was rendered upon a reconventional demand, filed by defendants in the cause on the 6th of June, without opportunity being allowed to file an answer to the reconventional demand and without a hearing on the merits, although the delays allowed by law within which to file an answer to said reconventional demand had not expired. Second. That it was rendered on the trial of a rule nisi for a writ of injunction prayed for by defendants in their reconventional demand. Third. That, at the date of the filing of said reconventional demand, the court issued an order appointing a judicial sequestrator, without bond other than the sheriff, for the property in controversy, although there was no prayer for the same, and although, at the date of the order, there was outstanding, in the hands of the sheriff, a writ of possession ordering him to seize and take into his possession the property in controversy. Fourth. That the judgment had not only the effect of dissolving and setting aside the orders of the court of May 6th and June 6th, restraining the execution by the sheriff of the writ of possession, ordering him to seize and take into possession the property in question, but forestalled the execution, by

the sheriff, of the writ of possession, by decreeing that the judicial sequestrator appointed by the court on the 6th of June, on the reconventional demand of the defendants filed on that day, should deliver the possession of the property, and the revenues thereof which he may have collected, to the defendants in the case. That the judgment provided for the issuance of an injunction restraining the plaintiffs from in any manner seeking to obtain possession of the property in controversy. That the judgment had the effect of dissolving the orders rendered on May 6th and June 7th for writs of injunction restraining the sheriff from executing the writs of possession. The court refused the new trial. On the 17th of June, the court granted the city a suspensive appeal to the supreme court from the judgment. On the same day, June 17th, an injunction issued enjoining the city from taking possession of the real estate situated at the corner of Dryades and Second streets, known as the "Second Street Market," and that it remain so enjoined and restrained until further orders of the court. On the 21st of June, on motion of defendants, the court ordered that W. J. McGeehan, theretofore appointed as judicial sequestrator of the revenues of the Second street market, involved in the suit, deposit weekly all collections of said revenues in the Citizens' Bank of Louisiana, the judicial depository of the court, to his credit as such sequestrator, to be disposed of as the court should direct, and that he make due report of all such collections and deposit. The writ of possession directed to the sheriff is not in the record.

At the time of the institution of the suit of *Ball v. City of New Orleans*, the revenues of the Second street market property and other markets had been farmed out to the New Orleans Contracting Company, under a contract ending the — day of —. For some reason not disclosed, the affairs of that company were placed in the hands of a receiver by the United States circuit court in the suit of *Del Orto* against the New Orleans Contracting Company, Limited; the receiver being authorized, among other matters, to collect the rents of the Second street market. This authority was withdrawn on the — day of —, doubtless for the reason that the contract of the city with the company had terminated on the — day of —. The effect legally of this withdrawal was to throw the collection of the revenues into the hands of the city, as the judgment of this court was still unexecuted, and the property was still in the possession of the city. A simple reading of the judgment of this court in the case of *Ball v. City of New Orleans* will show that the right of the plaintiff therein to the ownership or immediate possession of the Second street market property, including the alleys connected therewith, was recognized absolutely and unconditionally. Had it been the intention of the court to have

postponed the yielding of possession of the property to the plaintiffs by the city to the liquidation and settlement of the rights between the parties as to the taxes and other matters reserved, we would either have remanded the cause for such settlement to be made, or would have in express terms made the execution of the judgment conditioned upon a prior liquidation and settlement. When the mandate of this court was sent to the district court, there was no legal reason under it which stood in the way of an immediate carrying out of its terms. The district court should not have granted the injunctions which it did at the instance of the city, and it acted correctly in setting them aside. After setting them aside, it should have refused, instead of granting, the city the appeal it solicited as to the execution of the judgment touching possession. Our decree was final in the premises, and called for no appeal. Had the city felt aggrieved by such refusal, it could have tested its right to an appeal by application to this court for relief. The effect of the granting by the district court of a general suspensive appeal has been to prevent the execution of the judgment of this court in the *Ball* Case up to the present time. Our judgment was not self-executing or self-operating. It required an enforcement through a writ of possession, unless possession should be surrendered voluntarily. As matters stand, there is now a writ of possession in the hands of the sheriff, the latter waiting upon the orders of the court in the premises that he should execute it. Had the district court not granted the appeal it did, matters would have taken a regular legal shape. The injunctions having been set aside, the writ of possession would have been at once executed by the sheriff. As it was, the execution was tied up by the appeal, and the court attempted to remedy the situation by enjoining the city from taking possession of the property, and placing it and its revenues in the possession of a private individual, called a sequestrator; thus bringing about a situation of affairs not warranted. The city was already in possession of the property, as it had never been divested or ousted of the same; and this possession was continued by the suspensive appeal granted. Our judgment could not be enforced and carried into execution by a decree of the district court *proprio vigore*. A decree of the district court could not be substituted for the execution of a writ of possession by the sheriff. The method of executing judgments is fixed by law. The district court could not, while granting the city a suspensive appeal, oust it from its existing possession of the property by a decree appointing a judicial sequestrator.

In *Hereford v. Babin*, 14 La. Ann. 333, this court held that a party had no right to enjoin the execution of a judgment absolute and unconditional in its terms, as to the matter it professed to decide during a litigation

as to other matters in controversy reserved by the judgment; that unliquidated claims cannot be pleaded by way of compensation against a judgment. This same principle was recognized in *Mengelle v. Abadie*, 45 La. Ann. 676, 12 South. 921, and *State v. Rost*, 50 La. Ann. 995, 23 South. 978. A fortiori, this cannot be done in respect to matters reserved which have not yet been brought into litigation. It will be seen that the city, in its petitions for injunction, did not advance any claims against the defendants, and did not seek to obtain judgment against them. The whole relief asked by it was obstructive and defensive, and limited to opposition to the execution of a writ of possession. Its whole claim to injunction rested upon the correctness of the proposition which it declared upon, that the judgment of the court made its enforcement by the plaintiffs conditional upon, or contingent upon, prior liquidation and a settlement between the parties of the matters reserved to the city therein. This claim had no basis to rest upon. In so deciding, we practically decide the whole case.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment of the district court appealed from, in so far as it sets aside the injunctions which it had granted herein to the city of New Orleans in the matter of the execution of the judgment in the suit of *Ball v. City of New Orleans*, be, and the same is, affirmed, but that, except as so affirmed, the said judgment appealed from be, and the same is, hereby annulled, avoided, and reversed; costs of appeal to be borne by the appellees.

(107 La.)

STATE ex rel. I. X. L. GROCERY CO.
Limited, v. LAND, Judge.
(No. 14,457.)¹

(Supreme Court of Louisiana, June 16, 1902.)

EXEMPTIONS—LABORERS—WHO ARE.

1. Mechanical engineers, electrical engineers, clerks, agents, cashiers of banks, bookkeepers, and all that class of employés whose employment is associated with mental labor and skill, are not considered as laborers.

2. The exemption from seizure protects laborers on farms, plantations, factories, and other places, where workmen possess no particular skill without trade labor. The skilled labor in trades is not exempt.

(Syllabus by the Court.)

Application for writs of certiorari and prohibition by the state, on the relation of the I. X. L. Grocery Company, Limited, against A. D. Land, Judge of the First judicial district court. Judgment reversed.

David Thompson Land, for relator. Respondent Judge (Leonard, Randolph & Randall, of counsel), pro se.

BREAUX, J. Exemption vel non from seizure for debt of the wages of a locomotive en-

gineer under the provisions of statute No. 79 of 1876, amending and re-enacting article 644 of the Code of Practice, is the issue before us for decision. A mechanical engineer running a passenger train is one who possesses skill and expertness. His position is highly responsible, and requires judgment, attention, and the conscientious discharge of duty. His character and reputation are fair subjects of inquiry when he presents himself for employment, as well as the training and experience he has had. The statute exempts "laborer's wages," a term of very broad meaning, it is true, but it remains that the skilled mechanic thoroughly versed in all the details and intricacies of his art is not to be compared with a laborer who hires himself out to serve on plantations, or to work and toll in manufactories as a mere servant, subject, without question, to the will and direction of the master. The former is frequently consulted in matters of the utmost importance, and his suggestions nearly always considered and heeded. We are only concerned with the words "laborer's wages," and whether or not the wages of the master mechanic in charge of a passenger train are exempt. We do not think they are, and, in our view, he is not a laborer within the meaning of the statute. To illustrate, we will mention that his coal heaver, who throws over the coal from the bin to the furnace, is exempt, but not the mechanic whose knowledge, trained eye and hand are relied on to protect the hundreds of passengers whose safety depends on his skill and duty intelligently performed. He commands those about him whenever necessary in the performance of his work. He is an employé, and not a mere laborer. He is not a mere laborer, any more than the highly trained electrical engineer, or any other trained tradesman who receives salary or wages. The following is an authority in point: "Artificers, handicraftsmen, or miners, etc., do not necessarily or properly fall under the denomination of laborers, there being, as I take it, a known distinction between a journeyman in any art, trade, or mystery or other workmen employed in the different branches of it and a laborer." *Lowther v. Radnor*, 8 East, 124. Referring to Webster's definition, it is said that a laborer is one who works at a toilsome occupation; a man who does work requiring little skill, as distinguished from an artisan. 18 Am. & Eng. Enc. Law (2d Ed.) p. 71, and authorities cited in support of note 4; *Railway Co. v. Baker*, 14 Kan. 563. A civil engineer is not a laborer or workman. *Railroad Co. v. Leuffer*, 84 Pa. 168, 24 Am. Rep. 189. Worcester defines a laborer to be "one who labors"; one regularly employed at some hard labor; a workman: an operative; often said of one who gets a livelihood by coarse manual labor as distinguished from an artisan or professional man. Id. "Clerks, agents, cashiers of banks, and all that class of employés where employment is associated with mental labor and skill, were

¹ Rehearing denied June 30, 1902.

not considered laborers;" citing *Railroad Co. v. Callahan*, 49 Ga. 511; *Oliver v. Boehm*, 68 Ga. 172; *Richardson v. Langston*, 68 Ga. 658; *Hinton v. Goode*, 73 Ga. 234. It has been said that such and similar statutes are presumably intended to protect a class of men who are ill fitted to protect themselves, men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families, and that they should not be extended by forced construction so as to include a class of men who are competent to take care of themselves, and need no such protection. "Muzzle not the ox which treadeth out the corn," denotes a subdivision in the great army of industry which does not include the energetic, self-reliant mechanic of this country.

The opinions of our learned Brother of the district court always arrest our attention and command our consideration. We have seldom had occasion to differ from his views. In this case our premises and the authorities at hand, different from his, have led us to a different conclusion, and we are therefore constrained to write a different judgment. It is therefore ordered, adjudged, and decreed that the writs of certiorari and prohibition be perpetuated, and the judgment of the district court in this case is avoided, reversed, and annulled, and the judgment rendered by the city court is reinstated, at costs of the judgment debtor.

(107 La.)

STATE ex rel. HEIDINGSFIELD et al. v. HICKS, Judge. (No. 14,456.)

(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—CERTIORARI—SETTING ASIDE CONVICTION.

1. Where a party is convicted and sentenced to a fine on the ground that a certain seizure made by him was illegal, and gave rise under a statute to a misdemeanor, and the seizure was subsequently decreed by the supreme court, in a civil cause before it, to have been legal, the conviction will, on certiorari, be set aside as null and void.

(Syllabus by the Court.)

Application by the state, on the relation of Ike Heldingsfield and James M. Martin, for writs of certiorari and prohibition to O. D. Hicks, judge. Granted.

The relator Heldingsfield is, and has been for some time, the manager of the I. X. L. Grocery Company, Limited, of Shreveport, and the relator Martin has been, and is still, the marshal of the town of Shreveport. They aver: That on April 28, 1902, an affidavit was made against them charging them with a violation of Act No. 79 of 1876 by seizing under garnishment process in the suit of I. X. L. Grocery Company, Limited, against B. Clarke (No. 931, on the docket of the city court of Shreveport, La.) the laborer's wages due by the Shreveport & Red River Valley Railroad Company to said B. Clarke as a lo-

comotive passenger engineer on the road of said company, a certified copy of said affidavit hereto annexed. Further represent that they were arrested under said charge, tried by said city judge, and fined the sum of \$10 each; that said case was appealed by them to the district court of Caddo parish, La., where they were again tried, and the judgment of the city court was affirmed. Further, that no appeal lies from the decision of said district court, and that said judgments of conviction against petitioner are illegal, wrongful, and oppressive; that they have violated no law of this state, and that the sums due by said railroad company to said Clarke are in no sense laborer's wages, exempt from seizure, but are recompense for personal services which are liable to seizure, and that petitioner filed a motion for a new trial both in the city court and the district court, and a motion in arrest of judgment on the ground that the judgments were contrary to law and the evidence, and said motions were overruled. In view of the premises, petitioner prayed for an order from the court that a writ of certiorari issue to said city judge and said district judge to send up to the court a certified copy of the proceedings in said case, and that a writ of prohibition issue to said judges restraining and prohibiting them from proceeding to enforce said sentences against petitioners until the further orders of the court, or to show cause to the contrary on a day to be fixed by the court for citation according to law, and for judgment perpetuating said writ of prohibition and certiorari, and annulling and setting aside the sentences pronounced against petitioners. They further prayed for costs and general relief. The judges named were ordered to show cause why the writs prayed for should not be granted. The judge of the First judicial district court answered, making part of his answer a certified copy of the proceedings had in the case entitled "State of Louisiana v. Ike Heldingsfield and James M. Martin," on file and of record in the court. He averred that relators pleaded guilty in the lower court to the charge of seizing the wages of B. Clarke, a locomotive engineer, and were, therefore, sentenced to pay a fine, from which sentence they appealed to respondent's court, where, after due proceedings had, the sentence was affirmed. Respondent shows that in the case of B. Clarke against the I. X. L. Grocery Company, Limited, respondent held that the wages of Clarke, a locomotive engineer, were exempt from seizure under the statutes of the state of Louisiana, and that after the rendition of said judgment relators were proceeded against in the city court for violation of Act No. 79 of 1876, making it a misdemeanor to seize "laborers' " wages. Respondent further shows that the same question of exemption of the wages of a locomotive engineer is now pending before the supreme court in case No. 14,457, 32 South. 433, and for the reasons set forth in respondent's answer in said cause the writ of pro-

bibition prayed for by relators should be denied. The judge of the city court answered. He stated that on the 18th of March, 1902, in the suit of B. Clarke against I. X. L. Grocery Company, Limited, and James M. Martin, city marshal, he had held that the wages of a passenger locomotive engineer were not exempt from seizure, but that on appeal his judgment had been reversed; that thereafter an affidavit had been made against relators for violation of Act No. 79 of 1876, and in consequence of the judgment, which had reversed his own, he found the relators guilty, though he did not individually think that judgment correct; that he could not, under the circumstances, have taken any other course than the one he had taken.

David Thompson Land, for relators. Respondent judges pro se.

NICHOLLS, C. J. (after stating the facts). The seizure made through garnishment process in the matter of the I. X. L. Grocery Company, Limited, against B. Clarke (No. 931 of the docket of the city court of Shreveport, La.) of the wages of said Clarke, who was a locomotive passenger engineer in the employ of the Shreveport & Red River Valley Railroad Company, has been this day by judgment of this court decreed legal. That seizure was the basis of the conviction and sentence of the applicants herein by C. D. Hicks, city judge, which judgment and sentence were on appeal to the First judicial district court for the parish of Caddo on May 8, 1902. The seizure having been legal, relators committed no crime. Their conviction was null and void, and of no effect, and said conviction is hereby so decreed and adjudged. The writ of prohibition herein applied for is hereby granted as prayed for, and the writ ordered to issue.

(107 La.)

FREUDENSTEIN v. FREUDENSTEIN
et al. (No. 14,161.)¹

(Supreme Court of Louisiana. May 28, 1902.)

APPEAL—REVIEW—QUESTIONS OF FACT.

1. This case involves only questions of fact. (Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by William Freudenstein against M. Freudenstein and others. Judgment for defendants, and plaintiff appeals. Reversed.

Richard H. Browne, for appellant. Edward L. Simonds, for appellees.

PROVOSTY, J. The plaintiff sues to be recognized as owner of one-third, undivided, of a square of ground in the city of New Orleans, and to be placed in possession thereof, or, in the alternative, for judgment against defendant for the value of his interest in said

square of ground, namely, \$2,000. He claims title as heir of his father, John Freudenstein, and of his brother, John M. Freudenstein. In 1861 the property in question belonged to the plaintiff's father, John Freudenstein, who made a sale of it to one Bachman. In 1869 Bachman conveyed the property to John Thuer, father of the defendants and husband of the defendant tatrix. Both of these sales were simulations, as fully appears in regard to the first from the testimony, and in regard to the second from the following letter, written many years afterwards: "New Orleans, May 17th, 1890. My Dear Brother-in-Law: We received a letter from your wife a few days ago, in which she enumerated the details in regards to the succession of dear mother-in-law, saying that she received such an amount, and my wife such an amount,—even more, according to her statement. She brings forth the vacant square of ground on Henry Clay avenue, saying that she (your wife) only had four lots, and my wife twelve lots. This ground has nothing to do whatsoever with the succession matter. It was placed in my name in 1869, and mother promised to let me have one-half of above square for nine hundred dollars; I to pay all current expenses, such as taxes, fences, etc., and said expenses to be deducted from the above amount. Since I owned square, I have expended and collected, as you will see according to the statement inclosed, amount of money paid out of my pocket. Thus far I have paid more than the amount of \$1,900.00. It was not until March 30th, 1876, when the shell-road bill was to be paid, and mother, not having the money to pay her portion, told her sons, John and William, if they would pay her amount, she would give to Caroline, John, and William her portion, or one-half, of the said square. I have never been compelled to dispose of same, as I am waiting, and have always been advised to hold on; and, from my own observation, I expect to realize a good price ere long. Whenever I sell the piece of ground, I will, according to promise, divide, and turn over the amounts belonging to your wife, John, and William. My intention never was to sacrifice the place, and I have endeavored to do the best I can for all. They have raised the assessment this year from 1,300 to 3,500 dollars. John is willing to wait, and wishes me to get a good price. If Caroline wishes to sell her lots, I will give her 800.00 dollars, but, if she will take my advice, she had better wait a little while, and get all she can. If she needs any money now for repairs on house on Magazine street and taxes for this year, I will lend her the money without interest, and wait until the square is sold. I have refused 3,500 dollars. I wish you would carefully read this letter, and let me know at an early date your ideas and wishes. Trying to do my best for the interest of all, and trusting my views will be fully understood and satisfactory, I remain your dear brother-in-law, [Signed] John Thuer."

¹ Rehearing denied June 28, 1902.

er." While this letter was not addressed to the plaintiff, and was not intended to serve as a counter letter, yet we think it can answer the same purpose, since it leaves no doubt that the property was not really sold to Thuer, but merely, to quote the language of the letter, "placed in my [his] name." John Freudenstein died in 1875, leaving surviving him his widow, Elizabeth Freudenstein, survivor in community, and owner of one-half, undivided, of the property in question, and the following children, issue of his marriage: John M. Freudenstein; Elizabeth Freudenstein, wife of Bachman; Caroline Freudenstein, wife of Klenle; Rosa M. Freudenstein, wife of John Thuer, the defendant tatrix herein; and William Freudenstein, the plaintiff. John Thuer, and after him his widow, the defendant tatrix, have been in possession and in charge of the property from the time of the simulated sale, receiving the rent from it, and paying all expenses connected with it. Mr. Bachman and Mrs. Klenle are making no claim to the property. They admit that John Thuer and his wife have settled with them in regard to same. John Thuer died in 1893, and John M. Freudenstein in 1898. Whether during his lifetime John M. Freudenstein was settled with for his interest in the property is one of the questions in the case. While the legal proof of his having been settled with is not very strong,—parol evidence being inadmissible, the matter involved being title to real estate,—we agree with the judge a quo it is sufficient. He signed the inventory of the succession of John Thuer, wherein this property was stated to belong to that succession; and he took no steps to enforce his rights, although he must have known of them, and although three years before his death Mrs. Klenle turned over to him the letter reproduced above, at the same time advising and warning him that he might have trouble in settling with Mrs. Thuer. After his death the letter was found "in an old bureau in the outer shed," among some valueless papers, while his other papers were "in his armchairs and drawers upstairs." We cannot but assume, as did the learned judge a quo, that this valuable document would not have been thus cast away if its usefulness had not been done away with by a settlement.

Except parol evidence, objected to and inadmissible, we can find nothing going to show that plaintiff ever parted with his interest in this property derived by inheritance from his father. He makes no claim as heir of his mother; nor could he, in view of the agreement of the mother with Thuer, contained in the letter, that the latter should have one-half of the property in consideration of certain payments to be made. This half thus disposed of by the mother must be considered to have been her own half, as she was without right to dispose, either in whole or in part, of the half belonging to the heirs of her husband. The lapse of time is not so signifi-

cant, considering that by the letter we are informed in the most reliable manner that so late as 1890 Thuer was still holding the property for the heirs, intending to turn over to them their share of the price whenever a sale should be made. That plaintiff demanded and received payment from Mrs. Thuer for labor in ditching and for loads of earth for filling on the property is not significant. Because he owned a small interest in the property was no reason why he should not bring a bill against it. As a matter of course, plaintiff cannot take back the property without reimbursing to the defendant all the money paid out by Thuer and his heirs on the property in the way of expenses, taxes, etc. That was the agreement. We think, with the learned judge a quo, that the \$1,800 mentioned in the letter must be taken to be that much money of which John Thuer was out of pocket on account of the property at the date of the letter, and that this \$1,800 must stand as the first debit item against the property in the account between it and Thuer and his succession, and as of the date of the letter. We think, also, that the statement of expenses annexed to the answer must be taken as proved, and that all items thereon from and after May 17, 1890, must be charged against the property, and that on all these items, including the \$1,800, 5 per cent. interest per annum must be charged from their respective dates. To the credit of the property on the account must be charged the rents received from and after the same date, May 17, 1890, as per statement furnished by defendant, and appearing in the transcript; with 5 per cent. per annum interest on each amount thus received from the 31st of November of each year, except that for the year 1890 the rent shall be divided according to time, and only that portion accruing after May 17th be charged. To this must be added, pro and con, all items accruing from rent and expenses subsequently to the time to which the said statements have been brought down. Any existing lease of the property must be respected.

Defendant has not prayed for judgment against the plaintiff for the \$520 alleged to have been loaned to him. The only prayer is that any judgment plaintiff may recover be offset by this amount,—a prayer which does not now fit the case, since the judgment to be rendered by us decreeing plaintiff to be owner of one undivided twelfth of the property cannot be offset by a sum of money. The demand, therefore, fails, without prejudice, however, to the right of plaintiff to renew it.

The legal situation with reference to the property is that plaintiff owns one-tenth and defendants nine-tenths thereof, and that defendants are entitled to continue in possession and in charge of the property as heretofore until plaintiff shall have reimbursed to them his pro rata share of the balance that shall be found due by the property to the defendants according to a computation to be

made in accordance with the views hereinabove expressed, and that in case of a sale to effect a partition the said pro rata share of the plaintiff in the amount due as aforesaid to the defendants by said property must be paid to the defendants, by preference, out of the share of the plaintiff in the proceeds of the sale; and the said legal situation as here declared is hereby made the judgment of the court, the judgment of the lower court being set aside, and the case remanded for the purpose of casting the said account; defendants to pay the costs of both courts.

(107 La.)

FREY v. FITZPATRICK-CROMWELL CO., Limited. (No. 13,983.)¹

(Supreme Court of Louisiana. May 12, 1902.)

JUDGMENT—AMOUNT ADMITTED—INTEREST—TENDER—NAME OF DEFENDANT.

1. Where defendant in his answer admits part of the amount claimed by plaintiff is due, the latter may take judgment for the amount so admitted and prosecute his suit for the remainder.

2. But where defendant, in the same answer, alleges that a legal tender of the admitted amount had been made to plaintiff on a certain day, which had been then refused, it is error to include in the judgment, so taken for the amount admitted, interest until paid.

3. If a legal tender had been made of the true amount due as alleged, defendant owed no interest thereafter.

4. The error of taking the judgment against the Andrew Fitzpatrick-Cromwell Co., Limited, instead of the "Fitzpatrick-Cromwell Co., Limited," the true name of defendant, is held not to vitiate the judgment, especially so since that was the name given the corporation by its counsel in the backing or indorsement placed on their answer.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Anton Frey against the Fitzpatrick-Cromwell Company, Limited. Judgment for plaintiff, and defendant appeals. Modified.

McCloskey & Benedict, for appellant. Charles F. Claiborne, for appellee.

BLANCHARD, J. Plaintiff sold defendant a lot of hides. Dispute arose relative to the quality and price of some of the hides, with the result that defendant would not pay the sum plaintiff demanded, and plaintiff would not receive the amount defendant offered. Whereupon, plaintiff brought this action to recover \$2,539.80 as the price and value of the hides sold. Defendant answered disputing plaintiff's version of the facts, giving its statement of the transaction, and averring that on this controversy arising, in order to avoid litigation, and with that purpose alone in view, it offered \$2,138.40 as the amount due, and that the tender was made on the 30th of October, 1900, to plaintiff personally in the presence of two witnesses, which tender plaintiff

refused. The prayer of the answer is that plaintiff be condemned to accept the amount tendered (the answer renewing the tender) in full satisfaction of the claim based upon the sale of the hides. Whereupon plaintiff moved for judgment against defendant for the amount admitted in the answer to be due, with reservation of his right to prosecute his suit for the balance remaining. This motion prevailed and judgment was entered up in plaintiff's favor for \$2,138.40, with 5 per cent interest from October 13, 1900, until paid and costs, without prejudice as to the remainder claimed by him, for which the suit was to stand and be prosecuted. Defendant took an order of suspensive appeal from that judgment, and pending same applied for a writ of prohibition to prevent the trial judge from proceeding further in the suit for the balance claimed by plaintiff. The application for the prohibition was denied by this court—it being held (1) that under the established jurisprudence plaintiff could take judgment in advance for an amount admitted in the answer to be owing, and could then prosecute his suit for the remainder; (2) that the suspensive appeal taken by defendant bears only on that part of the cause merged in the judgment, and did not operate to prevent the prosecution of the suit for the balance claimed by plaintiff. See *State ex rel Fitzpatrick-Cromwell Co. v. Ellis*, 106 La. 715, 31 South. 313. Defendant's appeal from the judgment taken by plaintiff for the amount admitted to be due is the matter now before us.

It is assigned as special error that the judgment was rendered against the Andrew Fitzpatrick-Cromwell Company, Limited, and that on such judgment plaintiff proposes to take out execution against defendant, the Fitzpatrick-Cromwell Company, Limited. It is true, the rule served on defendant to show cause why plaintiff should not take judgment for the amount admitted to be owing, described defendant corporation as the Andrew Fitzpatrick-Cromwell Company, Limited, and the judgment which followed designated defendant in the same way. The prefix of the word "Andrew" is not thought sufficient to vitiate this judgment. Andrew Fitzpatrick is the president of defendant company and the rule was served on him. His first name "Andrew" prefixed to the legal cognomen of the corporation, does not in the least render uncertain that the judgment was intended to be against the Fitzpatrick-Cromwell Company, Limited. Besides, defendant's counsel, in their answer in which it was admitted that the amount for which judgment was taken was due, backed or indorsed the answer as follows:—"Anton Frey vs. Andrew Fitzpatrick-Cromwell Co., Limited." Having themselves committed the error and thus, perhaps, led plaintiff's counsel into making it, their clients cannot be permitted to reap any advantage therefrom.

We entertain no doubt of plaintiff's right to take judgment for the amount admitted to

¹ Rehearing denied June 21, 1902.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 128.

be due him in defendant's answer. The question arises whether plaintiff is entitled to interest on the amount admitted by defendant's answer to be due, in the way it is written up in the judgment—that is to say, from October 13, 1900 (the day of the purchase of the hides), until paid. The contention of defendant is that having made a tender to plaintiff of the amount on October 30, 1900, this tender stopped interest and that it was error for the trial court to allow interest as was done. It will be alike interesting and instructive to review the law and the authorities in respect to legal tender, to ascertain what is required to be done in order to stop interest on a debt when there is a dispute between creditor and debtor as to the exact sum due. Where this dispute exists—the creditor claiming a certain sum; the debtor acknowledging to owe another and a smaller sum and making a legal tender of the same—does such tender, if the amount thereof prove to be the sum actually due, have the effect of stopping interest from running, or, in order to stop interest, must the tender be followed by a consignment or deposit of the money to the credit of the creditor?

In an early case *Mudd v. Stille's Heirs*, 6 La. 19, Judge Martin, as the organ of the court, said:—"It has been contended that interest ought not to have been allowed because a tender was made to the attorney of the plaintiff. But this tender was not made to the person, nor in the manner prescribed by law, to constitute a real tender, and none other has the effect of stopping interest." (*Italics ours.*) This is tantamount to holding that a real tender made to the right person and in the manner the law points out, has the effect of stopping interest.

What constitutes a real tender, to whom must it be made and in what manner? "When the tender is for money due," says Code Prac. art. 407, "it must be made to the creditor himself, or at his actual or chosen domicile, by the debtor, or by his agent, by tendering to such creditor the sum which is due to him, with the interest and such costs as he may have incurred, and exhibiting such sum to him in the presence of such witnesses, in the current money of the United States." See Civ. Code, arts. 2167-2169. The number of witnesses required to the real tender is two. Code Prac. art. 400. The Code of Practice says not a word about "consignment" or deposit following the tender, when the tender is for money due: Aliter, where the thing due and tendered is property. Code Prac. art. 405. Then it must be followed by consignment if the debtor wishes thereafter to be relieved of the responsibility and risk of the thing. Id. art. 414. Civ. Code, art. 2167, declares that when the creditor refuses to receive his payment, the debtor may make him a real tender, and on the creditor's refusal to accept it, he may (not must) consign the thing or sum tendered. Then it goes on to say that a real tender fol-

lowed by consignment, exonerates the debtor; that it has the same effect as a payment; and that the thing thus consigned remains at the risk of the creditor. Here is a declaration of law that to exonerate the debtor the tender must be followed by consignment. But how exonerate the debtor—from what? From further responsibility as to the safe-keeping of the thing tendered and consigned. Thereafter it is to be at the risk of the creditor. It refers to property, to things due—not money for a debt due. Code Prac. art. 413. The meaning of the article of the Civil Code is not that to exonerate the debtor from interest on the sum of money he owes, there must be a consignment as well as a tender. If it be money due for debt, and a tender is made of the amount that is owing previous to a suit having been instituted, the plaintiff shall recover the sum tendered and such interest only as had accrued previous to bringing the action. This is one declaration of Code Prac. art. 415. If it be property that is due, and a tender is made of it previous to suit, the plaintiff shall be decreed to pay all the expenses incurred for the preservation of the property if the same had been consigned. This is another declaration of Code Prac. art. 415. As does article 405, this article 415 distinguishes real tenders which are made for debts for money due, and such tenders made for property or things due. If property is due, it must be tendered, and in order to put it at the risk and charge of the creditor it must be deposited. But where money is due, the legal tender, without the deposit, stops the interest. It is the tender and not the deposit which stops interest. This is made plain by the decisions. In *De Goer v. Kellar*, 2 La. Ann. 496, the debtor by leave of the court, deposited the money in court to abide the result. The court held the deposit not being a tender it did not stop interest. It would, however, have had the effect of a tender if the debtor had deposited it in court in such way that the plaintiff could have taken it. But a mere deposit of the sum admitted to be due in court to await the determination of the issue between the plaintiff and defendant, not preceded by a formal tender to plaintiff, did not have the effect of stopping interest. In *Bacon v. Smith*, 2 La. Ann. 441, 46 Am. Dec. 549, the court said the mere announcement by the maker of a note of his readiness to pay, made to the holder, and the refusal of the latter to receive the amount, is not a legal tender and did not stop interest. Citing Code Prac. arts. 407, 415. There was no intimation that a tender and deposit was necessary to stop interest; only that a tender was necessary to stop it. In *Small v. Zacharie*, 4 Rob. 146, the court said:—"With regard to the interest, we think it was also properly allowed. Supposing that the admissions on which the judgment is based could not be divided, the plea of tender relied on by appellants is so informal, irregular and insufficient that it cannot be taken

as a compliance with the requisites of the law." Citing Code Prac. arts. 404, 407, 413, 415, and Civ. Code, arts. 2163, 2164 (old numbers). If the plea of tender made in that case had been formal and regular, it would have stopped interest. That is a clear deduction from the language quoted, though further along in the case the court throw out the suggestion that "consignment," too, was necessary. In *Alter v. Shepherd*, 27 La. Ann. 207, the court said:—"The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of the tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses." The words "in case the creditor refuses" mean in case he refuse the tender made. This case is a direct authority on the point that a tender made must have its legal effect, and this, too, though it be not followed by consignment. In *Bank v. Barnett*, 27 La. Ann. 178 (at bottom of page), the court said:—"The defendant swears he made a tender to plaintiff at maturity of the last note for which his own was pledged; but it is not proved that a formal, real tender of the money was made as required by article 407, Code Prac. The defendant cannot, therefore, avail himself of the exoneration from interest and costs stated in article 415, Code Prac." (Italics ours.) Here, there is not a word about consignment or deposit of money being necessary. It is an authority direct that a formal tender alone exonerates thereafter from interest and costs. In *Zimmermann v. Langles*, 36 La. Ann. 68 (top of page), the court said:—"Neither does the law make it essential that where a tender has been made or waived, the debtor should consign the amount tendered, or which, without the waiver, would have been tendered. It leaves it optional with the debtor to do so or not at his pleasure." (Italics ours.) Citing Code Prac. art. 412; Rev. Civ. Code, art. 2167. This is a direct authority that a tender does not have to be followed by consignment or deposit, and it supports *Alter v. Shepherd*, 27 La. Ann. 210, where the court held that though consignment may be made, it is not essential that it should be.

It would, thus, seem to be pretty well established that what is called a "real tender" does not have to be followed by deposit to give effect to the tender. That is to say, a tender regularly made, as the law directs, has the effect of stopping interest and costs from the date of the tender if the amount tendered be the exact amount due at the time of tender. "The failure to make the consignment does not defeat the benefit to be derived from a tender, or from one which has been waived." said the court, further, in *Zimmermann v. Langles*, 36 La. Ann. 68—citing *Alter v. Shepherd*, 27 La. Ann. 210. Again, in the same case, said the court (same page):—"When the consignment has not taken place, the debtor continues to be answerable for the

amount tendered." Yes, for the amount tendered, but not the interest on it. "It would be no excuse for him," continued the court, "that he has lost or was robbed of the amount, or that the bank with which he did business and in which the amount was on deposit, to his own credit, has become insolvent, or the like." And further continued the court in the same case:—"When the consignment has been legally made the debtor is exonerated from further liability." What is meant by "further liability"? The court tells us for it continues:—"The money or property remaining on deposit at the charge and risk of the creditor. Should it perish, or be spoiled, or its value diminished without fault of the debtor, the loss would fall on the creditor." (Italics ours.) So, the only purpose of the deposit or consignment after tender is to put the thing or the money at the risk and charge of the creditor. The tender itself, without the deposit, stops interest and costs if it be for the amount due. This is made still clearer by the language of the court in the *Zimmermann Case* which followed:—Thus:—"When the tender has been made or waived, it is immaterial who is the custodian of the money or the property, the bank or the creditor (debtor?); as in the case of money, the bank would not pay interest on it to the creditor, provided in either case such money be forthcoming on the demand of the creditor. The debtor, in either case, would not be responsible for interest between the time the tender was made or waived and that of the demand for payment." (Italics ours.) The meaning of the sentence italicised is, that when a tender of the amount due is made and refused by the creditor, who, afterwards, concludes to accept it, the debtor is not due interest on the amount so tendered from the time of the tender up to the time when the creditor, reconsidering his refusal, gives notice of acceptance. He does this by demand of payment, or notice of acceptance of the amount that had been tendered. And if the debtor then declines to pay the amount which once he had tendered, interest would run on the same from the time the creditor had, by demand of payment, signified his purpose to accept. In *Thompson v. Edwards*, 23 La. Ann. 183, the court, said:—"If the tender of the amount admitted to be due be not made by the debtor in the manner provided in article 407 of the Code of Practice, and the creditor brings suit, the debtor must be condemned to pay costs." This is the equivalent of holding that if the tender of the amount had been made in the manner provided by the law as laid down in the article of the Code of Practice cited it would have had its legal effect, which is exemption from costs and interest from and after the date of tender. A tender does not merely exempt from costs; but from interest as well. Code Prac. art. 407, says not one word about consignment. In *McStea v. Warren*, 26 La. Ann. 453, the court held that where an offer to pay what

was due was made and refused, a formal tender was, by the refusal, dispensed with, and that where, after this equivalent of a tender, a suit was brought for the money, interest could be collected only from judicial demand. Here is a direct authority that a tender of the amount due, made and refused, stopped interest, though no deposit is mentioned to have been made, and interest only began to run again on a demand being made (in that instance by suit) for payment by the creditor, and from the date of such demand. In *Conrad v. Burbank*, 24 La. Ann. 18, the plaintiff took judgment for so much of his demand which defendant admitted, and reserved the right to prosecute his suit for the remainder. The question arose as to whether he was entitled to interest on the amount thus admitted to be due when interest was not specially included in the admission. The court held he was entitled to interest because by law all debts bear interest at 5 per cent. from the time they become due, unless otherwise stipulated, and then added:—"To be relieved from payment of this interest, it was incumbent on defendant to allege a tender made in accordance with law." Not a word about deposit as well as tender. Tender alone duly made would have stopped interest. No other conclusion is possible from this decision. In *Marice* against New Orleans & Carrollton Railroad Company, decided by the court of appeals for the parish of Orleans in January, 1900, the court said:—"It has been held that the announcement by a party of his readiness to pay a note is not a real tender, and that nothing but a real tender can be effective to arrest interest." Citing Code Prac. art. 415; *Mudd v. Stille's Heirs*, 6 La. 18; *Bacon v. Smith*, 2 La. Ann. 442; *Bank v. Barnett*, 27 La. Ann. 179. The cases thus cited by the court of appeals are among those hereinbefore referred to. The question of interest and what was necessary to be done by a debtor to stop its running against him, was at issue in the case before the court of appeals.

The law relative to real tender embodied in the Code of Practice, is found in section 1, c. 4, beginning with article 404 and ending with article 418. The latter article reads as follows:—"All the other rules relative to real tender provided by the Civil Code, not reenacted in this section, and which are not *contrary to the provisions above expressed*, must be observed; but all the provisions of the other statutes relating to the same subject are hereby repealed." (Italics ours.) This article, then, makes it clear that the law of tender as laid down in the Code of Practice prevails over that on the same subject-matter in the Civil Code, in case of any conflict between the two. The Code of Practice nowhere declares that deposit or consignment must follow tender, in case of money due for debt, in order that tender should have its legal effect. On the contrary, even in case where property is due, article 412, of that Code specifically declares that where a

tender is made by the debtor and refused by the creditor, the debtor has the option either to retain the property in possession until the creditor demands the same judicially, or to deposit it at the charge and risk of the creditor. In case he elects to deposit it and does so in the manner Code Prac. art. 413, directs, should it perish thereafter, be spoiled or its value diminish, the creditor must bear the loss, if the tender be adjudged valid. Id. art. 414. And in case where money is due, as hereinbefore shown, Id. art. 407, provides for nothing more than tendering the sum due to the creditor in presence of two witnesses. So that if the Civil Code be construed as also requiring consignment, it is to that extent in conflict with the Code of Practice and the latter prevails. In the case of *Walker v. Brown*, 12 La. Ann. 266, *Voorhies, J.*, as the organ of the court, held that a tender of payment by a debtor, in order to exonerate him, must be followed by a consignment or deposit of the money. The question of interest was not raised, and the declaration of the opinion, that in order to exonerate the debtor, tender of payment must be followed by consignment, was made with reference to the currency notes of a certain bank which *Walker* (plaintiff in injunction) claimed the right to pay or deliver in satisfaction of the demand made upon him for moneys which he (as sheriff) had collected for taxes. The organ of the court did not make it clear what he meant, as to that case, by the words "tender and deposit of the notes were essential to exonerate the plaintiff." In view of the fact that no matter as to interest was at issue there, the case is not an authority adverse to the contention—that a real tender of the amount due has the effect of stopping interest. But if the case be in point it is in conflict with the authorities hereinbefore cited and must give way before them. If a legal tender duly and regularly made does not have the effect of stopping interest—always supposing that the sum tendered is the true amount due—wherefore the good of all the law relating to tender that is found in the books? What use does tender subserve if it has not that effect? If "consignment" is essential, why did not the law confine itself to rules regulating the consignment? Why burden itself with a whole section of the Code of Practice—some 15 articles—relating to real tender, telling what it is, how to be made, and prescribing precise rules regulating it? When a tender is made of all that is really due the creditor has it then and there in his power to possess himself of that which acquits his claim, and if he refuse it upon the mistaken plea that a larger sum is due him, he is without right to complain at the loss of interest thereafter. All debts, it is true, bear interest at 5 per cent. from the time they mature, and this without stipulation as to interest, but the law, by providing for real tender, supplies a way for the debtor, by putting his creditor in default, to stop the running of in-

terest against him. The consignment without the tender would not stop interest. The law does not so provide. The consignment does not benefit the creditor, for, claiming a larger sum, he will not accept the amount consigned in discharge of the debt, and, thus, not being possessed of the money he has not its use. If it be said he may change his mind, and the money being on deposit, he can at any time possess himself of it and by its use or investment make it earn interest, it is answered so he may, any time after the tender, experiencing a change of mind as to its refusal, notify the debtor of his willingness to accept, and if not paid by the debtor on such notification, interest commences to run again from that moment. On reason and authority, therefore, it is held that a real tender made of the true amount due a creditor, puts him in default in respect to it, and suspends from its date the running of interest on the debt in favor of the creditor.

Since defendant's answer alleges that a legal tender of the amount due had been made to plaintiff on October 30, 1900, which had been then refused, it was error to include in the judgment interest until paid. If it be true that \$2,138.38 is all that defendants owe, and that they tendered it on October 30th, they are not answerable for interest thereafter, and in advance of the trial of the merits of the cause the judgment, in awarding interest, should have confined itself to interest from the time plaintiff claimed it, October 13, 1900, to the date of the alleged tender, October 30, 1900. The same is true of costs. The judgment for the amount admitted to be due should have awarded costs, if any, incurred only up to the date of the alleged tender. The question of interest and costs accruing after the date of the alleged tender should have been left over to await the trial on the merits as to the balance of his demand claimed by plaintiff and disputed by defendant. If on that trial defendants show that the amount they tendered plaintiff on October 30, 1900, was the exact sum which was due, and no less, they will owe no interest and no costs thereafter. But if it appear otherwise, and plaintiff recovers the balance, or part of the balance, he claims, then defendant will owe interest on the \$2,138.38 from October 30, 1900, up to the time it pays the same to plaintiff, as well as interest from October 13, 1900, on the balance, or part thereof, as the case may be, for which he recovers judgment at the trial on the merits, and will also owe the costs of suit incurred after the date of the alleged tender, October 30, 1900.

It is, therefore, ordered that the judgment appealed from be amended as follows:—That plaintiff do have and recover of defendant, the Fitzpatrick-Cromwell Company, Limited, the sum of \$2,138.40, with 5 per cent. per annum interest thereon from October 13, 1900, to October 30, 1900, together with costs if any which had been incurred up to said Octo-

ber 30, 1900, without prejudice to the difference between the amount, \$2,539.30, claimed by plaintiff, and that admitted by defendant, \$2,138.40, and for this difference or balance plaintiff's right to prosecute the present suit is reserved. It is further ordered that plaintiff's right to claim interest from October 30, 1900, on the sum for which judgment is now awarded him, should defendant fail to make good its plea of legal tender, be likewise reserved to him, and also that his right to claim interest from October 13, 1900, on the balance, or part thereof as the case may be, for which he recovers judgment on the trial of the merits, should defendant fail to make good its plea of legal tender, be reserved to them—the same to be considered and determined by the trial court when trial for the balance claimed by plaintiff is had, or thereafter. It is further ordered that as thus amended the judgment appealed from be affirmed, costs of the appeal to be borne by plaintiff and appellee.

(107 La.)

KORY et al. v. LAYMAN. (No. 13,854.)¹
(Supreme Court of Louisiana. May 21, 1902.)

BREACH OF CONTRACT—DAMAGES.

1. A preponderance of evidence establishing plaintiffs' contention that they bought at a stipulated price a mortgage note held by defendant, they are entitled to recover damages for the breach of the contract by defendant, but the legal measure of damage is the difference between the contract price and the value of the note at or about the time it should have been delivered—not the difference between the contract price and the face value of the note, though it appear that at a sheriff's sale, shortly after, of the mortgage property under foreclosure of a prior mortgage, a sum sufficiently large was realized to satisfy prior incumbrances and meet in full the note in question.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by A. Kory & Sons against Leopold M. Layman. Judgment for defendant, and plaintiffs appeal. Reversed.

Farrar, Jonas & Kruttschnitt, for appellants. Solomon Wolff, for appellee.

BLANCHARD, J. Plaintiffs' cause of action is, that in June, 1899, they purchased from the defendant a certain promissory note, executed by Thos. D. Kent and secured by mortgage on certain plantation property in the parish of Lafourche. That the note was for \$7,000, and bore interest at 8 per cent. from date of execution, February 23, 1894, until paid. That defendant, as the owner and holder of the note, agreed to sell it to them for \$1,125 cash, on condition that they would give him a written guaranty against liability growing out of their acquisition of the note. That plaintiffs consented to these terms and offered to pay the price

¹ Rehearing denied June 26, 1902.

stipulated and to execute the required guaranty, but that defendant refused to deliver the note. That, subsequently, the property mortgaged to secure the note was sold under executory process which issued on other notes of a ranking mortgage and realized a sum sufficiently large to pay the first mortgage notes and the note in question herein, and also two other companion notes. The contention of the plaintiffs is that had the note been delivered to them at the time of their purchase, they would have realized its full face value, with interest from January 1, 1899. It seems there had been payments of interest on the note and extensions had, and in this way interest had been paid up to January 1, 1899, and the note extended to January 1, 1900. What plaintiffs sue for, therefore, is the difference between what they agreed to pay for the note, \$1,125, and its face value, \$7,000, which difference is \$5,875, with interest on the full \$7,000 from January 1, 1899. This is the amount of damage they aver they have suffered by defendant's breach of the contract of sale. The answer of defendant is a general denial. There was judgment rejecting plaintiffs' demand and they appeal.

Ruling—No serious questions of law are involved. The case turns on an issue of fact, which is to be determined on the weight and preponderance of evidence, for there is much conflict of testimony. The note in question was one of a series of three notes secured by the same mortgage. Two of them were for \$7,000 each, the other for \$6,895.14. They had originally been the property of Jos. Weill & Co., who pledged them for money borrowed. In this way one of the notes passed into the hands of plaintiffs, one into the hands of defendant, and the third into the hands of one Levy. Representing the second mortgage on the property the notes were for some time considered doubtful securities. But, later on, it began to be thought they had a greater value than had been supposed. Realizing this, plaintiffs, quietly holding on to that one of the notes which had passed into their hands, began to bestir themselves to acquire the other two. But other parties were moving on the same line and a demand for the notes began to develop. Before this demand became active, plaintiffs entered into negotiations with defendant to buy the note he held. Defendant was willing to sell and agreed to take \$1,125, but wanted the written guaranty hereinbefore referred to. Plaintiffs were willing to pay the price and give the guaranty, and to have an instrument evidencing the latter drawn up, the parties repaired to the chambers of the attorney of the defendant. He drew up the instrument, but that one of plaintiffs' firm who was attending to the business expressed a wish to consult his own lawyer before signing. Accordingly, he took the document over to his lawyer, who, it seems, advised him not to sign it. He returned and reported this fact, and the

trade was declared off. Plaintiffs, however, it appears, reconsidered, overnight, the matter, and their version of the story is that the next day, which was June 20th, they informed defendant they had concluded to sign the guaranty, pay the \$1,125, and take the note; that defendant agreed to this, but said he could not then deliver the note because he had left it in the hands of his lawyer, who had departed the city on the evening of the preceding day, and that as soon as he returned he (defendant) would get the note and the document and bring both to plaintiffs; that on the next day—June 21st—defendant failed to bring the note and paper to be signed, giving as the reason that his lawyer had not yet returned; and that on the 22d—the attorney having meanwhile returned—plaintiffs sought defendant for the purpose of consummating the deal, when they were informed by him that his attorney had sold the note to another. Plaintiffs protested, tendered the \$1,125, and demanded the note. This version is disputed by defendant, though the parties agree, substantially, as to what took place in defendant's attorney's office at the time the document evidencing the guaranty was drawn up, and as to the trade being declared off at that time. Following that meeting, defendant's version of the story is, that Max Kory, one of plaintiffs, called on him the following day; that he was not in his office when the call was made; that, later, the same day, he went to plaintiffs' place of business where there was some desultory discussion of the matter, some request on plaintiffs' part that the proposed guaranty be modified; that he (defendant) replied he had left the note and written instrument of guaranty with his attorney, who was then absent from the city, and he would do nothing until his return; that Max Kory told him he was endeavoring to secure the note of the same series held by Levy; that his purpose was to secure all three of the notes as he would then be in a better position to protect his interest; that he (Kory) did not want the note held by him (defendant) until he had secured that of Levy, with whom he was then corresponding—Levy being a resident of St. Louis; and that to this he (defendant) replied with the statement that when Kory secured the Levy note and exhibited it to him, he would know he was in earnest about the purchase of the note he (defendant) held. Was there a contract of sale—a thing proposed, a price agreed upon, consent of parties? If so, it took place at plaintiffs' place of business on June 20th—following the meeting the day before at defendant's attorney's office. Defendant had gone to plaintiffs' office, following the visit of Max Kory to his office, on which occasion he was out. Now, to the proposition that at plaintiffs' office it was agreed, substantially, by and between Max Kory, representing plaintiffs, and defendant, that plaintiffs would sign the guaranty and pay the

\$1,125, and that, thereupon, defendant would deliver to them the note, four witnesses distinctly testify. They are the three Korys—father and two sons—who compose plaintiffs' firm, and their bookkeeper, Louis Gagnet. As against this is the testimony of the defendant alone. On collateral matters, however, having a bearing on the main issue, defendant finds corroboration in the testimony of O. P. Shaver. This witness, as the agent of the holder of the notes representing the first mortgage resting on the property, who was desirous also of getting control of the notes representing the second mortgage, succeeded in purchasing for \$1,600 that one of the second mortgage notes held by Levy. He then called upon Kory & Sons (plaintiffs herein) with the view of purchasing the note they held. In the conversation that ensued he says Max Kory told him his firm was endeavoring to buy the Levy note, and had bought the note held by Layman (defendant herein) conditioned upon his being able to buy the Levy note—from which he (Shaver) inferred or understood the Korys did not want the Layman note unless he could get the other one too. At that time Shaver had the Levy note in his pocket, though he did not apprise them of it. He says he could not get the Korys to make a fair offer for their note, and he, thereupon, left them and went to defendant's place of business. Arriving there he told defendant he desired to buy the note he held. To which he replied, in substance, that he was under obligations to the Korys to sell it to them if they could also buy the other outstanding note held by Levy. Shaver answered this by the statement that the Korys could not buy the Levy note, for he had already purchased it and had it then in his pocket. Whereupon defendant replied, "That releases me; you go and talk to my attorney about it." Shaver then went to the attorney's office, where defendant himself shortly joined them, and the result of the negotiations between them was that defendant sold the note to Shaver for \$1,750, and then and there delivered it to him. Nor did he exact from him any guaranty holding him (defendant) harmless against any liability growing out of his (Shaver's) acquisition of the note, as he had insisted on in the negotiations with plaintiffs. But whatever of corroboration Shaver's statement may be to defendant's denial of plaintiffs' version of the controversy, we cannot give to it the weight of turning the scale in defendant's favor. There still remains the testimony of the three plaintiffs and of Gagnet (the latter of whom had no interest in the case and no bias other than that springing from the fact that he was the employé of plaintiffs) that it was positively understood and agreed upon between plaintiffs and defendant on June 20th that the latter would sell them the note in consideration of the price named and the signing of the guaranty. We are impressed with the belief that a bargain was made and

was only prevented from consummation by the then absence of defendant's attorney from the city—both the note and the written guaranty being in his possession. Before the attorney's return active demand for the note developed. Other competitors for it appeared. There was a chance for a rise in price. Defendant discovered this and took advantage of it. Whereas plaintiffs were only to give him \$1,125, Shaver could be and was forced up to \$1,750, and the note passed to him. This was on the 22d of June. The sale and delivery to Shaver was an active violation of the obligation to sell to plaintiffs, and the latter being apprised of it were dispensed with putting defendant regularly in default, though as to that there was, we think, a sufficient putting in default. Plaintiffs are entitled to recover, but not, we think, the difference between the \$1,125, they had agreed to pay for the note, and its face value, \$7,000. It is in evidence that on June 28th, six days after having been informed by defendant he had disposed of his note to Shaver, they (plaintiffs) sold the note for the same amount (\$7,000), which they held, for \$3,000. This sum is rather to be taken as the value of the note defendant held than its face value. True, subsequently the sale of the mortgaged property by the sheriff developed a price large enough to pay off prior incumbrances and have sufficient to cover in full the notes of the second mortgage. But this could not be foreseen at the time of the negotiations for the note. At that time the value of the note predicated on the approaching sheriff's sale was speculative. The legal measure of damages in the case, in the absence of fraud alleged or proved, is the difference in the contract price and the value of the thing at or about the time it should have been delivered. *Gillett v. Landis*, 7 Rob. 332.

We cannot agree with the contention of defendant that because plaintiffs predicate their claim on another and larger measure of damages their suit should be dismissed; that they cannot recover on the smaller measure of damages because not specifically set up. Plaintiffs alleged a state of facts which, if proven, establish defendant's liability, and then averred that the damages they had suffered and were entitled to recover is the difference between the price they stipulated to pay for the note and its face value. That was merely a conclusion of law. Because mistaken in this, and because the law provides another measure of damages in such case, it is no ground for dismissing their suit that they did not invoke it. The greater includes the less. They prayed to be awarded \$5,875. We find they are entitled to an award of \$1,875—the difference between the \$1,125, the contract price of the note, and \$3,000, which was its value at or about the time the note should have been delivered to them, as shown by the sale which they made, for that price, of the note they held.

For the reasons assigned it is ordered and decreed that the judgment appealed from be avoided and reversed, and it is now adjudged that plaintiffs do have and recover of defendant the sum of \$1,875, with legal interest from judicial demand, together with costs of suit in both courts.

(107 La.)

KAHN v. BECNEL et al. (No. 14,089.)

(Supreme Court of Louisiana. April 28, 1902.)

FACTORS — ENFORCEMENT OF CLAIM — DISCOUNTS — MORTGAGE BY PARTNER — AUTHORITY TO MAKE — RATIFICATION.

1. Defendants recognized the claim as due, including an amount formerly due to the husband of plaintiff, to which she had succeeded as the head of her late husband's firm.

2. The oyer granted and complied with brought all claims sufficiently before the court for the purpose of the trial.

3. Discount charged by plaintiff, not being sustained by the facts, is deducted from plaintiff's claim.

4. A partner is bound by his acts as mortgagee to the extent of his interests, and by his declarations of indebtedness as mortgagor.

5. A partner who is not the special agent of the partnership has no authority to execute a mortgage against his co-partners.

6. The copartners are not bound as having ratified their copartner's act in having mortgaged their property, as it is not shown that they were made aware of the fact that he had mortgaged their property.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. James; Richard McCulloh, Judge ad hoc.

Action by Sarah Kahn, widow of Morris Fettel, against Joseph Becnel & Co. and others. From the judgment, both parties appeal. Modified.

Lazarus & Luce and Edward N. Pugh, for plaintiff. Robert G. Dugué, for defendants.

BREAUX, J. Plaintiff brought this suit to recover a balance of \$20,638.12, with interest and attorney's fee. In her petition she sets forth that this amount is due her by the planting partnership of Joseph Becnel & Co., composed of Joseph Becnel, who died in 1897, whose estate is represented by his widow, and of Numa Becnel, Bazil Becnel, Damas Webre, Omer Webre, and of Victor Bourgeois. The husband of the plaintiff, Morris Fettel, was the commission merchant of defendants from about the year 1893 until his death, on the 17th day of April, 1895, and during that time they became indebted to him in a considerable sum. Immediately after her husband's death, Mrs. Fettel took charge of her husband's commission business, and conducted it in her own name. She, as a commission merchant, advanced merchandise and cash to the defendants. The defendants came into court after they had been sued, and asked for oyer of the notes referred to in plaintiff's petition, and also for oyer of her accounts, which had not been filed

with the petition. Plaintiff, in accordance with this order, filed her notes and accounts, and included in her return to the order accounts showing the balance due by defendants to Morris Fettel, the husband of plaintiff. Defendants, after plaintiff had thus filed the account and papers, filed a written objection, in which they averred that plaintiff had not complied with the order of court, because some of the accounts which she had filed purported to be accounts between M. Fettel and Joseph Becnel & Co., and not between the plaintiff and Joseph Becnel & Co., and that in consequence the accounts claimed by plaintiff did not show a balance in her favor; that there was nothing in plaintiff's petition to connect the defendants with M. Fettel. This was overruled, and subsequently defendants filed their answer. They, in this answer, denied that plaintiff had a mortgage to secure the payment of the notes amounting to \$15,000, mentioned in plaintiff's petition. They denied all indebtedness, and averred that no settlement of accounts had ever been made, and averred further that a correct account would show an indebtedness from the plaintiff to the defendants, instead of a debt against them. The testimony shows that, during all the years that plaintiff or her predecessor was the commission merchant of the defendants, monthly settlements were made, showing exactly the debits and credits between them. A copy was forwarded to the managing partner of the firm. Not long prior to the death of this partner the accounts in the possession of plaintiff and those which had been carried on the partnership books of the defendants were carefully examined, and were found correct. These accounts, as alleged by defendants, included the accounts of amounts due to the late Morris Fettel, not covered by the allegations of the plaintiff's petition. The indebtedness of the defendants to Morris Fettel, amounting to \$7,836.80, was included in plaintiff's account, and from the date of her husband's death she treated this claim as absolutely her own. The allegations of her petition originally were directed exclusively to the recovery of an amount which she claims is due, and as having been advanced since her husband's death. The mortgages were executed to cover the amounts due her for advances, but they also included amounts due her late husband. Defendants assail the validity of these mortgages on the ground that they are not binding. The facts are, as relates to these mortgages, that the property mortgaged did not belong to the surviving partners at the date that they were executed. It was all in the name of Joseph Becnel individually, until 1891, but he really owned only one-sixth of the property, and the remaining five-sixths belonged to his codefendants. He signed the acts of mortgage each year for several years in the name of the partnership, and not in his own name. He had no power of agency from his copartners. He in 1891 executed a deed of

sale to his copartners for five-sixths of the property. It was not recorded until April, 1894, and after that date each year a mortgage was executed by Joseph Becnel individually in favor of Morris Fettel, and after his death in favor of the plaintiff, by Joseph Becnel, for advances in the name of the partnership only. The judgment of the district court deducted the claim of the late Morris Fettel from the plaintiff's claim, and gave judgment for the balance and interest and fee of attorney, less \$1,383.33 charged by plaintiff as discount. It dismissed the demand for recognition of mortgage. Both plaintiff and defendants appeal.

We deem the foregoing a sufficient statement for the time being. We will state other facts as they come to our attention while passing upon the case.

We take up in the first place for decision the question of the amounts as set up in plaintiff's account. We will state in addition to the facts already stated regarding plaintiff's claim that plaintiff's bookkeeper testified as to the correctness of her accounts. The managing partner had the authority to acknowledge the correctness of accounts. The defendants judicially admitted that the managing partner had the authority to acknowledge the correctness of accounts. This partner found no objection to the items carried in the open account, but did not understand how it was possible to hold his firm bound for the payment of the promissory notes secured by mortgage which had been executed as security for advances. These notes had been carried on the account. As usual with commission merchants, entry was made that they had been discounted. The amount of the discount was placed to his credit, less the commission which is usually deducted, and to which the merchant is entitled, when in reality the note is discounted, not when it remains in the hands of the merchant, and he advances the money. The plaintiff not having thus discounted this note, she had no right to discount it herself and charge a commission. *Delogny v. Creditors*, 48 La. Ann. 488, 19 South. 614.

Defendants, as relates to the amount of plaintiff's claim, urge that the sums due to the late Morris Fettel, her husband, should be deducted. They allege in this connection that although plaintiff claims to have complied with the order in matter of oyer directing her to file notes and accounts, she has not complied with the order, for some of the accounts which she has filed were accounts between M. Fettel and Joseph Becnel & Co., and not accounts between plaintiff and Joseph Becnel & Co. In passing upon the question whether this amount should be deducted, as claimed by defendants, we will have to return for a moment to the ruling of the district court regarding oyer. The facts are, as relates to this order, that the term of the district judge expired a short time after he had decided that the court's order, as relates to oyer, had been complied with, and all

needful papers had been filed. His successor, who took up the case after this ruling, held "nothing was said or intimated in the petition about an account of M. Fettel. Under these circumstances, had plaintiff the right to file it in answer to the prayer for oyer of account of Mrs. Fettel? * * * The mere statement that this account was not in any way mentioned in the petition carries with it the denial of the right of plaintiff to file it. Had nothing been urged with regard to it, plaintiff could not have produced it." Upon the ground suggested by the foregoing, the second district judge deducted the balance carried on plaintiff's account of a date anterior to her husband's death. In this we have found that he has erred. The amount could be recovered under the record as made up when the first judge presided, and on the issues as presented.

Plaintiff's contention is that the defendants alleged in their petition for oyer that they could not safely prepare their defense without oyer of the note and a detailed account showing how the total claimed by plaintiff was obtained, and that as she, in answer to this demand of defendants, filed a full and perfect account, showing how the \$23,000 was obtained, defendants were notified, and that they cannot gainsay their own act, and preclude plaintiff from defending herself.

The defendants objected to a consideration of the husband's claim, as not alleged, and one which plaintiff had no right to recover in this suit. The evidence was objected to, and a bill of exceptions reserved: "Counsel objects to that portion which shows on its face that it is an account of the firm of J. Becnel & Co. with M. Fettel, on the ground that there is absolutely nothing in the petition to justify proof of any indebtedness at any time to anybody except the plaintiff herself, Mrs. Fettel. It is understood that the same objection and same ruling applies to all evidence, without its being necessary to reserve the objection." The defendants excepted to the court's ruling.

The claim of Morris Fettel was taken into the business of his widow and the successor of the firm. She, with defendants' consent, as expressed in the different acts, and by the consideration of the notes, treated this Morris Fettel claim as her own. In the different transactions it lost its identity as a separate and independent claim by defendants to Morris Fettel. They bound themselves to pay the whole of the amount to Mrs. Fettel,—that due to Morris Fettel, and that which afterwards became due to the plaintiff. She held the notes and accounts which came into her hands as surviving widow and usufructuary. Personally and as usufructuary she stands before the court to recover the amount to which she is entitled. "The usufruct being of money, the usufructuary owns the thing subject to the usufruct and could bring an action therefor." Civ. Code, art. 536. She can maintain all actions necessary to in-

sure her possession and enjoyment of the right. Defendants' contention is more particularly that plaintiff had not claimed as usufructuary, and in consequence she should not have been heard to prove a right coming from the first firm after the death of her husband. It must be borne in mind that these claims were blended together, with the expressed consent of all concerned, so as to render it not possible with any degree of certainty to determine where the respective rights of the parties begin, and when, as to date, plaintiff's husband's claim was brought to a close. They were treated as one by all the parties concerned. When plaintiff, in answer to defendants' prayer for oyer, filed all her claims, she substantially gave notice to defendants of the claims she held, and which made up the amount alleged to be due. There was then, as to pleadings, a sufficiently complete record made up to enable plaintiff to escape from the bald, technical issue raised,—that defendants had not received ample notice of the nature of the demand. It is true that parties must be held to their pleadings. They should also be held to their contracts. When the obligors recognize a right upon which they are sued as being in the plaintiff, and pray for oyer, while they may show lack of consideration or any other legal defense, they are scarcely in a position to urge successfully, in face of their prayer for oyer for the papers that went to make up the claim sued upon, and in face of the papers themselves, the correctness of which they had acknowledged, and which are filed in response to their motion for oyer, that they are not to be considered as evidence, because of insufficiency of allegations. To illustrate, A. sues on a note for \$1,000 due him by B. The maker, B., defends on the ground that \$100 of the amount is due to C. A. meets this defense by pleading the note, and shows that prior to the date of the note the \$100 became his, and that B. was aware of the fact when he made the note. B. would not be permitted to urge that this consideration assumed by him, irregularly it may be, was not alleged, although the note had been declared upon. The onus of pleading is with the defendant who seeks to avoid paying the amount.

The mortgage claimed by plaintiff as bearing upon the property of the partners, although executed by one of the partners without a power of agency, presents the next question for our consideration. On the face of the papers, the inscription of the deed from Joseph Becnel to his copartners left him without authority to mortgage the interest of his co-owners and partners. Although in the answer defendants allege that Joseph Becnel was their authorized agent to secure advances, and to bind Joseph Becnel & Co., or its members, in matter of obtaining these advances, this did not confer on him the right to execute a mortgage which would bind partners who had not expressly con-

sented to his executing a mortgage. The power to mortgage must be express. In this case it was not. No authority whatever was given to the managing partner, as relates to mortgaging the property. Plaintiff seeks to meet this defense by contending that defendants are estopped from denying that the managing partner before named was not the owner of the property, as declared in the act of mortgage which he executed in favor of plaintiff as mortgagee. One may be bound by a sale who stands by and encourages the purchase of the property, but here there is no testimony tracing knowledge of this mortgage to the co-owners. They, as far as the record discloses, were not made aware of it by any fact brought to their attention. The advances were received in accordance with the agreement of Joseph Becnel with plaintiff, and were expended, it is contended by plaintiff, for the benefit of the partnership; but, we state again, whether they knew that the return of these advances was secured by a mortgage is not known. This partner, it is true, in 1891 acted as the agent of his copartners in buying the plantation mortgaged. The power to buy in that case was expressly granted, but there was nothing in this act authorizing him to mortgage the place. He acted as their agent in managing the business of the partnership. We can only repeat that he had no authority to mortgage the place. Property can be mortgaged by the owner by written deed, but a mortgage is not to be inferred because the owner of the property, who is no party to the deed of mortgage, received benefit from advances afterward made to the one by whom it was mortgaged. "To create a conventional mortgage, there must be clear expression of intent to do so." Succession of Benjamin, 39 La. Ann. 612, 2 South. 187. Here there was no expression of any intent, no deed signed, and no step taken expressly toward ratifying the mortgage which had been executed. Article 3303 of the Civil Code has application in case of agency. The partner is to some extent the agent of his copartners. He is not in every instance considered as an agent. At any rate, we have found no well-considered decision sustaining the view that a partner may, without authority, mortgage the property of his copartners, and expend the proceeds, without informing them, and can cause them to be bound as mortgagors without their knowledge.

We pass to defendants' contention that Joseph Becnel is not bound in propria persona: that he is only bound as a member of the partnership, as he signed only the partnership name of Joseph Becnel & Co. The act of mortgage sets out that he, as owner of the property, mortgaged it to plaintiff. True, as before stated, he signed the act as partner. In signing he did not put an end to all his personal responsibility as a debtor by adding "& Co." to his name. He became bound as joint owner and partner, and personally as a

mortgage debtor, and did not shift the mortgage indebtedness in such a way as to save, free from mortgage, the property to the extent of his interest, which he declared it was his intention to mortgage. He was a principal both as a partner and personally, as declared in the deed, and the added "& Co." does not detract from the force of his declaration. He did not bind his partners, for we have seen that he was not expressly authorized to bind them in executing a mortgage, but he certainly bound himself not to deny the verity of his declarations in the act. He, as a partner, owned one-sixth of the property which was his, whether considered relatively to his interest in the partnership, or in so far as he was personally concerned. To that end he could mortgage it as a partner or in propria persona. A question somewhat similar has been decided in matter of a sale. *Lee v. Ferguson*, 5 La. Ann. 532. We think that his heirs are estopped by the recitals of the act.

It is ordered, adjudged, and decreed that Mrs. Sarah Kahn, widow of Morris Feitel, have judgment against the firm of Joseph Becnel & Co. and against Mrs. Almeyre Webre, administratrix of the succession of Joseph Becnel, Numa Becnel, Bazil Becnel, Damas Webre, Omer Webre, and Victor Bourgeois, jointly, for the sum of \$20,638.62, less \$1,386.33,—a credit to which defendants are entitled. Of this amount, the sum of \$15,000, less \$1,386.33, deducted from the time it was charged by plaintiff, bears interest at the rate of 8 per cent. per annum from May 7, 1896, and 10 per cent. on the aggregate due on the note and interest for attorney's fee; the remainder on open account to bear interest at the rate of 5 per cent. from May 25, 1897. It is further ordered, adjudged, and decreed that the mortgage executed by Joseph Becnel & Co. and Joseph Becnel individually on the 7th of May, 1896, is recognized as legal, valid, and binding to the extent of one-sixth interest of Joseph Becnel in the property of the said partnership, and that same be seized and sold to pay and satisfy the one-sixth of his indebtedness to plaintiff. It is further ordered, adjudged, and decreed that plaintiff's claim to a mortgage on the property of Joseph Becnel & Co. for the remaining five-sixths is rejected. Defendants to pay the costs of appeal.

On Motion for Rehearing.

(June 28, 1902.)

On the application for rehearing our attention is called to the fact that \$1,386.33 (an amount the opinion declares she is not entitled to) is not referred to in the decree immediately after the mention of the total, \$20,638.62. In order to take this out of the domain of all possible uncertainty, the deduction of \$1,386.33 from the \$20,638.62 is now ordered and decreed, leaving due altogether \$19,252.29. After having made this deduction of \$1,386.33, the court is unanimously

of opinion that the rehearing should be refused; the other points argued not presenting grounds for rehearing.

(107 La.)

STATE v. LEO. (No. 14,450.)¹

(Supreme Court of Louisiana. June 16, 1902.)

FORGERY—INDICTMENT—SUFFICIENCY.

1. Where the alleged falsely altered instrument, with the uttering of which a party stands charged in an indictment, is not full and complete on its face, but requires the introduction of evidence of extrinsic facts to make it such, such extrinsic facts must be set out in the indictment.

2. It does not suffice, in a criminal statute, that its purpose should be manifest. To be effective, that purpose must find expression in its language as required by legal rules. Courts may be authorized sometimes to restrain the generality of the terms of a law so as to exclude from its operation exceptional cases, but not to enlarge the terms of a limited law.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Joshua G. Baker, Judge.

Joseph M. Leo was convicted of forgery, and appeals. Reversed.

Defendant has appealed from a sentence to the penitentiary at hard labor for two years "for the crime of uttering and publishing as true a false, altered, forged, and counterfeited bond." In the indictment upon which he was tried and convicted it was charged that he "feloniously did utter, tender, and publish as true certain false, altered, and counterfeited bond, the tenor of which said bond is as follows, to wit:

"I, the undersigned, agree to stand as Surety for ~~Andrew~~ and Leo to the amount of his

~~the~~ contract twenty two hundred dollars \$2200 Respt

"[Signed] Thos. J. Callaghan."

—He, the said Leo, at the time he uttered, tendered, and published as true the said false, altered, and counterfeited bond, well knowing the same to be false, altered, and counterfeited, with the felonious intent to injure and defraud, contrary to the form of the statute of the state of Louisiana in such case made and provided, and against the peace and dignity of the same." We find in the record the following demurrer: "Defendant, Jos. M. Leo, demurs to all and any evidence on the part of the state under the indictment in this case, and enters this general demurrer on the following grounds: (1) That said indictment does not charge any offense under any statute of this state. (2) The offering or forging or counterfeiting or falsely making or altering a bond, as well as the offense of publishing as true any such false, altered, forged, or counterfeited bond, feloniously knowing the same to be false, altered, forged, or coun-

¹ Rehearing denied June 28, 1902.

¶ 1. See Forgery, vol. 23, Cent. Dig. § 72.

terfected, with intent to injure and defraud any person or body politic, are common-law offenses, since the statute does not define what is forgery or counterfeiting. (3) That, in charging said offenses against defendant, the indictment should have conformed with the practice at common law, with the modification, however, introduced by the statutes, to the effect that 'It shall be sufficient to describe such instruments by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac simile thereof or otherwise describing the same or the value thereof.' (4) That said indictment does not conform to the common-law practice, with subjoined amendment in several respects. (5) That the indictment is defective in this: that it does not describe the instrument charged to be forged by any name or designation whatever, but terms it in general as 'a bond,' without stating in the least what sort or species of a bond, so as to apprise the accused of the nature or class of instrument or bond which he is charged to have forged, or to have uttered, tendered, or published same. (6) That the indictment is defective in this: that when it alleges the contents of said bond, by videlicet, it does not recite the whole instrument, but leaves out the contract mentioned in said bond, by which said Thomas J. Callaghan is said 'to stand as security for Jos. M. Leo to the amount of his contract, twenty-two hundred dollars.' That the nature of said contract, its species or kind, are not made apparent, by reason of the omission to state in said indictment any name or designation by which the said contract may be usually known, by omitting to give even the purport thereof, and without in any wise describing the same, or the value thereof. (7) That said indictment is defective in this: that the only description or designation of the obnoxious instrument is that it is 'a bond,' generally, while under a videlicet the security part of the contract is singled out and copied in the indictment, without explaining or specifying what the contract is, in extenso, and without copying the said contract in the indictment. That the accused is not informed of the nature, kind, or species of the contract referred to in the excerpt inserted in said indictment, and accused is entitled to be apprised of the whole contract,—principal as well as accessory. (8) That said indictment is defective in this: that it does not substantially state in what consists the alleged forgery, counterfeiting, or alteration, and does not substantially point out what part thereof is forged, counterfeited, or altered, nor what part is genuine, nor does it aver the whole of the instrument aforesaid is forged, counterfeited, or altered. Therefore defendant prays that this demurrer be sustained, and that said act of indictment be quashed." Defendant filed, also, a second demurrer to the indictment preferred against him. He averred: "(1) That the allegations there-

of do not charge any offense known to the laws of Louisiana. (2) That the allegations or charges are insufficient to characterize any offense or crime denounced and punishable by the laws of Louisiana. (3) That the allegation 'to injure and defraud' is too vague and is insufficient, there being no statement as to the party he injured and defrauded. Wherefore defendant prays that the said indictment be quashed, and the prosecution dismissed." These demurrers were overruled, defendant reserving a bill of exceptions. The defendant was arraigned, and pleaded "Not guilty," and the case went to trial. Upon the trial the district attorney offered in evidence the bond and contract referred to in the indictment, which evidence was objected to by the defendant. The court overruled the objections, and the evidence was admitted, defendant reserving bills of exception. The trial resulted in a verdict of guilty, with recommendations to the mercy of the court. Defendant moved for a new trial, which the court refused. He reserved a bill of exception to this ruling, and filed a motion in arrest of judgment, which being overruled, he, after sentence, appealed.

The first of the bills of exception referred to as having been reserved to the introduction of evidence recites that when one Mrs. C. McCroslin, a witness in behalf of the state, after being sworn, was testifying on behalf of the state, a certain written paper of specifications of contract between defendant and the said Mrs. McCroslin was handed to said witness for examination and identification, and, after having been examined by said witness, the state then offered the said written instrument of specifications in evidence; and counsel for the defendant now makes part of this bill of exceptions the said written instrument of specifications so offered at the time, to which offer in evidence of the same counsel for the defendant then and there objected on the grounds, among others: "First. That the so-called bond and written specifications are not known at law nor in common parlance as a 'bond,' and the same do not fall under the operation of Louisiana Acts of 1894, No. 180, aforesaid (page 223), since in them there is no stipulation whatever by builder, contractor, or undertaker for the payment of workmen, mechanics, and laborers, nor furnishers of material and supplies. Secondly. That the term 'his contract,' in the videlicet inserted in the act of indictment herein is a vague and loose term, pointing to no kind, species, or nature of contract for which the said Thomas J. Callaghan assumed to stand as security; that it might apply to any sort or species of obligations whatever, as to date, contracting parties, and nature and purport of obligations, so that in that respect the instrument does not sufficiently put defendant on his guard, and indicate what evidence he had to meet. But said objections, as also the four objections in said bill of exceptions No. 2, here reiterated and re-

a part hereof, as well as the various allegations of defendant's demurrers overruled by the court, and made a part of the present bill of exceptions, were overruled by the court for the reasons stated at the time by the court. Counsel for defendant then and there excepted, and made the said written instrument of specifications a part of his objections, together with the testimony of Mrs. McCroslin, which counsel now also makes part of this bill of exceptions; and now the defendant tenders this, his bill of exceptions, for signature, and prays that the same be signed and made a part of this record." The second bill recites that, "when Mrs. McCroslin was testifying as a witness for the state, a certain written paper, which are specifications of a contract between the defendant and Mrs. McCroslin, was handed to the witness for examination and identification, and, after having been examined by the witness, the state then offered the said contract and specifications in evidence, to which evidence counsel objected on the grounds: First. That the instrument sought to be offered, and which purported to be an agreement of specifications for a building to be erected by this defendant, was inadmissible in evidence, inasmuch as no reference had been made thereto, nor was there any allegation in the indictment to put this defendant sufficiently upon his guard, so as to know what evidence he had to meet. Second. That the said instrument offered by the state was mere specifications, and was not a bond which was alleged to have been forged and counterfeited; that the said instrument and specifications were separate and distinct from the so-called bond made the subject-matter of the alleged uttering and publishing as true; and, furthermore, that the so-called bond, as set out in the indictment, does not in any way refer to the specifications then sought to be offered in evidence. Third. That the indictment herein charges the uttering and publishing as true of a certain false, forged, and counterfeited bond of twenty-two hundred dollars, without in any respect giving the name, appellation, species, or kind of obligation by which any alleged contract might be ascertained or be known; nor does the said indictment give, either literally or in any other way, any allegation by which this defendant could be apprised of the said specifications so intended to be offered by the state on the trial hereof. Fourth. That if the document herein set out in the indictment is intended to be a bond to secure a contract, and for the security of workmen and furnishers of materials, then and in that case the said pretended bond as set out in the indictment is not in compliance with the act approved July 12, 1894, and known as Act No. 180 of 1894. But said objections so urged to the admission of the specifications herein were overruled by the court for the reasons stated by the court at the time, to which ruling of the court counsel for the defendant then and there excepted,

and made the specifications a part of his objection, together with the testimony of Mrs. McCroslin, which counsel also makes part of this bill of exceptions; and now this defendant tenders this, his bill of exceptions, for signature, and prays that the same be signed and made part of the record herein." The evidence objected to, but introduced, was annexed and made part of the bills, as was also the testimony of Mrs. McCroslin, taken down by the stenographer.

The bill of exception to the refusal of the new trial recites that the motion for a new trial, which was annexed and made part of the bill, having come up for trial, "after argument thereon the court, for oral reasons assigned, overruled the motion, to which ruling counsel for defendant excepted, and, with leave of the court, made the contract of specifications on file part of the bill." The motion for a new trial was based upon the following assigned grounds: "First. Because the verdict herein rendered is clearly contrary to the law and the evidence. Second. Because on the trial hereof the witnesses W. O'Brien, Joseph Woodhall, L. W. Shaw, and S. W. Leo, witnesses on behalf of the defendant, testified, in substance, that they had worked on the building wherein this alleged bond is said to have been given, and that they had had conversations both with Mrs. McCroslin and her husband, Mr. McCroslin, and that they both had stated to the said witnesses whose names are herein given that they never required a bond from this defendant on the building which was then being put up. Third. Because on the trial of this cause the state offered in evidence, over the defendant's objection, a certain instrument in writing, purporting to be an agreement of specifications for a building to be erected by this defendant; that, over defendant's objection, the said specifications, although no part of the alleged indictment, and having no reference thereto, were permitted to go to the jury; that by reason thereof this defendant was prejudiced by the admission of said testimony. Fourth. That the said admitted instrument, termed 'Specifications,' was not mentioned nor set forth in said indictment, nor was there any way by which this defendant could be apprised of the intended offer of said instrument of specifications, and that the admission thereof was prejudicial to his rights. Fifth. Because, if the alleged contract which is made the basis of this indictment was intended to be a contract as provided for by Act No. 180 of 1894, then and in that case the same is not drawn up, nor is it in compliance with the said act, and is null; that the said pretended bond has never been recorded in the mortgage office in compliance with the said act heretofore recited. Sixth. That the said document offered in evidence, and described in the indictment as a 'bond,' is not known as such either in law or popular appellation, but is simply a stipulation of suretyship, vague and general

in its terms, without setting forth with whom the contract was made, when made, by whom made, and what the species, kind, or nature or object of the obligation was; that, in order that the said surety stipulation should be valid, that the principal obligation of which this was a suretyship should have been set forth, either by giving the name by which it is known in law, or by giving its purport, neither of which has been done herein. Seventh. Act No. 180 of 1894 determines and classifies as a bond only the contract of suretyship on building contracts which is required of contractors and builders to secure the payment of all the workmen, mechanics, and laborers, and all who furnish materials and supplies actually used in the building; that there is no law or statute which classifies or terms as bonds stipulations of suretyship which the contractor or builders makes and furnishes to secure the owner with whom it is made, nor is the surety stipulation made in favor of the owner himself."

Defendant moved an arrest of judgment on the grounds: "First. Because the said indictment herein does not set forth the violation of any penal statute of this state. Second. Because the indictment fails to set out any one of the known obligations as set forth in the statute which can become the subject-matter of forgery. Third. That the indictment sets out as follows: 'That the said defendant, Joseph M. Leo, did feloniously utter, tender, and publish as true a certain false, altered, and counterfeited bond, the tenor of which is as follows, to wit: "I, the undersigned, agree to stand as security for Joseph M. Leo to the amount of his contract, twenty-two hundred dollars. Respectfully, [Signed] Thomas J. Callaghan."' That the said pretended bond as herein set out is not a bond in law, but is only an agreement, which has never been perfected into a bond. That, as the statute prescribes what species of documents shall become the subject-matter of forgery, forgery cannot be committed by making an instrument in any form, unless provided for by law, even though it be calculated to deceive most persons. Fourth. Because, if the pretended bond as set forth and described in the said indictment is intended to be known as a bond relative to contracts for buildings, and the security of workmen and furnishers of material, then this defendant says that the said document does not comply with, nor is it in accordance with, Act No. 180 of 1894. That said act determines and classifies as a bond only the contract of suretyship on building contracts which is required of contractors and builders to secure payment of workmen, mechanics, and laborers, and all who furnish materials and supplies actually used on the building, and that there is no law which classifies or terms as bonds the stipulation of suretyship which the contractors or builders may make to secure the owner with whom it made the building contract, nor does the act stipulate

that the surety stipulation shall be made in favor of the owner himself; that nowhere is the document as set forth in the indictment known in law as a bond, and it is therefore not the subject-matter, nor can it be the subject-matter, of the crime alleged against this defendant." In view of the premises, defendant prayed that judgment herein be arrested, and for general relief.

Albert Voorhies and Henriques & Dunn, for appellant. Walter Gulon, Atty. Gen., and J. Ward Gurley, Dist. Atty. (Lewis Gulon, of counsel), for the State.

NICHOLLS, C. J. (after stating the facts). Section 833 of the Revised Statutes, after declaring that whoever shall forge or counterfeit, or falsely make or alter, or shall procure to be falsely made, altered, forged, or counterfeited, or shall aid or assist in falsely making, altering, forging, or counterfeiting, certain instruments which were specially enumerated, proceeds as follows: "Or shall alter [utter?] or publish as true any such false, altered, forged or counterfeited record, certificate, or attestation, charter, deed, will, testament, bond, letter of attorney, policy of insurance, bill of exchange, promissory note, acceptance, indorsement, assignment, order, acquittance, discharge, or receipt, knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person or body politic or corporate, on conviction shall be imprisoned by imprisonment at hard labor for not less than two nor more than fourteen years." Section 1049 declares that "In any indictment for forging, uttering * * * any instrument it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac simile thereof, or otherwise describing the same or the value thereof." Defendant insists that the instrument averred to have been feloniously uttered is not on its face a bond. That it is not sufficiently described. That extrinsic parol evidence had to be called in and used in the trial in aid of the charge made against him, touching matters and things which should have been set out in the indictment, so that he should have known, as he was entitled to have known, under the constitution (article 10), the nature and cause of the accusation against him. That the evidence introduced on the trial should not have been admitted, he not having been properly apprised by the indictment as to what evidence he would have to expect against him or be prepared to meet. That the word "bond," in a statute prohibiting the uttering of a false, altered, and counterfeited bond, means a bond binding upon some obligor, to some obligee, and requiring something to be done, which, if not done, can be compensated by action on the bond. 13 Am. & Eng. Enc. Law (2d Ed.) page 1098, note; State v. Briggs, 24 Vt. 501.

That the supreme court of Louisiana had held that the offense denounced as forgery was a common-law offense, because the Louisiana statute had not defined the offense, but remitted its definition to the common-law jurisprudence. That therefore it is not sufficient for the indictment to follow the language of the statute. It must be made in distinct compliance with the common-law requirements, except so far as modified by Louisiana statutes. That the indictment should have shown every fact and circumstance constituting the offense, so that the accused could not be misled as to the charge he has to answer. That an indictment describing a specific offense by the use of general terms, without setting out also all the facts and circumstances connected therewith, if the facts alleged do not make out the offense charged, is defective. That it is not enough to charge that the defendant committed the crime of uttering a false and altered instrument, but it should be alleged how he had committed it. *State v. Flint*, 33 La. Ann. 1288; *State v. Stiles*, 5 La. Ann. 324; *Whart. Cr. Pl. pars. 154-221*. That when the nature, sort, or effect of the instrument does not affirmatively appear on its face, the extrinsic matter to show this must be alleged. 2 *Bish. New Cr. Proc.* par. 415; *Com. v. Hinds*, 101 Mass. 209-211; *State v. Wheeler*, 19 Minn. 100 (Gil. 70) et seq.; *Williams v. State*, 51 Ga. 535; *People v. Park*, 1 Am. Cr. Rep. 227; *People v. Galloway*, 17 Wend. 543; *People v. Harrison*, 8 Barb. 560; *Cunningham v. People*, 4 Hun. 465-457; *State v. Murphy*, 46 La. Ann. 419-421, 14 South. 920.

The defendant was not charged with forging or with altering an instrument of any kind. He is charged with having feloniously uttered, tendered, and published as true a certain writing, which is to a certain extent, at least, described in the indictment. It is therein designated as a bond. Who altered it is immaterial. In the portion of the instrument inserted in the indictment, we find that a pen had been run through the word "Andrus" and the word "and," and that letters "Jos" and the "M" are interlined; that the word "their" has been erased, and the word "his" interlined. The instrument, without the erasures and interlineations, reads: "I, the undersigned, agree to stand as security for Andrus and Leo to the amount of their contract, twenty-two hundred dollars (\$2,200). Respt., [signed] Thomas J. Callaghan." While with the alterations and interlineations it reads: "I, the undersigned, agree to stand as security for Joseph M. Leo to the amount of his contract, twenty-two hundred dollars (\$2,200). Respt., [signed] Thomas J. Callaghan." So that Thomas J. Callaghan is made to appear as agreeing to stand as security for Jos. M. Leo to the amount of his contract, \$2,200, instead of agreeing to stand as security for Andrus and Leo to the amount of their contract, \$2,200. So much appears on the face of the indictment. It does not appear who

altered it. It is declared that it had been falsely uttered. It is further declared in the indictment that the defendant uttered, tendered, and published as true this false and altered instrument, designated therein as a bond, well knowing when he did so that the same was false and altered, and that this was done with the felonious intent to injure and defraud. The indictment shows that this instrument so altered was tendered (uttered) by Leo to some one, though neither the person to whom it was offered, nor the circumstances under which it was uttered and tendered, are set out. The state claims that it is apparent that it was uttered and tendered to some one with whom Leo had either already made a contract, or with whom he proposed to make one if he could. It contends that the altered instrument, in the condition in which it appears in the indictment, was well calculated to mislead, deceive, and defraud any person to whom it would be tendered falsely as an agreement on the part of Callaghan to stand as security for Leo on his contract; that the moment Leo feloniously uttered this false and altered instrument, with the knowledge that it was such, and with the felonious intent of defrauding some person, he committed a crime, under section 833 of the Revised Statutes, no matter who the person might be to whom the instrument was presented; no matter what the character, terms, or amount of the contract might be; no matter whether a contract had already been entered into, or merely proposed; and no matter whether the party to whom it was presented should have, in fact, been injured or defrauded or not; that the legal commission of the crime was one thing, and the detailed circumstances of the crime another thing; that all that the state was called upon to set out in the indictment and disclose to the accused was the nature and cause of the charge against him, so that he knew what it was, leaving to him to call for detailed specifications of the charge in a bill of particulars if he thought himself not fully advised in the premises.

An examination of section 833 of the Revised Statutes will show that the instruments, under the terms of the section, which it is made a crime to utter or publish as true, if false, altered, forged, or counterfeited, are for some reason made smaller than those which in the first portion of the section it is made a crime to falsely make, alter, forge, or counterfeit; that in this larger enumeration "securities for money or property" and "bonds" are both set out, while in the smaller one "securities for money or property" are left out, but "bonds" are retained. The district attorney, with the statute before him, evidently felt it necessary to set out in the indictment the instrument which was to be averred as having been feloniously uttered in a manner such as to make it fall by designation under some one of the instruments included in the enumeration of the statute, and for that reason he selected the term "bond." The

object of the general assembly in enacting section 833 is very evident, but it does not suffice in a statute (particularly in a criminal statute) that its purpose should be manifest. To be effective, the purpose must find expression in the language of the law itself, as required by legal rules. We have held it permissible sometimes to restrain the generality of the terms of a law so as to exclude from its operation exceptional cases, but we are not authorized to eke out or enlarge the terms of a limited law so as to place thereunder cases which evidently should have been included therein to fully effectuate their object, but which by inadvertence or other causes were omitted. We do not think it necessary for the purposes of this case to give a definition to the word "bond." This particular statute deals with "bonds" as things other and distinct from "securities for money or property," and we should do so also. The term "bond" is sometimes used as a generic term,—as a written instrument by which a person has become bound or committed legally; as, speaking of an honest man, we hear it frequently said, "His word is as good as his bond," without reference to the specific form of the evidence of the obligation. Usually the word is taken to mean a secondary or accessory securing a primary obligation in favor of some third person. The indictment does not declare that the defendant, Leo, had come under any civil obligation, written or verbal, towards any one for which Callaghan had become his surety; that Leo had in fact made any contract, or that he had tendered it to any one with the view of effecting a contract. The instrument declares: "I agree to stand security for Joseph M. Leo to the amount of his contract, twenty-two hundred dollars. Thomas J. Callaghan." Armed with it, Leo would doubtless have been in a position to induce some one to enter into a contract with him to an amount of \$2,200. The instrument would, under such circumstances, notwithstanding its terms of present obligation on the part of Callaghan, be, at most, an offer or tender by him to become security for Leo on a contract to the extent of \$2,200. The instrument would not, on its face, nor in reality, be a bond. If Leo should become liable upon a future contract, it might be said that coupling the obligation of Callaghan, evidenced by this instrument, with his own, he had furnished a bond in favor of the obligor in the contract; but, until this obligation of Leo had arisen, this instrument, said to be Callaghan's, was merely inchoate, prospective. It was not on its face a bond. Other facts would have to arise and be connected with it to make it constitute part of a bond. It is true that as great a wrong and injury might be accomplished through the instrumentality of a writing of this kind as might be accomplished by the uttering of an instrument technically and strictly falling under the designation of a bond; but we cannot, in matters of crime, pass from one act falling with-

in a statute to one falling without it, no matter how alike they might be in the harmful consequences which the statute seeks to prevent. We do not think the altered instrument was technically a bond. Assuming that the facts connected with the uttering of this instrument were such as to have brought the defendant within the grasp of the provisions of the statute, these facts should have been set out in the indictment. In *State v. Murphy*, 46 La. Ann. 420, 14 South. 920, we quoted approvingly the following language from Wharton (page 740): "Where an instrument is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force. Thus, where an indictment charged that A. did feloniously and fraudulently forge a certain writing, as follows: 'Mr. Bostick: Charge A.'s account to us. B. & C.,'—with intent to defraud B. & C., it was held that the indictment was not valid without charging that A. was indebted to Bostick, as there could be no fraud unless a debt existed." Referring to the case before us at that time, we said: "The indebtedness may be proved aliunde. To admit the proof and give legal force to the indictment, it must aver such facts as will invest the instrument with legal efficacy. Where an instrument is not on its face sufficiently full to be a receipt, the defect may be supplied by showing a course of dealing between the parties in which it is understood to be and treated as such. This extrinsic matter must appear both by averment and proof. * * * Assuming the discussion that the account judged is genuine, it is not per se of legal efficacy against any one without additional averments in the indictment setting forth the facts connected with the transaction." See, on this subject, *State v. Stephens*, 45 La. Ann. 702, 12 South. 883. The indictment in the present case is for the same reason faulty, and the testimony offered in support of it, and which was admitted over defendant's objection, should have been excluded.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court therein rendered, and herein appealed from, be, and the same are hereby, set aside, annulled, avoided, and reversed.

(107 La.)

HARVIN v. BLACKMAN. (No. 14,232.)¹
(Supreme Court of Louisiana. May 26, 1902.)
APPEAL—RECORD—STATEMENT OF FACTS—ADMISSIONS BY COUNSEL—ESTOPPEL.

1. If an appellee has in point of fact placed the record in such shape in the district court as would entitle him, in case of an appeal by his opponent, to maintain by the record the judgment in his favor, it is the duty of appel-

¹ Rehearing denied June 25, 1902.

lant to place the record before the court on appeal in the same condition; but it is no part of his duty to come to appellee's assistance and make out a proper record for him, if he, through negligence, has failed to do so himself.

2. An appellant is entitled, acting in his own interests, to have a statement of facts made out, but he is not called upon to do so in the interest of the appellee.

3. A district judge cannot be called upon to make out a statement of facts in a case after an appeal has been perfected therein, either by motion in the district court or certiorari from the supreme court.

4. Plaintiff cannot be divested of the ownership of real estate worth \$4,000 by the verbal admission and conclusion of law of an attorney at law that a plea of estoppel filed by the defendant is well founded, without any evidence in the record back of the admission.

5. Courts have frequently declared that a lessee is estopped from contesting the lessor's title while he holds possession under the lease, but this is subject to exceptions. If the lease itself was the result of force or violence, the facts connected with the same should be examined into. Estoppels are not favored in the law, particularly when advanced in limine by way of exception. It is better that such pleas should be determined after trial and hearing upon the whole case. Succession of Frances, 23 South. 254, 49 La. Ann. 1740.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Red River; Charles V. Porter, Judge.

Action by Marion Harvin against Theophilus Blackman. Judgment for defendant, and plaintiff appeals. Reversed.

Sutherland & Hall, for appellant. Egan & Scheen, for appellee.

NICHOLLS, C. J. The fact that the defendant died two days prior to the rendition by this court, on March 17, A. D. 1902, of the judgment in this case, having been formally called to the attention of the court, and it appearing by papers filed that the widow of the deceased has been duly recognized by the court below as natural tutrix of the minor heirs of the defendant, and has qualified as such, and it appearing further that the widow, in her own right and as tutrix aforesaid, and likewise the major heirs of the defendant, have come forward and made themselves, by plea filed, parties to this appeal in lieu and stead of the deceased defendant, the court orders the judgment aforesaid rendered on the 17th of March, A. D. 1902, to be set aside, and now hands down anew the same opinion and judgment as of this date, as the opinion and judgment of the court in the case, which judgment or decree is as follows, to wit:

The plaintiff alleged: That on March 13, 1893, he acquired from the defendant, under private act duly recorded in the parish of Red River, for the price of \$1,250, certain real estate, which he described, containing 200 acres, more or less, as shown by deed, which he declared he annexed and made part thereof. That when he acquired said property it was in the woods, and had no improvements of any kind whatever on it, and

that since the acquisition of said property he had cleared up and put in a high state of cultivation about 120 acres of it, fenced it, built houses, outhouses, cisterns, and tenant houses necessary for the successful operation of it as a farm, at his own expense, which improvements were well worth the sum of \$2,500. That he had fully paid and settled the purchase price of said land, as will more fully appear on the trial. That on January 9, 1899, after he had fully paid for said place, or was prepared to and had offered to pay whatever amount might be due to said Blackman, the said Blackman sent for him to come to his house for the purpose of arranging any difference still existing between them, and that, while in the said Blackman's house on this peaceable mission, the said Blackman, with threats and attempted violence, compelled petitioner, by force and against his will and consent, to sign a deed conveying the above-described property back to said Blackman, which deed was recorded in Book I of Conveyances. That the aforesaid deed stipulates as a consideration for said sale the sum of \$1,200 cash, which sum was never paid; nor did petitioner at said time know what price, or that any price, was fixed in the deed for the sale of said land; the same being executed against his will and consent. That said described property was well worth the sum of \$4,000, and that the sale from him to the said T. Blackman, of date January 9, 1899, was null and void, for the reason that said sale was made under duress, as above set forth, and against the will of petitioner, and without his consent, and for the further reason that there was no consideration for said sale. He showed that by law he was entitled to have said sale of date January 9, 1899, rescinded and revoked and set aside. That, in the alternative, in the event the court held that the aforesaid deed from himself to T. Blackman, of date January 9, 1899, should not be rescinded, then and in that event he desired and was entitled to a judgment against the said T. Blackman in the full sum of \$1,200, with 5 per cent. interest thereon from January 9, 1899; being amount stipulated in said deed as the consideration of said sale, which was in no manner paid or settled. That at the time he signed said deed to said Blackman, on January 8, 1899, said Blackman threatened to take his life if he ever divulged the fact of his having signed said deed under duress, and that he had remained in fear of his life since said time. That said forced sale left him without means to prosecute a suit to rescind the said sale, and that he, being an uneducated and unskilled colored man, had to depend upon hard manual labor to earn said means, at the same time having to support a large family, and that at the earliest possible moment he instituted this suit. In view of the premises, petitioner prays for services and citation hereof, and that, after due proceedings had, he have judgment against

the said Theophilus Blackman, revoking, rescinding, and setting aside the sale from himself to the said Blackman (of date January 9, 1899, and recorded in Book I of Conveyances, p. 14) of the property hereinbefore described, and that he be restored to the quiet possession thereof. But in the event the court refused to rescind said sale, then, in the alternative, he prayed for judgment against the said Blackman in the sum of \$1,200, with 5 per cent. per annum interest thereon since January 9, 1899; being the consideration stipulated in said deed which was not paid. He further prayed for all orders and decrees necessary, for costs, and for general and equitable relief. The petition was filed on November 5, 1900. Defendant, without in any way answering the demand of the plaintiff, filed a plea of estoppel. He averred that he was the owner of the property described in plaintiff's petition; that for the first several years the plaintiff had leased the same from him, and in January, 1899, he leased the same to plaintiff for the period of three years (that is, for the years 1899, 1900, and 1901) for the price and sum of \$300 per year for the years 1900 and 1901, and \$165 for the year 1899, and that the said Marion Harvin executed his three notes in favor of the appearer for the said sum of \$300 and \$165, payable one each year; that the notes due for the rent of the years 1899 and 1900 have been paid, and that he now holds the note for the rent of said land for the year 1901, a copy of which was annexed to and made part hereof, and contract of lease for the year 1899, also annexed hereto and made a part hereof; that the said plaintiff, Marion Harvin, was in possession of the land described when this suit was brought, and was now in possession of said premises, as the tenant of defendant, and that, as lessee and holding under this defendant, he was estopped from in any manner disputing and contesting defendant's title to the said land; and that his suit should be dismissed. In view of the premises, he prayed that this plea of estoppel be filed, and that same be maintained, and the suit against him be dismissed, and for all orders necessary, and for costs and for general relief. The plea was tried, and judgment was rendered by the district court in favor of the defendant and against the plaintiff, dismissing his demand at his costs. The judgment was declared by the court to have been rendered "by reason of the law and the plea of estoppel filed."

The plaintiff, by petition, applied for and obtained an order of appeal at chambers. He gave an appeal bond, which was approved on the 8th of November, 1901. The transcript of appeal was filed in the supreme court on November 22, 1901, and on the same day the defendant moved to dismiss the appeal in the following words: "The transcript is not complete, and does not show the evidence or admission on which the judgment of the district court was rendered. He filed

in the district court a plea of estoppel on the ground that the plaintiff held the property in controversy as his tenant under a lease contract, to which plea were attached the rent notes of plaintiff in his favor, and plaintiff's counsel admitted in open court that the facts set up in the plea were true, and did not require the evidence or admission to be taken down in writing; that the appellant had made no effort to have the record completed by getting a statement of facts from the opposing attorneys, nor from the court, which statement of fact could have been easily obtained; that defendant himself had made application in open court to have the record completed, by filing a motion for same, a copy of which he annexed and made part of his motion to dismiss, which motion the district judge denied, to which ruling of the court appellee excepted, and reserved a bill of exceptions; that the judge gave as his reason in the bill of exceptions for denying the motion that an appeal had been granted, and a bond for appeal filed, and he did not think he had any authority to grant any further orders or take any further proceedings in the case, but that the counsel for plaintiff did admit in open court that the notes for rent of the defendant, annexed to the plea of estoppel, were genuine, and that the plea of estoppel was good; that he annexed a certified copy of the bill of exceptions, and made the same part of his motion to dismiss, and also a copy of the minutes of the court, showing the filing of said minutes; that it was the duty of the appellant to complete the record, and he not only had failed to do so, but had refused to permit him (the appellee) to complete the same, by having a statement of facts placed therein. In view of the premises, he prayed that the appeal be dismissed."

In the bill of exceptions filed by appellee the district judge refused to make out a statement of facts, for the reasons stated, but added that, "in order to avoid delay, in the event the supreme court should think differently, he would state that, on the trial of the exception referred to, counsel for plaintiff, in open court, admitted that the notes annexed to the exception and plea of estoppel were genuine, and that the plea was good."

After this motion was filed, plaintiff's counsel consented and agreed that the statement of facts made by Judge C. V. Porter in the bill of exception of date November 14, 1901, a copy of which was annexed, should be filed in the record, and that same go into the transcript as the judge's statement of facts in the case, as if made and included in the original transcript, agreeing that the court shall consider the statement of facts in the case as fully as if ordered to be filed on this certiorari being made peremptory. The explanation of this agreement is that the appellee had, after making a motion to dismiss, applied to this court for a certiorari, addressed to the district judge, directing him to make out a statement of facts in the case. The

clerk of the court certified that the record delivered by him contained a true and correct transcript of the proceedings had and documents filed, with all the minutes of the court, and all the evidence adduced in the case. It will be seen that while the appellee was seeking to have the appeal dismissed on the ground that through appellant's fault the transcript was not complete, and did not show the evidence or admission on which the judgment of the district court was rendered, he was himself attempting to have the record made up so as to show those facts, by means first of an application to the district judge, after the appeal in the case was perfected, to make out a statement of facts, and subsequently through a certiorari from this court to the judge, directing him to make out such a statement in order to "correct the record." It is evident that the appellee was apprehensive, if the appeal was not dismissed in limine upon the ground that the appellant was at fault in sending up the transcript as made, and the case should be taken up on the merits, he himself would be held to blame in not having placed the record in such shape in the lower court as would warrant and justify the appellate court, in case of an appeal, in affirming the judgment of the district court in his favor. It is unquestionably true that if an appellee has, in point of fact, placed matters in the district court in such shape as would entitle him, in case of an appeal by his opponent, to maintain by the record the judgment rendered in his favor, an appellant will be required to place matters before the supreme court in the same condition; but it is no part of the duty of an appellant to come to appellee's assistance if the latter has, through laches and negligence on his part, failed to make out for himself a proper record. He should have anticipated the possibility of his opponent's appealing, and taken precautions to safeguard his interests to meet that contingency. An appellant is entitled, acting in his own interests, to have a statement of facts made, if he claims the right at the time, in the manner, and under the circumstances fixed by the law; but an appellee cannot, for his own benefit, require him to do this. He himself must initiate matters and protect himself according to law. We have no reason to suppose that the record brought up is not precisely such as the clerk certified it to be. We cannot dismiss the appeal. It is hereby maintained. Maintaining the appeal forces us into an examination of the record, to ascertain from it whether the judgment appealed from can be affirmed.

We may say here that the application made by the appellee to the district judge, after the appeal was perfected in this case, to make out a statement of facts, the refusal of the district judge to grant that application, and the bill of exceptions taken to that refusal, are matters not properly before us. This all occurred in the district court after it had lost

jurisdiction of the appeal taken in the case. That such statement cannot be called for after an appeal has been taken is well settled. The district judge cannot be required to make such a statement through a certiorari directed to him under a claim of "correcting the record," for there was no "error" to "correct," so far as any "statement of facts" was concerned. If appellee's idea was that the minutes should have shown, and did not show, that evidence was introduced, and what that evidence was, and that admissions were made, and what those admissions were, the remedy, if permissible, was not through an amendment and correction of the minutes, and not by a statement from the district judge. Our attention is called to the fact that the district judge, in the bill of exceptions, admitted as a fact that plaintiff's counsel had admitted on the trial that the notes annexed to defendant's plea of estoppel were genuine, and the plea of estoppel was good. That declaration was made by the judge only contingently, to meet the case of this court's ordering him to make a statement of facts. As we have given no such order, the declaration is not before us officially. Were we to take notice of it at all, it would be simply by force of a consent and recognition by the parties themselves that that statement was true in fact.

Turning to the record, we find that the act of purchase on which plaintiff declares was not, in point of fact, annexed to his petition, though alleged to be so, and that the note and act of lease annexed to defendant's plea were never offered in evidence, though they may have been referred to. They are in the record solely because they were attached to the plea, not because they were filed in evidence. Had they been offered in evidence, they would have been filed and referred to. Had they been introduced in evidence, they would not, even on defendant's theory of estoppel, have entitled the defendant to a judgment, for neither the note nor the act of lease are identified as covering the land which the plaintiff claims in this suit. Granting everything that the defendant claims, it amounts to nothing more than this: That, without either the note or the act of lease being in evidence, the plaintiff's attorney admitted they were genuine, and admitted, as a matter of law arising from that fact, that defendant's plea of estoppel was good. It may be that plaintiff's counsel was authorized to admit the genuineness of plaintiff's signature to the note and act of lease, and that on that admission being placed of record, and the instruments themselves being admitted in evidence, the judge, on the evidence, might have ruled against the plaintiff, but these were not the facts. Plaintiff by the judgment is divested of real estate which, under his allegations, which defendant does not deny, is worth \$4,000, solely through a verbal admission and conclusion of law of an attorney at law, without any evidence in the

record back of the admission. And this admission and conclusion of law are made in the face of pleadings that, whatever paper title the defendant may have, it was extorted from him by force and violence on the part of the defendant, placing him in fear of his life, which continued up to the filing of the suit. It is difficult to apply the doctrine of estoppel to this condition of facts. It is very true that the courts have frequently recognized that a person who has entered into possession of property under lease from another will not generally be permitted, during the continuance of the lease, to impugn the lessor's title, but this doctrine has numerous exceptions. Its application should be invoked in aid of working out equity, and not made to cover wrong. Estoppels are not favored in the law, and, where there is reason even to suspect that they may be utilized for purposes of oppression, the whole subject-matter from which they seek to exclude investigation should be thrown open to the light. It may be that plaintiff's assertions are all wrong, and that defendant's claim that he is estopped may be well grounded; but we feel that justice would be better subserved in this case by dealing with the question of estoppel at the end of a trial, after evidence adduced, than at the beginning of one, on unexplained papers. Succession of Francez, 49 La. Ann. 1740, 23 South. 254. If, where a person in possession of property as owner is forced by another, by violence and through fear, to give him a deed for the same, and under the influence of the same violence and fear the original legal possession of the owner is continued under a forced possession as lessee, all inquiry into all the circumstances of the case is cut off, under the doctrine of estoppel, the rights of men would be made to rest on frail foundations, and weakness placed at a great disadvantage. Plaintiff did not by direct and specific allegations refer to and attack the lease which the defendant alludes to as having been equally occasioned and continued by violence, but he did aver that he had been in constant fear since the deed of sale was passed. There may have been some special and good reason for this. Possibly the lease did not, in fact, cover the same property. Possibly he anticipated that, if defendant should set up an estoppel by reason of the lease, he would do so by way of defense in an answer, instead of by way of exception, and he could in rebuttal or replication attack the lease when so set up, and that he could do this more advantageously than through direct attack originally. Be this as it may, we see enough in the pleadings to admonish us to proceed cautiously in this matter. If defendant has acted legally and properly in this respect to this property, he has nothing to fear from investigation; and we think all the circumstances of the case should be ascertained, and that for this purpose both parties should be permitted to amend their pleadings. We reach this conclusion the more readily be-

cause, independently of this particular question, the judgment rendered must be reversed, and the cause remanded. Granting that the plaintiff were estopped from contesting defendant's title to the property by reason of his occupying towards him the position of a lessee, that fact would not cut him off from setting up and recovering judgment upon his alternative demand if he could make good his allegations.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that this cause be reinstated on the docket of the district court, to be there proceeded with according to law; leave being hereby granted to both parties to amend their pleadings.

(107 La.)

ARMISTEAD v. SHREVEPORT & R. R.
VAL. RY. CO. (No. 13,985.)

(Supreme Court of Louisiana. June 21, 1901.)

NAVIGABLE STREAMS—OBSTRUCTION—COMPROMISE—NEGLIGENCE—MINIMIZING DAMAGES—LOSS OF PROFITS—CARRIERS—BREACH OF CONTRACT.

1. A railroad company constructing a bridge across a navigable stream so negligently as to obstruct the navigation of the stream is responsible for the damages caused by the obstruction.

2. A litigant who has himself violated a compromise is not in a position to plead such compromise in bar of his adversary's action.

3. It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and care, or at a moderate expense, for which effort and expense he may charge the wrongdoer; and where, by the use of such means, he may prevent loss, he can only recover for such loss as could not thus be prevented.

4. The duty of preventing or minimizing a loss about to occur rests primarily on the party by whose negligence or fault it is about to occur; and if such party voluntarily fails in this duty, having means ready to hand for the performance of it, he alone will be held responsible, and it will not avail him to say that the injured party might have lessened the damages by performing the duty for him.

5. The plaintiff chartered a boat to convey some cotton seed to his cotton seed oil mill. The defendant's bridge obstructed the passage of the boat, and deprived plaintiff of the profits he expected to realize from the milling of the seed. *Held*, plaintiff can recover for these profits.

6. On the same voyage plaintiff expected to realize profits from the selling of liquors and fruit; also he expected to procure other cotton seed, and to realize a profit from the milling of the same. All these profits are too uncertain and contingent to serve as a basis for a judgment.

On Rehearing.

7. The authorities agree that after a wrong has been committed the damaged party shall not increase it, and that if he does he shall have no right to complain of loss or injury sustained by his willful acts of omission or

¶ 2. See *Compromise and Settlement*, vol. 10, Cent. Dig. § 84.

commission. *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256.

8. In this case a carrier having failed to take certain cotton seed and to carry it from one point to another according to a contract, and the other contracting party, being in possession of the seed at the place of intended shipment, having abandoned it, so that it was lost or destroyed, it is held that the measure of damages for which the carrier is liable is the value of the seed at the place of intended delivery, after deducting its value at the place of intended shipment and the freight, as agreed on, and adding to the remainder the expense which would have been incurred in preserving the seed. The carrier is not, however, liable for the loss resulting from the abandonment of the seed, nor for the prospective profits to arise from its conversion into manufactured products at the point of delivery.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by W. W. Armistead against the Shreveport & Red River Valley Railway Company. From the judgment, plaintiff appeals. Modified.

Sutherland & Hall and Nettles & Carter, for appellant. Leonard, Randolph & Rendall, for appellee.

PROVOSTY, J. The plaintiff, owner of a small cotton seed oil mill, chartered a steamboat for the purpose of transporting to his mill a lot of cotton seed he had accumulated on the bank of Lake Bisteneau; also for the purpose of transporting from his mill to certain customers of his mill some cotton seed meal, the product of his mill, and incidentally for the purpose of carrying some freight for the public; also he thought to turn an honest penny on the trip by having on the boat some fruit and liquors for sale. For the privilege of selling these liquors and fruit he paid an internal revenue license of \$9.50. The bridge of defendant across Loggy bayou barred the passage of the boat, and put an end to the voyage, to plaintiff's alleged damage as follows:

120 tons of cotton seed at \$7 per ton	\$840 00
2,000 seed sacks at 10 cents.....	200 00
Fruits and liquors.....	125 00
Revenue license	9 50
Loss of profits on same.....	200 00
Miscellaneous freight	100 00
Inconvenience and trouble.....	100 00
Net profits on the manufacture of the seed	428 00
Damages by failure to get other seed..	500 00
Loss of profits on 100 tons of meal....	225 00
Loss of profits on hulls.....	47 75

The defendant does not seriously deny its responsibility. but pleads a compromise, and strenuously contests the amount of the damages. The compromise stipulated the payment of a certain sum to plaintiff in full of all claims, and stipulated further as follows: "The party of the second part * * * hereby bind and obligate themselves to have a steamboat at the landing of said Armistead [the plaintiff] at Cabin Point, on Red river, on or before March 27th, 1899, to receive a cargo, or such part thereof as said Armistead may

desire to transport, and to transport the same on said boat up Loggy bayou, and through Lake Bisteneau, as high up as Port Bolivar, in the event a sufficient depth of water can be found on said route to permit the passage of said boat." The clause italicized here is italicized also in the instrument of compromise. It was inserted in view of the fact that the water in Loggy bayou and Lake Bisteneau might at any time fall below the navigation stage. In the event of such fall, plaintiff would have to take defendant's will to make the trip, in place of the deed of having made it. Under these circumstances, plaintiff was justified in treating a two-days delay in the tendering of the boat as having vacated the compromise. There is also evidence to the effect that this and the previous delay had caused the orders for the cotton seed meal to be countermanded. Time, here, was of the essence of the contract. *Davidson v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885. Moreover, plaintiff was under no obligation to furnish a cargo, and therefore his refusal to deliver his meal for transportation did not excuse the boat from proceeding on its voyage in fulfillment of the compromise. The boat was "to receive a cargo, or such part thereof as the said Armistead may desire to transport." If Armistead desired to transport no cargo, all the boat had to do was to proceed on its voyage to transport the seed. The defendant violated the compromise, and then voluntarily canceled it, and is therefore not in a position to plead it in bar of plaintiff's action.

We proceed to take up the items of damage in regular order: The seed were left to rot, and to be appropriated by who might choose to take them. The responsibility for this the plaintiff and the defendant cast each upon the other. The evidence shows that there was reasonable certainty of the navigation holding out for one trip of the boat, and we think defendant should have made this trip. It is idle to say that plaintiff might have saved the seed by means of sheds, fences, or land transportation, or what not. The business way of going at saving the seed was to go and get them in a boat; and, after barring plaintiff from doing this, defendant should itself have done it, since this boat was to hand for the purpose. 1 *Suth. Dam.* pp. 150, 151; *Id.* (2d Ed.) p. 187, § 88. The boat could have carried and saved 86 to 90 tons, worth \$7 per ton. Defendant is responsible for this, less \$1.80 per ton, which plaintiff might have realized on the seed by transporting them by land to Shreveport. For the remainder of the seed we do not hold the defendant responsible, as it does not appear that the boat could have counted with reasonable certainty on having navigation for a second trip. As to this remainder of the seed we hold plaintiff to the obligation under which he was to use every reasonable endeavor to save the seed, with the right to charge defendant with the expense of the

salvage. So holding him, we can allow no more than the probable expense of the salvage. Adopting, for want of a better, the lower court's estimate of this expense, we fix this salvage at 50 cents, per ton, or \$7 in all. We can allow nothing for the sacks. They could have been saved at an insignificant expense, and plaintiff was clearly under the obligation thus to save them, and they are probably included in the estimated value of the seed. As to the "fruits and liquors" and "inconvenience and trouble," we adopt the estimate of the judge a quo, and fix the damage at \$100. By the act of the defendant the plaintiff was deprived of an opportunity to utilize his revenue license, which had cost \$9.50. We think this amount should be allowed. We disallow the item, "Loss of profits on same, \$200." These profits are not proved with sufficient certainty. For the same reason, we disallow the item, "Miscellaneous freight, \$100," and the item, "Damages by failure to get other seed, \$500." We do not agree with the learned district judge in his denial to plaintiff of the profits expected to be made on the milling of the seed. The defendant cannot deny that, but for the obstructing bridge, plaintiff would have had the milling of the seed, and that this operation would have yielded profit. The seed had been procured for the purpose of realizing this profit; and this profit, thus cut off by its wrong, defendant must make good. *Suth. Dam.* (2d Ed.) p. 132, § 59; *Id.* p. 157, note 1, § 70. We fix this profit at \$2.75 per ton, or \$275. We adopt the estimate of the judge a quo on the two last items, "Loss of profits on 100 tons of meal, \$75," and "Loss of profits on hulls, \$6."

Recapitulation.

86 tons of seed at \$5.20.....	\$447 20
Salvage of 14 tons of seed at 50 cents.....	7 00
Fruit and liquors, inconvenience and trouble.....	100 00
Revenue license.....	9 50
Profit on manufacture of seed.....	275 00
Loss on cotton seed meal.....	75 00
Loss on hulls.....	6 00
	<hr/>
	\$919 70

It is therefore ordered, adjudged, and decreed that the judgment appealed from be increased to the amount of \$919.70, and that as thus amended it be affirmed, with costs in both courts.

On Rehearing.

(June 21, 1902.)

MONROE, J. It is suggested in the application for rehearing that there is error in the opinion handed down, in the matter of the amount allowed for seed, and for profit on the manufacture of seed, and a re-examination and reconsideration of the evidence and of the law of the case have led us to conclude that the suggestion is well founded. The defendant was at fault in obstructing Loggy Bayou with its bridge, but the fault was entirely without malicious intent and at

once acknowledged, and the most earnest and honest efforts were made to repair it. The captain of the boat which the plaintiff had chartered was paid \$100 (an amount fixed by himself) to compensate him for the use of his boat, and the defendant agreed to furnish the plaintiff with another boat on or before March 27th that would go through the bridge. In order to comply with this agreement, it chartered the *Lille Barlow* at \$25 a day, and wired to Vicksburg for a pilot, to whom it agreed to pay \$4 a day, and boat and pilot were at hand before the time appointed. But unfortunately one of the boat's cylinder heads was blown out, a Sunday intervened, which delayed the repairs, and the boat was not ready to start until the morning of March 29th. We have held in the original opinion that the plaintiff was within his legal rights in declining to accept it at that time. It is nevertheless a fact that he might have accepted it with but little inconvenience or loss, and that his refusal to furnish the meal for the outgoing cargo, or to accept the offer that was made to him, through the attorney who had represented and who assumed to be then representing him, to pay \$150 and to bring out his cotton seed from Lake Bisteneau, was an extreme, and, as we think, rather inequitable, assertion of those rights. The defendant, through its representative, was told that it could bring out the seed, but that the plaintiff's claim could not be settled unless it also paid \$400; and, this demand being considered unreasonable, the plaintiff paid the boat and the pilot which it had employed something over \$100, and discharged them, with the expectation that it would be called on to answer in an action in damages. Such an action was brought at once in the parish of Red River; the plaintiff claiming then, as he claims now, \$2,650, and including in his claim the alleged value of the cotton seed, then lying on the shore of Lake Bisteneau, within three miles of his plantation and of the store conducted by his son and son-in-law with capital furnished by him, which seed he assumed to abandon as in a case of total loss; and, the action thus brought having been dismissed, he brought the present suit in the parish of Caddo. We think that the plaintiff's demand was unreasonable, and that whilst it was perhaps the duty of the defendant, having the boat at hand, to have brought out the seed, yet that its failure to do so gave to the plaintiff no right to abandon the seed as in case of total loss. The evidence shows that it was rather late to have made it available as a fertilizer during the planting season of 1899, and that it could not profitably have been shipped elsewhere for milling purposes; but it also shows that it could have been protected where it was at a cost not exceeding \$50, or stored in a vacant house not more than a half mile distant, and that it could have been preserved, and would have been quite as valuable, if not

more valuable, the next season. The plaintiff, however, having adopted the theory of abandonment, persisted in it to the end, and not only did neither he nor his representatives, who were on the spot, pay any attention to the seed, of which they were in possession, but they seem to have allowed it to be understood that it belonged to nobody; and plaintiff's son testifies that he actually saw the wagons of his neighbors going to haul it away without making any comment or objection. The names of some of those neighbors are given, and in view of the testimony referred to, and of the fact that it is not suggested that they were dishonest people, we think the presumption a fair one that the plaintiff or his representatives practically gave the seed away, which they certainly had no right to do at the expense of the defendant. Beyond this, there is considerable conflict in the testimony as to the quantity of seed. Plaintiff's son testifies that he weighed four or five of the sacks, and that their average weight was 140 pounds; and there is further testimony, in support of this statement as to the manner in which the sacks were filled, showing that they were suspended and the seed rammed in with pestles; and we must accept this evidence as conclusive upon the question of weight, though disinterested witnesses, engaged in the business of handling seed, testify that the average weight of seed, in commerce, is 100 pounds to the sack. The more serious conflict is as to the number of sacks. The same witness for plaintiff states that he counted them when they were hauled to the landing, and that there were 1,500 sacks, whilst two witnesses for the defendant, who were sent to Port Bolivar for the purpose immediately after the refusal of the plaintiff to accept the *Lille Barlow*, testified that they counted them and found only 750 sacks; and one of these witnesses further testifies that about that time he met the witness for the plaintiff, above referred to, and that the latter told him that there were about 800 sacks at Port Bolivar, and from 150 to 200 at Vicker's landing. This statement is, however, denied by the witness to whom it is attributed. Upon the other hand, a witness who lives in the neighborhood, and who, it appears, had ordered a half ton of meal from the plaintiff, being examined under commission, as a witness for the plaintiff, is asked, "Do you know of any seed accumulated in March or thereafter, 1898 [1899], on the bank of Lake Bisteneau? If so, how much seed was there, and what became of those cotton seed?" To which he replied: "I do. I do not know how much, but suppose that there were somewhere between five hundred and a thousand sacks." And he further testifies that the seed was hauled away by persons whom he names,—being the neighbors to whom we have already referred. The plaintiff claims, and so testifies, that the seed was worth \$7 a ton on Lake Bisteneau, and \$9

at his mill, at Cabin Point, and that the freight by the boat was to have been \$1.25 a ton. Other witnesses, doing a much larger milling business, at Shreveport, testify that they bought seed at \$5.50 and \$6 a ton f. o. b. throughout the country, but would not have bought it at all on Lake Bisteneau, because of the difficulty of getting it out, and that it was worth about \$8 at their mills. The plaintiff claims that his sacks were worth 10 cents each. The witnesses mentioned testify that seed sacks were worth about half that amount. The plaintiff, who had about one year's experience in milling, whose mill was operated for 11½ hours during the day, working up a ton of seed an hour, and was shut down at night, testifies that his profits from the manufacture of seed amounted to \$4 a ton, though the seed itself was worth \$9. Another witness, who has been in the business for many years, who manages a mill that runs day and night, and consumes about 14 times as much seed in 24 hours as that of the plaintiff, and who gets his seed at 75 cents less a ton than the seed in question would have cost the plaintiff according to his own statements, testifies that the profits in the milling amount to about \$1.50 a ton, that there is great advantage and economy in running a mill continuously, and that for that reason the practice is universal in all large mills.

To these facts we are of opinion that the legal principles which should be applied are those which have been recognized by the courts and text-writers as follows, to wit: "The authorities agree that after a wrong has been committed the damaged party shall not increase it, and that, if he does, he shall have no right to complain of loss or injury sustained by his willful acts of commission or omission." *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Judice v. Railroad Co.*, 47 La. Ann. 255, 18 South. 816; *Alrey v. Car Co.*, 50 La. Ann. 653, 23 South. 512; *Bader v. Railroad Co.*, 52 La. Ann. 1060, 27 South. 584; *Carr v. Land Co.*, 103 La. 239, 29 South. 715. "Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent." *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117. "The duty is not arbitrarily imposed upon the injured party to do or amend the work of the other, or to finish it, but only when it is a reasonable duty that he ought to do, instead of passively allowing a greater damage." 1 Suth. Dam. pp. 150, 151. And so applying them, we conclude that in allowing 75 cents per ton on 100 tons of seed, as the difference between the value at Lake Bisteneau and at Cabin Point, after deducting cost of transportation, and adding thereto \$50 as the probable cost of preserving the seed at Lake Bisteneau, the judge a quo has given the

plaintiff all that he is entitled to upon that item of his claim. As to the claim for loss of profits which might have been made upon the manufacture of the seed, the defendant is not liable therefor in any aspect of the case, since, in the first place, there was nothing, so far as we are informed, to have prevented the plaintiff from buying and manufacturing other seed, nor does it appear that he did not run his mill to its full capacity during the entire season; and, in the next place, unless there are unusual conditions, which are not established in this case, the limit of a carrier's liability for the nondelivery of goods is the value of the goods at the place of destination at the time at which they should have been delivered, and this the plaintiff has been allowed, less the loss occasioned by his failure to take care of the goods in question at the place from which they were to have been shipped. The computation contained in the opinion handed down should therefore be amended by reducing the item of \$447.20, relating to the value of the seed, to \$75, by adding \$50 as the probable cost of preserving the seed, and by striking out the item, "Profit on the manufacture of seed, \$275," which would reduce the judgment as rendered by us to \$322.50.

It is therefore ordered and adjudged that the decree heretofore rendered be amended by reducing the amount thereof to \$322.50, and, as thus amended, that it be now made the final judgment and decree of this court.

(107 La.)

WILSON v. BANNER LUMBER CO.,
Limited. (No. 14,366.)¹

(Supreme Court of Louisiana. June 16, 1902.)

DEATH OF MINOR—RIGHT OF ACTION—DIVORCE OF PARENTS—INJURY TO SERVANT—FELLOW SERVANT.

1. The right of action to recover damages for the death of a minor child survives in the father or mother, or "either of them." If the wife has, previous to the death of the child, obtained a divorce from her husband, and has the care of the minor children, she can bring the action without his authorization.

2. Her right to recover the amount of the damages is not affected by the fact that she remarried prior to the accident.

3. Where an employer returns his laborers to their homes by means of a hand car, a number of miles from work, after working hours, the employer is liable in damages for an accident which happened while so returning home, due to the negligence of the foreman in charge of the men, even though the accident happened after the day's work had been completed.

4. A water boy is not a fellow servant of a section foreman, within the meaning of the law governing the negligence of employes.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Tangipahoa; Robert R. Reid, Judge.

Action by Sarah M. Wilson against the Banner Lumber Company, Limited. Judg-

ment for plaintiff, and defendant appeals. Modified.

O. P. Amacker, James Houston Price, and Clay Elliott, for appellant. Carter & Brock and Kemp & Kemp, for appellee.

BREAUX, J. Plaintiff sues to recover \$10,000 from the defendant as damages for the death of her son Oscar Duncan. She is the divorced wife of Martin Duncan, and the present wife of Wright Wilson.

Defendant, in the first place, interposed a bill of exceptions on the ground that plaintiff has no right to bring this suit, because Martin Duncan, her former husband, is not a party to the suit, and plaintiff, since her divorce, having remarried, her status has so changed that she cannot bring this suit. The contention on the part of the defendant is that the father's name is always before the mother; that, if one has the right to sue, it is vested in the father, and not in the mother. By the statute of 1884, No. 71, the right of action survives in the name of the father and mother, or either of them. The language of the statute includes both of them. The marriage relations having been dissolved, the mother can, without being joined by her former husband to authorize her, bring suit for damages. The statute did not single out the father as the only one in whom the right survived, nor did it look to the necessity of suing in the name of both, but expressly states that the "father and mother," or "either of them." Having used the words "either of them" to express the legislative will, the courts are without authority to exclude the mother from whatever right the act in question may confer. The mother sued for the divorce in question. It was granted at her instance, and we infer that she was by the decree left in charge of the minor children, and that the right survives in her only in case a divorce is obtained against the father. Be that as it may, the mother has the right to stand in judgment after the divorce has been obtained, and she is not cut off from the right of recovering because she has obtained a divorce, nor because she became the wife of another man after she had obtained a divorce.

Defendant, in the second place, pleaded the exception of no cause of action. Defendant directs our attention to plaintiff's averment that her son with his laborers were on their way home after the labor of the day was over, which excludes the idea that they were in defendant's service at the time he met his death, claiming that the contention that defendant is liable for acts of men not alleged to have been engaged in doing defendant's work at the time the act was done cannot be supported. The laborers of defendant (among them, plaintiff's son) had to be taken to a distance of about 18 miles every day to their place of work and return. They were conveyed morning and evening on defendant's hand car. This mode of conveyance had to be resorted to in order to obtain the labor at

¹ Rehearing denied June 23, 1902.

the place needed. There was at least, we take it, acquiescence of defendant in permitting the laborers to ride on the hand car when returning home as they were returning on this occasion.

The defendant further contends, again by way of exception, that plaintiff's son was the fellow workman of the section foreman who had charge of the hand car which collided with the animal on the road. They were not, in our view, as relates to work in defendant's service, fellow servants. One was in charge of men, including plaintiff's son, and received larger wages than those who worked under him. The son of plaintiff was a water boy, and was paid 50 cents a day for his work. He was employed by the section foreman who was in charge of the hand car, who had authority to employ the gang of men who worked under him. He (plaintiff's son) was riding, as customary, with other hands, returning in the evening after the day's work had been finished. The section foreman had control of the hand car and the direction of the men who rode on this car after the day's work, returning to their homes. The master, as relates to safety in running, owed some duty to the workmen; and the act of its employé when the accident happened was not the act of plaintiff's son, but the act of the master. We come to the question of fellow servant in the order of the case. A fellow servant ceases to be such, and becomes a vice principal, when he is clothed with power of control and direction, and in the exercise of such power is intrusted with the performance of some positive duty owed to other employés, and which has devolved on him from the master. *Barrows*, Neg. p. 131. "As in the case of the conductor of a train, the foremen of section-men, the foremen of railroad yards, the servant exercising the supervision represents the master in the performance of a master's duty, and hence by his negligence the master may become liable." *Thomas*, Neg. p. 868.

The exceptions, we think, were properly overruled by the district court.

This brings us to a consideration of the merits, and primarily to the facts of the case. In August last, plaintiff's son was violently thrown from the hand car, which collided with a cow on the track, and was instantly killed, and the foreman was severely wounded. There were 8 or 10 men on the car, and it was running down a grade of about 4 feet to the 100 feet. There was a curve on the hill, and usually the cars were run down this hill at a slow rate of speed. The view was not obstructed from the top of the hill to the place where the cow was struck, and the distance was about 200 yards, and the animal was in open view of the men on the hand car from the time it turned the grade to the place of the accident. In other words, it could have been seen a distance of about 200 yards before it was struck. This animal was at the lower edge of what the witnesses refer to as the "dump," and started slowly to walk to

and on the track. The distance between the lower edge of this dump and the track was about 10 feet. It was at this time that the men on the car attempted to drive away the cow by hallooing at it, but in this they entirely failed, as it continued to cross at some little distance in front of the car until it was struck, and it was also killed. From the testimony we glean that in coming down that hill it was the part of prudence and good judgment to run slowly and to keep the car well in hand. The violence of the impact, as shown by the result, shows, we think, that on this occasion the machine was not well in hand, and from the testimony we infer that the speed was faster than it should have been down the grade in question. We infer that, even after they began hallooing to frighten the cow off, if the car had been under complete control it would have been possible to stop it in time to avoid loss of life. The testimony creates the impression that ordinary care was wanting in this instance. On these men went on their way home through curves and cuts, and were perhaps slow about stopping for anything. This was innocent enough, but not consonant with rules and usage which it is well to observe for the sake of safety and to avoid accidents. Defendant controverted this view of the case, and called only one witness, the section foreman, whose testimony is at variance with that of plaintiff's witnesses. The members of the jury in all probability were familiar with the locality, knew the witnesses, and heard them testify. We have not found that they erred in finding a verdict for the plaintiff.

The boy killed was 16 years of age, his wages were very little, and we infer that he contributed very little, if anything, to the support of his mother. After majority the obligation to hand over his wages to his mother would have come to an end. At 21 years of age he would then have owed only alimony. The alimony of the son to the mother is never large. For these reasons, we have concluded to reduce the amount of the verdict to \$2,000.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is amended by reducing the amount of damages from \$3,333.33, with legal interest, to \$2,000, with legal interest thereon from time set out in the judgment amended. It is further decreed that plaintiff and appellee pay the costs of appeal.

(107 La.)

STATE v. BAPTISTE. (No. 14,477.)¹

(Supreme Court of Louisiana. June 16, 1902.)

CRIMINAL LAW—CONTINUANCE—APPEAL—REVIEW.

1. An application for delay because of the absence of witnesses is properly refused where

¹ Rehearing denied June 30, 1902.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1232.

no showing is made that the presence of the witnesses can be secured at the future day.

2. A ruling of the lower court will not be reviewed on facts not positively shown by the bill of exceptions to have been called to the attention of the judge at the time of the ruling.

Blanchard, J., dissenting.
(Syllabus by the Court.)

Appeal from judicial district court, parish of Acadia; Conrad De Baillon, Judge.

Joe Baptiste was convicted of murder, and appeals. Affirmed.

John J. Robira (Story & Pugh, of counsel), for appellant. Walter Gulon, Atty. Gen., and William Campbell, Dist. Atty. (Lewis Gulon, of counsel), for the State.

PROVOSTY, J. The defendant was convicted of murder, and sentenced to be hanged. He complains that he was denied the benefit of compulsory process to procure the attendance of his witnesses. His trial being fixed for the 30th, he on the 28th applied for an order to procure witnesses living in the parish of Orleans, and the judge made an order accordingly. On the day of the trial, defendant asked for the postponement of the trial on the ground that the sheriff of Orleans had not yet made any return on the subpoenas that had been sent to him for service, and that defendant could not go to trial without the witnesses for whom the subpoenas had issued. The judge denied the request, and defendant reserved a bill of exceptions. For the intelligent discussion of the point presented in this bill, it is necessary to transcribe the bill. It is as follows: "Be it remembered that on the 24th day of the month of April, 1902, this case was duly fixed for trial by the district attorney for the 30th day of April, 1902, and on the — day of April, A. D. 1902, on motion of district attorney, was reassigned to the 1st day of May, A. D. 1902. That on the 28th day of April, A. D. 1902, he and his counsel having only then discovered the whereabouts of two very important witnesses, to wit, Bob Coleman and Kid Broadie, he at once, through his counsel, made application as hereunto attached and made part hereof. That the said two witnesses were in the city of New Orleans, and that the counsel for the defendant furnished the proper officers with the address of the said witnesses, or of the place where they could be found. That the testimony of the said witnesses would have been to the effect that he was acting strictly in self-defense in killing the said Alcide Theophile, and that they were the only witnesses except himself who would swear to same. That the said witnesses, if present, would have sworn that Alcide Theophile was the aggressor, and that he struck the accused several times with a heavy bottle before the accused fired the fatal shot, and that they were the only witnesses by whom he could prove this. That on the day assigned for trial, May 1, 1902, the case was duly called for trial, and the defendant, through his counsel,

objected to being tried, and asked for a postponement thereof, on the grounds that the sheriff of Orleans parish had made no return on the subpoenas issued for the attendance of said witnesses; that the accused had supposed that the said witnesses were in Houma, Terrebonne parish, Louisiana, and that he and his counsel had only discovered that they were in the city of New Orleans through a letter received by the said accused on the day that the process was taken out; that he had been confined in the parish jail since; and that he and his counsel had made every effort to locate and discover the said witnesses. That the court refused to grant a postponement of the case until a return was made by the sheriff, for the following reasons, to wit: 'By the District Attorney: The reassignment of the said case was not on motion of the district attorney, but by mutual consent of the attorney of defendant herein and the district attorney. The motion for the continuance of the case on account of the absence of the witnesses was properly overruled by the judge because the application for the witnesses was filed on the day before the trial, although said case had been fixed already a week previous, and said motion was not made according to law, and did not state the number of street, or name of the said street, where said witnesses were supposed to live. By the Court: The case was originally assigned for April 30, 1902, and afterwards, by consent, the case was reassigned for May 1, 1902. The subpoena was not applied for within a reasonable time before May 1st, and it was impossible to have obtained the attendance of the witnesses within that delay. No delay was asked for, and, besides, the testimony would have been cumulative only. Besides, the sheriff of Orleans was unable to locate the witnesses; the subpoenas not showing where the witnesses resided, except of New Orleans.' To which ruling," etc. The bill of exceptions recites that "the counsel for the defendant furnished the proper officers with the address of the said witnesses, or the place where they could be found." Assuming this to be equivalent to a statement that the street address was given to the sheriff of Orleans, nothing shows that the fact of said address having been given was brought to the attention of the judge at the time that he was called upon to rule on the point of granting further time or not. The bill does not say that it was. It recites that "counsel asked for a postponement on the grounds that," etc.; stating specifically and in extenso the grounds, but not saying that the street address of the witnesses was furnished, or even that defendant knew the street address. So far as the bill affirmatively shows, the judge was not informed of this address having been given, or even of the defendant's having known the address. So far as the bill shows, the application for delay was based on the fact that subpoenas for witnesses of no fixed residence, and of not sufficient promi-

nence for their names to be found in the directory, had issued to the sheriff of Orleans, without the street address of the witnesses being given, and that said sheriff had not yet made any return. Under these circumstances, considering the improbability of finding transient persons of no prominence in so large a city as New Orleans, we think it was for the judge to consider whether the probability of the presence of these witnesses at a future day had sufficiently been made to appear for him to postpone the trial of the case. Matters of continuance and postponement are necessarily largely within the discretion of the trial court. *State v. Mansfield*, 52 La. Ann. 1355, 27 South. 887. This court will not interfere except in a case of clear abuse of discretion. The motion for new trial was made several days after the trial, when the accused must have known with certainty whether or not there was ground to hope that the presence of the witnesses could be secured at a future day, and yet he did not include among his grounds for new trial the expectation to procure these witnesses at a future day. We cannot but think his counsel would have done so for him, if it would have been possible to justify the expectation by proof.

Defendant next complains of the refusal of the court to permit him to offer evidence of the dangerous character of the deceased. The objection was that he had not, by proof of a hostile demonstration on the part of the deceased, laid the foundation for the introduction of the evidence. Counsel have argued the case before us on the theory of there having been some proof of a hostile demonstration, but the judge states positively in the bill of exceptions that there was none; and the settled rule is that this court will be governed by the statement of the judge.

The third bill of exceptions has not been noticed by counsel either in oral argument or in brief, and it is, besides, without merit.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

BLANCHARD, J. This man is under sentence of death. I am constrained to dissent from the opinion of the majority of the judges and from the decree which affirms the verdict and sentence because I think error was committed by the trial court in ruling the accused to trial, over objections of his counsel, before a return could be had, or was had, on subpoenas for two witnesses for the defense which had been sent to the sheriff of the parish of Orleans for service. The facts were these:—The case on April 24th was assigned for trial for April 30, 1902, and on April 28th was reassigned for May 1st. On April 28, 1902, the accused being confined in jail, and thus not able readily to locate his witnesses, obtained for the first time information that two of his witnesses, Coleman and Broadie were in New Orleans, which city

was several hundred miles distant from the parish of Acadia where he was held for trial. He moved on that day for subpoenas to issue for them. This motion was in due form, was sworn to by the defendant, and the judge granted an order directing the subpoenas to issue. The subpoenas did issue and were sent to the sheriff of the parish of Orleans, reaching him, it seems, on April 30th. That was the day before the case was fixed for trial, and, of course, it was impossible for him (the sheriff) to search out the witnesses and make his return by May 1st, the day the case was to be called for trial. On May 1st, the case being called for trial, the accused objected to going to trial until the sheriff of Orleans parish had made his return, and asked, not for continuance, but for a postponement until the sheriff could be heard from. The court refused this and ordered the trial to be proceeded with. The accused excepted to this and brings the point up by bill of exceptions duly signed. In his application under oath for compulsory process to obtain the presence of the two witnesses named, the accused had sworn that he expected to prove by them that the killing of the man, for whose alleged murder he was held, was purely in self-defense and only after the dead man had threatened to kill him (the accused). In the bill of exceptions it is set forth that counsel for the accused in causing the subpoenas to issue had furnished the proper officers with the address in New Orleans of the witnesses, or the place where they could be found. The bill also reiterates what was expected to be proven by the witnesses, as above given, and that they were the only witnesses except himself who could give that testimony. It also recites the means by which the accused obtained the information the witnesses were in New Orleans, he supposing them to be in Terrebonne parish, and that the process to compel their attendance was taken out on the very day he learned of their presence in New Orleans. It does not appear otherwise than that this was the first application for a continuance or postponement of the case.

The constitution gives an accused person the right to compulsory process for obtaining witnesses in his favor. Article 9. In cases involving human life it should be liberally construed. Here process had issued and reached the sheriff in a distant parish on the day before the case was called for trial. When called for trial, on the showing made that the sheriff of the parish of Orleans had not had time, and in the nature of things could not have had time to get his return back by the day of trial, there should have been a postponement of the trial until his return was made, or at least until a reasonable time for the return had elapsed. This was not done and its refusal was error. It may be the subpoenas did not themselves give the street number in the city of New Orleans where the witnesses were to be found,

but the statement is made that information was given the sheriff where in New Orleans he could find them. This was a sufficient compliance with the law. Even if no street number was given, it did not follow the sheriff could not, by inquiry, locate the witnesses, and, at any rate, a sufficient time should have been allowed to hear from him. In *State v. Collins*, 104 La. 631, 29 South. 180, this court, commenting on the haste with which the trial of the accused was brought on, said:—"While the zeal displayed by our learned Brother of the district court in the prompt vindication and enforcement of the law merits commendation, we are yet constrained to hold that, in this instance, he carried it a little too far. We differ from him in denying the continuance sought. This was a capital case. The life of a human being was at stake and for the time being it was sheltered by the presumption of innocence. Great deliberation—an utter absence of precipitancy—should have characterized every movement of the court leading up to conviction." These words are applicable here. There was too great haste in the instant case. A postponement ordered for a day later in the week, or until the following week, would have been the proper ruling. In that time the sheriff of Orleans parish would have been heard from. In *State v. Fairfax* (recently decided and not yet officially reported) 31 South. 1011, Mr. Justice Provosty, for the court, said:—"A summons was issued for the witness and was put in the hands of the sheriff of the neighboring parish for service, all in time; but when the case was called for trial the witness had not appeared and it was found that the sheriff had not made any return, and that it could not be known whether he had served the summons or not. The defendant asked for a postponement of the trial until it could be ascertained whether or not any effort had been made to serve the summons. In other words, whether or not he had had the benefit of the right of compulsory process for obtaining witnesses in his favor secured to him by the constitution. Instead of granting this motion the court compelled the defendant to have recourse to a regular application for a continuance on the ground of the absence of the witness. * * * The court ruled the defendant to trial on the admission by the prosecution that the witness if present would testify as stated in the affidavit for continuance. * * * We think the trial should have been postponed until reliable information had been secured as to whether the defendant had had or not the benefit of his constitutional right of compulsory process for obtaining the attendance of witnesses." The case at bar is stronger in its facts and circumstances calling for postponement than was the one just referred to. In *State v. Adam*, 40 La. Ann. 745, 5 South. 30, where the subpoena for a witness had gone to the sheriff of a neighboring parish and no return had been made,

so that it was not known whether the subpoena had or had not been served, the court said: "The accused was entitled to know of such return and in the absence thereof could not be driven to trial."

The contention is advanced by the majority of the court in the instant case that the accused in a motion for new trial should have renewed his objection to having been forced to trial because of the nonreturn of the sheriff of Orleans parish on the subpoenas, and should have shown by evidence in support of the motion that the witnesses were in New Orleans and their whereabouts there. It is a fact that in a motion for new trial filed he did renew this objection, but how could he, confined in jail, manage to produce witnesses to show the facts referred to? Such witnesses were themselves in New Orleans and would have had to be brought from that city to Acadia parish to testify. This is requiring a little too much of a poor devil of a negro in confinement under conviction for murder. He did all the law reasonably required of him when he made his showing for postponement because of the nonreturn of the sheriff of Orleans parish on the subpoenas sent to him. In the *Fairfax Case*, supra, it was not required that additional showing should be made on the trial of the motion for new trial. Indeed, in no case now called to mind has it ever been held necessary to make such additional showing on the hearing of an application for new trial.

I do not think this man has had such a trial as is guaranteed him by the constitution and respectfully dissent from the decree which consigns him to the gallows.

(107 La.)

LINDSEY et ux. v. TIOGA LUMBER CO., Limited. (No. 14,362.)¹

(Supreme Court of Louisiana. May 26, 1902.)

TRIAL—SICKNESS OF JUROR—SUBSTITUTION—INJURY TO EMPLOYE—WARNING OF DANGER—CONTRIBUTORY NEGLIGENCE.

1. If after a civil case tried by a jury has begun, and evidence adduced, one of the jurymen falls sick and is forced to withdraw, the district judge has the authority, in the absence of a demand from either plaintiff or defendant that the whole jury be discharged, or that the case be postponed or continued, to have another jurymen substituted, and the trial proceeded with; neither side objecting to the proceedings subsequent to the substitution.

2. An employer who places an inexperienced youth around machinery at a dangerous place, and at work calling for notice or warning of the danger to which he would be exposed, and the special necessity of vigilantly watching the movements of his fellow workman, is charged with the duty of giving such notice and warning, and if he fails to do so is liable for damages for resulting injuries. If the injury came from the negligence or fault of his fellow workman, the employer would be liable, not for that fault, but for his own fault in placing the injured party at work and in such place without warning.

¹ Rehearing denied June 30, 1902.

3. An unskillful or even an imprudent act on the part of a workman is not necessarily a fault on his part. The unskillful or imprudent doing of an act may under some circumstances be imputable as a fault to the employer who was charged with the legal duty either of preventing or guarding against it by proper instructions or warning, or of declining to make the assignment to the work.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; W. F. Blackman, Judge.

Action by J. T. Lindsey and wife against the Tioga Lumber Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs in this suit are the father and mother of Dan Lindsey, a minor, who died from the effect of injuries received by him while in the employ of the defendant company. It is charged that the deceased had been working for defendant about five days, his employment being to catch lumber after being dropped from the saws to the live rollers on its way to the edger at the plant of the defendant company; that he was placed at a point between the edger and the live rollers, and, as the lumber dropped from the saws and was carried on these live rollers, the end of a piece of lumber struck him across the lower portion of the body with sufficient force to shove him from his position, against the edger, and inflicted upon him a serious wound, which caused his death about 24 hours after the accident. That their son was a boy, inexperienced as a mill hand, and, being placed by the defendant in this dangerous position, it was defendants' duty to have informed him of the danger of the position, which they failed to do; that the position in which he was directed and ordered to stand to perform the labor and work he was set to do was attended with, and he was subjected to, greater danger than was necessary for the proper exercise of the functions of his employment; that the machine in use, and through the use of which their son was killed, was faulty, old style, and defective, and entailed great and unnecessary risk and danger upon the employes, and that the plant was faulty and defective in its construction, and the situation and location of the machinery therein, and that the accident complained of was due in great measure to this faulty construction and location; that the injury and its results were occasioned by gross, wanton, criminal negligence of the defendant company; that defendants carelessly and negligently failed and refused to give the deceased instructions as to how to guard against danger in the exercise of the duties placed upon him by the commands of his employers, although they well knew they were placing him in a dangerous position, and he knew nothing of the manner of catching lumber from the live rollers, and of the danger of the lumber striking him in its passage from

the live rollers, and that it was absolutely necessary that he have such instructions; that their son was a common laborer, having no experience in said work, and that the loss of his life was caused by no fault or negligence of his, but wholly by the fault and negligence of defendant and its agents in commanding him, and failing to give him any instructions as to the character of the work which he was expected to perform, and the means of guarding against accidents in performing such work; that he was a youth 17 years of age, strong, and enjoying good health; that defendants hired him without their consent and knowledge, and after his wound and subsequent death they could easily have notified the father and mother of the accident to him, so that they might have been with him at his death; that the company absolutely refused and failed to notify them, but attempted to keep it a secret from them, and it was fully two months after his death before they received notice of the same, through a friend. They averred that they had been damaged in the sum of \$5,000, in the loss of his association and comforting aid and assistance their son would have been to them in their support, and in the grief and bereavement they had suffered. Defendants, after pleading the general issue, denied specially that any accident occurred to the deceased through any fault or negligence of theirs. They averred that, if any accident happened to him, it was his contributory negligence, and on account of the negligence of his fellow servants who were working with him on the live rollers. They denied that deceased was a minor, and that they knew who his parents were, or that they sought to conceal his death and had refused to notify his parents. They specially denied that the deceased was subjected to any danger by their order, and averred that the deceased sought from them the employment at which he was said to have been hurt. They denied that the machinery used by them, and by which the deceased was said to have been injured, was faulty, old style, or defective, or that it entailed greater and unnecessary risk and danger upon the laborers than was usual and necessary. They denied that it was defective in its construction, location, and situation. The case was tried by a jury, which returned a verdict of \$5,000 damages in favor of plaintiffs against defendant. After an unsuccessful attempt to obtain a new trial, defendant appealed.

White & Thornton, for appellant. Wallace & Moss (Ryan & Blackman, of counsel), for appellees.

NICHOLLS, C. J. (after stating the facts). Before reaching the merits, we have to dispose of a question raised by a bill of exceptions which we find in the record, taken by defendant. The bill recites that on the trial of the cause, after a jury of 12 had been im-

paneled, the pleadings read, testimony partially adduced, and the trial proceeded with for one day, on the morning of the second day one of the jurors who had been sworn in the case was reported sick and unable to attend court, whereupon the presiding judge ordered that additional jurors be summoned, as in case of talesmen, to supply the place of the said Charles Turner, to which ruling counsel for defendant objected on the ground (see *Moffet v. Koch*, 106 La. 371, 31 South. 40) that it was incompetent, after a jury had been impaneled, a part of the testimony adduced, and the trial proceeded with, to discharge a juror, and select another to proceed in his place, which objection was overruled for the following reasons: "By the Court: Charles Turner, one of the jurors, was too ill to attend court,—being confined to his room with fever,—and so notified the court. The court ordered an additional juror to serve in the place of the said Turner. One juror was offered, and both parties accepted him, and the other jurors were sworn over. I ordered the case to be proceeded with de novo, by reading the pleadings and introducing the evidence. The authority to do this on the application of either plaintiff I think is fully recognized by the authorities,—particularly the decisions of our supreme court in *Follin v. Foucher*, 8 La. 563-565, and *State v. Moncla*, 39 La. Ann. 868, 2 South. 814, and authorities there referred to. Unless this power can be exercised by a judge, a civil jury case could be protracted almost indefinitely, at great cost, delay, and inconvenience to litigants and witnesses. There can be no resulting injury to defendant, and in this case both plaintiff and defendant accepted the additional juror." Counsel of defendant before us questions simply the right and power of the court, under the circumstances shown, to have substituted a new juror for the sick one without his consent. If the substitution itself, he says, was legal, he has no complaint to urge against the regularity of the subsequent proceedings. He argues that the trial could not have legally proceeded in the absence of the juror; that therefore the situation forcedly required either that the jury should be entirely discharged, and matters take such shape thereafter as would follow legally as the result of a mistrial, or that the case should either be postponed or continued to await the result of the juror's illness. He says he does not claim the right to select any particular jurymen, but the jury being complete, accepted, and sworn, and the case entered into, he had the right to insist upon retaining him. We have on a number of occasions stated that the right of litigants in respect to jurors is not a right of selection, but of rejection. The claim urged here is one of "retention." That the court had the power and right to have made the substitution, if done with counsel's consent, is not denied. It is not, therefore, the "authority" of the court which is im-

pugned, but the circumstances under which this authority was exercised. Defendant did not seek to have the juror retained through a demand to have the trial either temporarily postponed or continued. Had he made a demand to that effect, we assume it would have been acceded to. This was the only form under which "retention" of the juror could be made to take the shape of a "right," for this asserted right would have disappeared at once before the unquestionable authority of the court to have discharged the jury. *Henry v. State*, 4 Humph. 270. When counsel did not urge his right to a postponement or a continuance of the case, we think he lost his vantage ground, and left the action taken by the court free from any reasonable complaint. *Thomp. & M., Juries*, c. 13, § 273.

The person injured in this case was a youth 17 years of age, differing in no particular respect from boys of that age. The evidence shows that he was utterly unfamiliar with the machinery of a sawmill. He had been employed at the mill only some seven or eight days; his employment being outside in the yard, assisting in taking logs from the pond. On the morning upon which he was injured, the mill being short-handed, he was called from this work into the mill by the foreman of the establishment, and assigned to the work at which he was injured, without any warning or instructions whatever. Counsel of defendant in their brief say: "There was nothing in his mental or physical condition that called for any particular instruction or warning, considering the nature of the work that the foreman called on him to perform; that work not being connected with the handling or directing the movement of any machinery. As to the danger of that position, that question is so closely connected with the manual duties to be performed that they must be considered together. The place was what is known in sawmills as the 'hole' or 'box,' and is shown to be a necessary place in all sawmills, and in area was about six by three feet, which area could be lengthened by pushing up a movable barrier. There was room enough in it for the needs of the workman standing there, and it was properly located and constructed. The work to be done there by Lindsey, the deceased, was to assist in removing plank that were passing down the live rollers and placing them on a platform from whence they could be sent to an instrument called the 'edger' when necessary, though Lindsey's duty ended when the plank were placed upon the platform. In the performance of this work he was assisted by another workman,—a man named Womack, who also managed what is called the 'cutoff saw' at his end. The method by which Lindsey worked was to insert a hook into the end of the plank and pull it forward onto the platform mentioned. He did not have to lift the plank, but simply to pull it forward, while Womack did the same at his end.

There was no possibility of this live roller being blocked up with lumber by not removing it, for, if the lumber on it was not touched, it would pass on and fall into a space prepared for it underneath the mill; the roller working somewhat after the principle of a cane carrier in sugar mills. And it seems that it was only the lighter lumber, like plank, that was to be removed when it was desired to saw or trim them; the heavy pieces being carried on and otherwise disposed of. It can be readily concluded that the task assigned to Lindsey did not require the exercise of any special strength, and this is the opinion expressed by all the witnesses. As to the degree of skill and experience required to perform the work, there is variance in the testimony, but the great preponderance of it is on the side that it did not require either skill or previous experience; that it was not a complicated case to work at, and did not require any special skill, the duty consisting in picking up the end of a plank and moving it properly; also that Lindsey had been there long enough to know how to catch the end of the plank and move it. Lindsey was not placed in charge of any machinery, dangerous or otherwise. He had nothing to do with the saws, and was not injured by them. His work consisted simply in pulling one end of a plank from the live rollers as it reached him, and placing it on a platform by his side, in order for it to be sawed by another man, and it was not the live rollers from which he was taking the plank that injured him. Either Lindsey was negligent about the attention to do his duties at that particular time, or Womack failed to be as careful as he should have been. In the first event, the doctrine of contributory negligence, and in the second the fellow-servant doctrine, barred recovery. In either event, the plaintiff could not recover. If there was danger, it was plain and open to view, and easily avoided with ordinary care. Lindsey had been working long enough to be well acquainted with it. Lindsey himself sought the work upon which he was employed."

We are satisfied from the evidence that the place at which Lindsey was set to work, and that the work to which he was assigned, were both dangerous, and required some experience, and called for notice or warning of the dangers to which a person employed in that place and that work would be exposed. Several of defendant's own witnesses testified as to the danger both of the place and of the work and to the necessity of knowledge and experience, and one of the workmen engaged at the edger urged and warned the young lad not to do the work, without specifying, however, what the danger was, or giving any instructions. It is useless and irrelevant to discuss what the danger of this particular place or what the danger of this particular work was, relatively to the danger of other places or other work about a saw-mill; also whether the mill was short-handed

that morning, or Lindsey sought the work. We have to confine ourselves to this special place and work. It is very true that Lindsey was not placed in charge of a saw, and did not operate machinery himself, and also true that he was not injured directly by the live rollers from which he took the planks; but he was surrounded by machinery operated by other parties, and he was injured by being thrown violently into the machinery, at the edger, which was at his side or behind him, by being struck by a plank thrown from the live rollers, by not being judiciously or skillfully handled by Womack and himself jointly, or by one or the other. Defendant argues that, if the injury was occasioned by the negligence and fault of Womack, the action would necessarily be barred by the fellow-servant doctrine, and, if it was occasioned by Lindsey's own negligence, his father and mother could not recover. If the work on which these parties were engaged was such as made it necessary, for Lindsey's protection, for him to be informed that the slightest error on the part of his fellow workman would carry with it great danger to himself, and that therefore he should specially watch all his movements, and guide his own actions and conduct by them, defendant company's foreman would certainly not be justified in permitting Lindsey to go to work under the impression and belief that it made no particular difference whether the two ends of the planks taken from the live rollers should be taken off simultaneously or not. If the effect of a failure on the part of either Womack or himself to seize the two ends of a plank simultaneously would be to throw one of the ends of the plank crosswise, so as to be caught up by heavy timbers passing down the rollers, and thrown violently back against the man opposite to it, and pushing him into the edger machinery, he should certainly have been informed of this possible or probable danger, so as to guard against it. If by reason of not having this information, and not taking the precautions for safety which he would have taken had he known it, he receives injury, his employer is liable to him, not for the fellow servant's fault, but for his own fault in not giving him proper information and warning. The fault of the fellow servant would be simply the occasion giving rise to the master's liability; the cause of the liability would be his own direct, individual fault. If the injury to Lindsey should have resulted from his own act of omission or commission, it would by no manner of means follow that his employer would be relieved from liability by reason of that fact. An act unskillfully or imprudently done is not necessarily a fault on the part of the person who does it. The unskillful or imprudent doing of the act may be imputable as a fault to some one else who was charged with the legal duty of preventing or guarding against the omission to do so, giving rise to a legal cause of action

against him by the very party who committed the unskillful or imprudent act. We are of the opinion that the deceased was not given the information and warning he was entitled to receive from the defendant company, his employer, and that the injury received by him was the result of that fact, and that the conclusions of the jury and the court on those points were correct.

We now turn our attention to the amount of damages which plaintiffs demand. This is a matter difficult to fix in a case where each and every factor which goes to make up the sum total is uncertain and problematical. The deceased was a youth of 17 years. When we come to estimate damages upon what would have been his length of life, we deal largely in conjecture, for there are many matters as to which no testimony can be adduced. For instance, we can form no idea as to the occupations which he might have engaged in; the climate of the places in which he might have been called on to reside; his special habits and character, as they would be developed later. We do not know whether he would have returned to his parents, and, if so, how long he would have remained with them; nor can we form any idea as to the extent he would have recognized, in fact, his various duties towards them, or been able financially to carry them out. The evidence shows that he had absented himself from his home, and his parents knew nothing of his whereabouts. As matters stood at his death, he was practically no assistance to them. When we come to consider the grief and sorrow of a parent, if they be allowable at all as elements of damage, how are they to be tested, and how are they possibly to be gauged? Plaintiffs do not sue upon a derivative action from their son, but upon a direct cause of action in themselves, conferred by law. Our Civil Code, in article 1934, declares, in matters of contract, the general rule to be that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, but that there are cases in which damages may be assessed without calculating altogether on the pecuniary loss to the party, —instancing "where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, in morality or taste, or some congenial or legal gratification." As to these, the article says, "though these are not appreciated in money by the parties, yet damages are due for them by each; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule." It then adds: "In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses and contracts, much discretion must be left to the judge or jury, while in others they have none but are bound to give such damages under the above rules as will fully indemnify the creditor whenever

the contract has been broken by the fault, negligence, fraud or bad faith of the debtor." In *Downing v. Steamship Co.*, 104 La. 523, 29 South. 207, we referred to this subject, saying that, though much had to be left to the discretion of the judge or jury, under this article they should not act arbitrarily in the matter. We do think this is a case entitling plaintiffs to vindictive or punitive damages. We think it due to the defendant to say that the charges made of attempted concealment of the death of the son, and of disregard of what was called for in the premises by feelings of humanity, are not only not sustained, but that the evidence establishes commendable conduct on their part. The parents of the youth were unknown to the defendant, and he did not seem disposed to give information on the subject. The defendant had him conveyed, with proper assistance, to the Charity Hospital at New Orleans, to be attended to, and, upon his death, furnished a neat coffin, caused him to be buried in a proper cemetery, and paid all the expenses. The verdict returned is for too large an amount. The amount should be reduced.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is, amended by reducing the amount of the judgment to \$2,500, and, as amended, it is hereby affirmed. Costs of appeal to be borne by the appellee.

PROVOSTY, J., dissents.

(107 La.)

TOWN OF MINDEN v. McCrARY. (No. 14,310.)¹

SAME v. McCrARY et al.

(Supreme Court of Louisiana. May 26, 1902.)

CRIMINAL LAW—APPEAL—BOND—CUMULATION OF CASES—BILL OF EXCEPTIONS—QUESTIONS NOT RAISED BELOW.

On Motion to Dismiss.

1. Inaccuracies in a bond of appeal in describing the judgment and sentence appealed from will not invalidate the appeal if the description contains statement sufficient to identify the sentence and judgment.

2. Cumulation for the appeal of all cases germane to each other and for similar offenses charged, if the cases are all brought up in one transcript, will not present ground of itself to dismiss the appeal.

On the Merits.

3. A bill of exception is not considered in a criminal trial when it only appears by entry in the minutes that the "bill was taken." *State v. Napoleon*, 28 South. 972, 104 La. 161.

4. In order to give the supreme court appellate jurisdiction on the ground of the unconstitutionality and illegality of a fine imposed by a municipal corporation, it must clearly appear that the issue was raised and determined in the lower court.

5. An affidavit, although not drawn in regular form, may be sufficient to sustain proceed-

¹ Rehearing denied June 23, 1902.

ings in a mayor's court. State ex rel. Cour-
rege v. Mayor, 23 South. 92, 50 La. Ann. 45.
(Syllabus by the Court.)

Appeal from mayor's court, town of Min-
den; J. P. Kent, Judge.

P. H. McCrary and P. H. McCrary and
others were convicted of gambling, and all
the parties appeal. Affirmed.

R. C. Drew and Stewart & Stewart, for
appellants. Lynn Kyle Watkins, for appel-
lee.

BREAUX, J. The minutes of the mayor's
court show that one of the defendants in case
No. 1 was charged with "permitting a gam-
bling game to be run in his house, room, or
tenement, accessible to the public in the town
of Minden," and the other defendants were
found guilty of gambling. He was tried,
and found guilty, and sentenced to pay a fine
of \$50, and to be imprisoned one day for each
dollar imposed in default of payment. From
this sentence he appeals.

Here a motion is made to dismiss the ap-
peal on a number of grounds, among them
the following: (1) That there are too many
cases included directly and by reference in
one transcript of appeal, and there is an il-
legal cumulation of causes for appeal in the
several cases by reference, and that the sev-
eral cases are not appealable in one transcript
before judgment entered and legal orders
granted therein, not having been first con-
solidated for trial. In the alternative, if the
town of Minden is held bound by the grant-
ing of such orders, then there is no reason
for connecting case No. 1 and case No. 2
against McCrary in one transcript, as those
two cases do not stand together, and have
not the same evidence, and the issues are not
triable in one case. (2) That the case does
not present any questions of law under the
pleadings and issues presented. Five other
cases are brought up in one transcript. The
same defense is made as was made by de-
fendant in case No. 1. In so far as plaintiff
and appellee seeks to dismiss the appeal be-
cause the bond is not in due form, we can
only say that it contains the essentials of a
bond, and is sufficient to enable appellants to
sustain their appeal. The consolidation of
the suits to which the appellant objects here
for the first time is not as serious an objec-
tion as at first appears. All the papers are
before the court that were before the court
of the first instance. The court, in its dis-
cretion, can consider more than one criminal
case in one transcript, if they are germane to
each other. The gambling charged against
the defendants was, as we understand, one
game, in which they all took part. The mo-
tion to dismiss is overruled.

On the Merits.

There are reasons special in this case for
refusing to reverse the judgment on the
ground that the ordinance attacked the af-

fidavits and that the other steps taken against
the defendant are unconstitutional. Appellants
did not except to the action against them on
the ground of illegality and unconstitutionality.
Merely a note in the minutes that de-
fendant took a bill of exceptions to the
court's ruling is not the action required. We
should be reluctant to subject the defendants
to this fine unless compelled to do so by the
clear rules of practice. The decisions hereto-
fore handed down leave us with no discretion
in the matter. It may be another case of dura
lex, yet it is the law to which we must adhere.
State v. Napoleon, 104 La. 166, 28 South. 972.
Without a bill of exceptions it does not ap-
pear that the question of illegality and uncon-
stitutionality was raised and considered in the
lower court. It has been repeatedly held that,
in order to raise the question of unconstitu-
tionality on appeal, it is necessary for it to
appear that it had been raised in the court
below. Defendant has attacked the affidavit.
The answer is to this complaint that this
court has not heretofore required this affidavit
in the mayor's court and recorder's court to
be technically accurate. It has been laid down
as necessary to cover the substance of the
charge. State ex rel. Courrege v. Mayor of
New Iberia, 50 La. Ann. 45, 23 South. 92.
The ordinance sets forth in substance that all
gambling is prohibited within the limits of the
town of Minden. Gambling in one way or an-
other was made the subject of legislation in
this state. St. No. 69 of 1886. See State v.
Hunter, 106 La. 187, 30 South. 261. When the
position is taken by defendant that the act
charged is not denounced as a crime, and is
not punishable, we can only say in answer
that enough of the facts should be embodied
in a bill of exceptions to enable us to deter-
mine the question.

The judgment is affirmed.

(107 La.)

CITY ITEM CO-OPERATIVE PRINTING
CO. v. PHOENIX FURNITURE CON-
CERN, Limited. (No. 13,991.)¹

(Supreme Court of Louisiana. May 12, 1902.)

RECEIVERS—EXPENSES—LIMITED CORPORA-
TIONS—UNPAID SUBSCRIPTIONS—COLLEC-
TION—FINAL ACCOUNTING—ASSETS—RESIG-
NATION OF RECEIVER—LIABILITY ON BOND
—RIGHTS OF CREDITORS—APPLICATION OF
FUNDS.

1. Ordinarily, the only excuse for the ex-
istence of a receivership is that the property
of the insolvent estate might be conserved and
applied to the claims of creditors, and the ex-
penses and charges of administration should
be in proportion to the interests involved and
the results achieved, always remembering that
the property administered is the common pledge
of the creditors, and that to realize the pay-
ment of their claims, as far as possible, in the
order in which the statutes provide, is the
first and paramount object of the law. It is
this result that is to be aimed at, and this
court will sternly enforce it in every case
coming before it.

¹ Rehearing denied June 28, 1902.

2. Unpaid subscriptions to the capital stock of a limited corporation are assets which the receiver must collect and apply to payment of debts, and his gestion is not complete until this is done, or a satisfactory showing made that it cannot be done.

3. When it appears on the face of the record that assets of the estate are not accounted for in what is presented as a final account, the case will be remanded, and this, too, notwithstanding failure to specially mention and complain of, in the opposition filed, this omission of assets.

4. And this court will not undertake the task of delving into voluminous books and other records brought up in the original by consent of counsel, to eke out the showing or want of showing made in this respect by the final account.

5. A former receiver, who, in suit to destitute him, resigns, must settle with his successor for his gestion of the estate, and his bond should not have been permitted to be canceled until such settlement is had.

6. The necessity for provoking an account by a creditor who demands payment is not to be superseded by a mere application to be paid entered upon the receiver's order book. Nor are creditors precluded in the matter of contesting claims set up against an estate except in the way the law provides, to wit:—by the filing of an account and its homologation contradictorily with them after the notice and delays required to be given.

7. Funds in the receiver's hands subject to no special privilege must be first applied in paying the claims which are entitled to rank as general privileges priming the lessor's privilege, and only for the balance that may be left over, after exhausting the fund subject to no special privilege, can recourse be had against the fund which is subject to the lessor's special privilege.

8. If there be authority in law, in case of a receivership, for the appointment of an attorney for absent creditors, his compensation is a charge on the sums coming to such creditors, and not in the mass of the creditors.

Monroe, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by the City Item Co-operative Printing Company against the Phoenix Furniture Concern, Limited. From the final accounting, Frank T. Howard, opponent, appeals. Reversed.

E. Howard McCaleb, for appellant. S. S. Prentiss, Jr., for appellees absent creditors. Dinkelspiel & Hart and E. M. Cahn, for appellee A. H. Kaiser.

BLANCHARD, J. This case is here on appeal by Frank T. Howard from the action taken by the trial court on the final account filed by the receiver for the defendant corporation. Howard was the owner of the store building in which the business of the corporation was conducted and the lessor of the corporation. He is a creditor of the concern for rent of the premises. He opposed generally each and every item on the account and specially objects to the rank of privilege accorded him on his claim for rent.

In October, 1899, three persons, Chas.

Weill, Ad. Koppel and Will. A. Taylor, incorporated themselves into the limited concern which figures as the defendant herein. The capital stock was placed at \$50,000, to be represented by 500 shares of the par value of \$100 each. Weill subscribed for 160 shares, Koppel for 150 shares and Taylor for 10 shares, making 320 shares of the 500 shares the charter authorized. It does not appear that any one else subscribed to the stock. Weill, it seems, disappeared from connection with the concern and Chas. Kirsch took his place. Koppel became president and treasurer, Kirsch vice president and secretary, and these two, with Taylor, constituted the board of directors. It would seem that of the \$32,000 subscribed by Weill, Koppel and Taylor nothing was paid in to constitute the active capital of the concern, for we find that after a little more than five months of existence the corporation was in a bad way. Debts were falling due and there was no money to pay, notwithstanding the fact that the months the concern had been in existence were the best business months of the year. The stock of goods, or considerable part thereof, had not been settled for, which should have been the case had the shares subscribed for been paid in, and the factory cost of the furniture on hand was only \$16,604.08. The board of directors met, passed a resolution admitting the inability of the concern to meet its obligations, declared the appointment of a receiver was necessary, and authorized the president to provoke the appointment of a receiver, or to consent to such appointment on behalf of the corporation. This was followed by a petition filed by the present nominal plaintiff asking the appointment of a receiver. The petitioner averred itself to be a creditor for advertising done for the corporation, though no amount of indebtedness is mentioned. The petition was answered the same day by the president of the concern, who admitted the allegations thereof and consented to the receivership prayed for. An order followed appointing Koppel (the corporation's president) receiver and authorizing him to administer the affairs of the concern as such, first requiring him to give bond in the inadequate sum of \$4,000. The receiver then petitioned for the taking of an inventory, for the appointment of an attorney at law to act as counsel to him, and for the appointment of an attorney for absent creditors. An inventory was ordered, an attorney to represent absent creditors was named, and the same attorney who had filed the petition for appointment of receiver was named as counsel to the receiver. The receiver then petitioned for authority to conduct the business of the corporation as a going concern, and an order to that effect was made. Within a few days following the appointment of receiver certain creditors took action to vacate the receivership on the ground that the whole proceeding was a scheme devised and carried on solely for the benefit

of the three stockholders of the concern and not with the view of benefiting its creditors; that its only purpose was to hold the creditors at bay, tie their hands, stay legal proceedings to collect their debts, and thus enable the three parties who constituted the board of directors to hold onto the property and assets of the corporation. These creditors specially objected to Koppel as receiver on various grounds, among others that his administration as president of the corporation had brought ruin upon it, and this demonstrated his unfitness and incapacity to conduct its business as receiver, and that if the receivership was to be continued, another man should be appointed. The result of this attack was that Koppel resigned the receivership and A. H. Kaiser was appointed in his stead. An inventory was taken. Its taking was made to occupy 11 days. The first day, which was Saturday, after appraising property to the amount of \$1,690.18 only, an adjournment over to Monday was had, when property to the amount of \$1,956.33 was appraised. Then an adjournment was had to Tuesday, when property to the amount of \$2,263.97 was appraised. Wednesday's work showed an appraisal of \$2,315.05; Thursday's work showed an appraisal of \$111.23; Friday's \$153.06; Saturday's \$739.64; Monday's \$1,367.08; Tuesday's \$145.44; Wednesday's \$2,154.38; and Thursday's \$766.93. Total \$13,603.29.

The notary and two appraisers, who officiated at this inventory, followed it up by presenting a bill for \$500—\$300 for the notary and \$100 each for the appraisers. These charges were excessive and exorbitant. This inventory was unnecessarily lengthened in the taking thereof. Two days, instead of 11, we think should have sufficed, and a charge of one-fourth, or at most one-third, of that preferred was sufficient. The receiver and his attorney should have vigorously opposed the bill presented and should have appealed from the ruling allowing the notary \$200 and the appraisers \$200. There was error in this allowance.

This receivership and its administration resulted in injury to creditors. It was a mistake from the first. The proceeds of the sale of its property were wasted in expenses and charges. The only parties benefited were the three stockholders, who were retained in the employ of the concern at the same salaries they had been receiving, their clerks, the receiver, his attorney, and others to whom costs were paid or proposed to be paid.

The receiver failed in his duty in respect to rendering accounts of his administration. Section 9 of Act 159 of 1898 requires quarterly statements of their gestion to be filed by receivers who are vested with powers of administration. This is not a merely directory provision of law. It shall be done, is the mandate of the statute. No account was filed until nearly one year had elapsed and then its filing was the result of action taken by cred-

itors to compel it. This account is presented as a final account. It shows aggregate sales of goods at private sale by the receiver from April to December, 1900, inclusive, to have been \$19,474.66. It shows aggregate purchase of goods during that period to replenish stock, \$3,944.17. It shows the aggregate of expenditures during that time in conducting the business to have been \$12,311.94. On this showing there is a balance on the face of the account of \$3,218.55 in favor of the receivership, which, strange to say, is not carried forward on the account, nor included in the funds which the receiver proposes to distribute according to the scheme of his account. Nor is this explained in any evidence submitted or statement made by the receiver. There is error in this so great that even without formal opposition pointing it out, the interest of justice warrants the reversal of the judgment and the remanding of the case.

After conducting the business eight or nine months, the remainder of the stock of goods on hand, together with the book accounts, assets, store fixtures, occupancy of the leased premises for the unexpired term of the lease, etc., was sold at auction and the auctioneer paid over to the receiver \$5,366.65, to which was added \$514.63 realized from collections of open accounts, etc., following the auction, making, together, \$5,881.28, from which, before filing the account, the receiver paid out \$604.23, leaving a balance of \$5,277.05, as to which the receiver, in his account, submitted a scheme of distribution. Preceding the auction sale the receiver had asked for another appraisal and this was ordered. Kirsch and Taylor, two of the three stockholders and directors of the corporation, were appointed appraisers. They were allowed by the receiver for the service thus rendered \$100 each. It thus appears that the taking of the inventory and appraisements made of this small estate has cost \$600 in all—a charge out of all proportion to the interests involved and grossly excessive. The allowance of \$100 each to Kirsch and Taylor is error. If this second appraisal was necessary at all, which seems doubtful in view of the fact that the goods appraised were about to be sold at auction for what they would bring in cash, so far as we are able to make out what the terms of the sale were from the meagerness of the record in this regard, half the amount allowed is deemed sufficient.

The charge and allowance of \$2,375 as fees to the attorney for the receiver is excessive. A fee of 10 per cent. upon the amount, \$5,277.05, what the account shows is the only sum in hand for the payment of charges and costs and for distribution to the creditors (out of which not a dollar will be available for ordinary creditors), together with \$300 as a fee for advice to the receiver and services rendered him in his nine-months administration of the business of the corporation as a going concern, making together \$827.70, is deemed a sufficiently large allowance for legal

services out of an estate of the size of this one.

The allowance of \$1,125 to the receiver is deemed excessive. It should be reduced to \$1,000 all told.

The attorney appointed to absent creditors was put down on the account at \$500, but reduced by the trial court to \$250, and allowed for that sum as a privileged debt on the mass of the funds for distribution. This is error. If there be authority in law, in case of a receivership, for the appointment of an attorney to represent absent creditors, as to which no opinion is expressed, the law is clear that his compensation is a charge on the sums coming to such creditors and not on the mass of the creditors. *Dunbar v. Creditors*, 39 La. Ann. 591, 2 South. 543; *Andrus v. Creditors*, 46 La. Ann. 1355, 16 South. 215.

Of the \$5,277.05 which the receiver places on his account as the only sum he has for distribution, it was proposed to absorb all of it save \$1,275.05 in payment of appraisers, attorney's fees and receiver's fees, leaving not a cent for ordinary creditors and only the \$1,275.05 for a creditor of as high rank as the lessor on his rent claim for \$4,496.18. And this is the net result of this receivership and of the administration of the receiver!

The trial judge properly sustained the claims of the state and the city of New Orleans for taxes due, with penalties, etc., and properly ranked these claims as first privileges on the funds in the hands of the receiver. The lessor was properly allowed the sum of \$4,496.18 due him for rent, with interest, and according him a lien and privilege therefor upon the proceeds of the goods in the leased premises, but there was error in subordinating his claim to that of certain general law charges. Of the \$5,277.05 in the hands of the receiver, \$1,519 was derived from the sale of property and assets not in the leased premises. To this sum of \$1,519 the lessor's privilege does not attach. On the remainder it does attach, and it also attaches to whatever further sum derived from the sale of the goods in the leased premises the receiver may be accountable for. The \$1,519, being a sum which owes no special privilege, must be first used in paying the claims which are entitled to rank as general privileges ahead of the lessor's claim. Civ. Code, art. 3254 et seq. Those claims are the taxes due the state and city of New Orleans, the license due the city, together with the penalties attaching to said taxes and license, the amounts due the notary and the appraisers, the auctioneer's fees, cost of advertisement of the property in the leased premises for sale and the clerks and sheriff's costs.

Of the \$827.70 which we hold is the amount that should be allowed the receiver's attorney as compensation, \$250 may well be considered as for "services necessary in order to put the court's action in motion" (as was said in *Salaun v. Creditors*, 106 La. 220, 30 South. 696) leading up to the sale of the property lo-

cated in the leased premises. For this \$250 a privilege is recognized as priming that of the lessor. This on the authority of *Salaun v. Creditors*. The same is true of the amount (\$1,000) which we hold should be allowed the receiver as compensation for his services. Two hundred and fifty dollars of the same is recognized as entitled to a preference over the lessor's claim for the reasons set forth in *Salaun v. Creditors*, and on the authority of that case. But both these amounts, to wit:—that portion of the fee due the attorney and that portion of the compensation due the receiver thus recognized as priming the lessor, are to be paid out of the \$1,519 (the fund owing no special privilege) as far as the same will go towards its satisfaction and the satisfaction of the other charges and costs that are recognized as priming the lessor. Only for the balance that may be left over after exhausting the said sum of \$1,519, are these claims to be allowed by preference over the lessor on the proceeds of the property which was contained in the leased premises.

The lease having stipulated that in event of suit to collect the rent, attorney's fees should be due the attorney of the lessor, such attorney's fees must be paid, and they are privileged as part of the rent claim.

It does not appear that Koppel, the first receiver appointed, has ever accounted to Kaiser, the second receiver, for his gestion of this estate. On the contrary, there is that in the record which leads to the belief he has not settled and is due something to the estate. Yet the present receiver, Kaiser, has permitted his bond to be canceled. He should be proceeded against for a settlement, and if it be found he owes the estate, the amount should be collected and accounted for by the receiver.

There is nothing in the record to show that the subscriptions made by Well, Koppel and Taylor to the capital stock of this concern were ever paid, and nothing to show that any effort to collect same, or whatever balance due thereon, was made by the receiver. Yet the record does disclose those parties subscribed to \$32,000 of stock, and from the face of the record the probability appears very strong that they did not pay the same. If unpaid, these subscriptions are assets of the estate, and the receiver should proceed to collect same for the benefit of the creditors. *Belknap v. Adams*, 49 La. Ann. 1352, 1353, 22 South. 382; *Morgan Co. v. Allen*, 103 U. S. 508, 26 L. Ed. 583; *Richardson's Ex'r v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; *Upton v. Tribilcock*, 91 U. S. 47, 23 L. Ed. 203. Where it appears on the face of the record that assets of the estate are not accounted for in what is presented as a final account, the judgment will be reversed and the case remanded, and this, too, notwithstanding failure to specially mention and complain of, in the oppositions filed, this omission of assets. And this court will not go through voluminous records and books,

brought up in the original by consent of counsel, to eke out the showing or want of showing made in this respect by the final account.

That provision of law (section 8 of Act 159 of 1898) which requires the clerk of court in receivership cases to keep a book known as the Receivership Order Book, and to enter therein all proposed orders, and which prescribes that no order shall be granted until 10 days after entry of notice thereof in the book, does not have the effect of precluding creditors from contesting claims against the estate which may have been made the subject of such orders so entered, and as to which no opposition was made within 10 days of such entry on the order book. It was not intended by this provision of law to do away with the necessity for provoking the filing of an account by creditors who demand payment. A rule to show cause why he should not be paid should be taken by a creditor after he has provoked the filing of an account, and after its homologation, and this necessity for provoking an account is not to be superseded by a mere application to be paid, in advance of the filing of an account, entered upon the order book. Creditors are not precluded in the matter of contesting claims set up against an estate except in the way the law provides, to wit:—by the filing of an account and its homologation contradictorily with them after the notices and delays required to be given.

This case presents a conspicuous example of the swallowing up—if the courts were to permit it—of an insolvent estate by expenses, charges and costs incident to its administration. This receivership was not conceived or begotten in the interest of the creditors of the corporation, and it seems clear that the purpose of its administration was not to further their interests and did not have that result. And yet the only excuse for its existence was that the property of the concern might be conserved and applied to the claims of creditors! The expenses and charges of administration by a receiver should be in proportion to the interests involved and results achieved, always remembering that the property administered is the common pledge of the creditors, and that to realize the payment of their claims, as far as possible in the order in which the statutes provide, is the first and paramount object of the law. It is this result that is to be aimed at, and this court will sternly enforce it in every case coming before it.

It is ordered and decreed that the judgment appealed from be avoided and reversed and that this case be remanded to the court a quo to be proceeded with as herein indicated, and with instructions that the account of the receiver be recast in accordance with the views herein set forth and the law, costs of this appeal to be paid by the receiver individually.

MONROE, J. I respectfully dissent.

(107 La.)

CARTER v. MORRIS BUILDING & LAND IMP. ASS'N, Limited. (No. 14,164.)¹

(Supreme Court of Louisiana. June 10, 1902.)

HUSBAND AND WIFE—SEPARATION OF PROPERTY—ACTION—JURISDICTION—RESIDENCE OF PARTIES—SALE OF REALTY—TITLE.

1. The courts are without jurisdiction to grant to persons not residing within the limits of the state a decree of separation of property.

2. The wife has not attempted to comply with article 2437 of the Civil Code. She has never returned to the place of matrimonial domicile at all, and therefore cannot stand in judgment.

3. The presence of the husband temporarily is not the presence contemplated by the article cited to enable the wife to sue.

4. One who tenders title conveying property should tender a title not suggestive of future litigation.

Nicholls, C. J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by Esther C. Carter against the Morris Building & Land Improvement Association, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Branch K. Miller, for appellant. James Legendre, for appellee.

BREAUX, J. This suit was brought to compel the defendant to sign the deed tendered, and complete the sale of property in accordance with an agreement entered into between plaintiff and defendant. She (plaintiff) was the owner by inheritance of property in the city of New Orleans. Upon an examination of the title the defendant found that it had cause to decline to complete the sale on the ground that plaintiff had no authority to sell the property. The objection to the title grows out of the following state of facts: The property was brought in marriage by the plaintiff as dowry in accordance with a marriage contract executed just prior to her marriage in 1873. In 1898, plaintiff, alleging that she is domiciled in Toronto, Canada, brought suit against her husband for separation of property in the civil district court in the parish of Orleans. The defendant husband made no defense, and a judgment by default was entered against him in that year. The record does not disclose that either plaintiff or defendant ever resided in Louisiana since their marriage.

The first contention of plaintiff is that dotal property may be sold by the wife after a judgment of separation of property between herself and her husband. The separation of property was decreed in 1898. The plaintiff meets at the outset with a difficulty that we have not thus far been able to do away with, and which constrains us to withhold a decree giving recognition to the title tendered. The husband was not a resident of the state, and was only here a few weeks on a visit when

¹ Rehearing denied June 30, 1902.

the suit was brought by plaintiff and service made. She did not return to this state at all, and has never lost her residence or domicile in Canada. It follows, we think, that the district court did not have jurisdiction over the parties. The question is one of status, and as a defendant in the suit for a separation of property brought by plaintiff against her husband it was not a mere personal right which the defendant in that suit could waive. It is a question of status, because a judicial separation of property emancipates not only her property, but her industry as well, from the control of the embarrassed husband. It enables her to conduct business in her own name for her benefit, and to earn a livelihood for herself and her family. It gives her the right to bind herself in matters of the administration of her property; also in matter of the disposition of her movable property. Civ. Code, 2436. She, it is true, cannot alienate her property without the signature of her husband or of justice. She must contribute to the support of the family. That is about all that remains of her obligations. As to property, she becomes a stranger to her husband. It changes the situation of the husband. He is presumed, because of the judgment of separation of property, to be an insolvent. He is no longer at the head of the community, and the wife must contribute in proportion to her fortune to the household expenses and to those of the education of her children. The wife cannot renounce, in advance, the right to sue for a separation of property, as it is a right recognized in the interest of the family and social order. The right of the wife to sue is entirely personal, but, after judgment has been obtained by her, it affects the marriage relations, to an extent at least. We are not dealing with the mere right of the wife to resume the administration of her paraphernal property,—a right, we take it, to be enjoyed by all, whether domiciled here or abroad,—but the unlimited and unqualified right to a separation of property. From that point of view we take it to be a question in which public order and social conditions are concerned. French commentators have considered the right in that light, and have gone much further than we think needful or advisable. "Si la communauté est en harmonie avec les rapports intimes établie entre le mari et la femme, il faut dire que la séparation de biens est en opposition avec la nature du mariage. Quand les époux sont divisés d'intérêt, il est fort à craindre que le lien des âmes en souffre." 23 Laurent, p. 439. By the effect of the judgment of separation the wife takes back the administration of the property. Plaintiff, at her own domicile in a foreign state, is absolutely without the right which grows out of a judgment of separation. The judgment affecting marriage relations would surely be an absolute nullity at the matrimonial home.

Plaintiff invokes a special law as applying and as authorizing her upon her return to this

state to sue her husband for a separation of property. Article 2437, Rev. Civ. Code. She has not complied with this special law, as she has never returned here at all, not even temporarily. The presence of her husband a few weeks or months was not equivalent to her presence. Moreover, the decisions of this court in order that a wife may have the right to sue have held that the return enabling the wife to sue means a return for the purpose under the protection of the laws of this state. *Smith v. Smith*, 43 La. Ann. 1148, 10 South. 248; *Hyman v. Schlenker*, 44 La. Ann. 108, 10 South. 623. A similar view was expressed by the supreme court of the United States in a suit for divorce under a law of Dakota. *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. We do not think that the court had jurisdiction to render a judgment of separation of property.

The plaintiff who offers a title to a buyer should offer a title valid in every respect, and not one which may be in the least clouded by the fact that the wife has not complied with the provisions of the statute in obtaining a judgment of separation of property the legality of which is needful in order to transfer a good title.

For reasons assigned, the judgment is affirmed.

NICHOLLS, C. J. (dissenting). The plaintiff entered into a marriage contract by which certain property belonging to her was placed under the control of her intended husband as dowry. It was a Louisiana contract, affecting real estate there. The law of Louisiana entered into and formed part of the contract. *Guerin v. Rivarde*, 8 Rob. 457; *Bienvenu v. Derbes*, 2 La. Ann. 771; Rev. St. § 1719. By that law and the decisions of this court she was entitled, under certain conditions, to resume control of the property. The right and the remedy to enforce the same given to her was a real right and a real remedy continuing in character. I do not think she lost either by reason of her having, as a wife, and as in duty bound, accompanied her husband to a distant state. The parties being subsequently in Louisiana, and the conditions existing which, had she been domiciled in the state, would have entitled her to resume control of the property, the wife, under the authority of court sued her husband to effect that object. The husband was cited personally, and the wife obtained a judgment years ago, which no one contests. I do not think that judgment can in Louisiana, and quoad its operation and effect upon that specific real property, there be held to be a nullity for want of jurisdiction of the court or the capacity of the wife to sue. What the effect elsewhere, or upon other property, or generally, we are not called on to say. I think the wife was entitled to invoke the aid of our courts through the remedies accorded by law to maintain and enforce the contract rights which vested in her on the creation of her

contract under the real statutes of the state. I think section 1719 of the Revised Statutes should be liberally construed in aid of the remedy.

(107 La.)

HARVEY et al. v. GULF STATES LAND & IMPROVEMENT CO. (No. 14,167.)

(Supreme Court of Louisiana. June 28, 1902.)

TAXATION—NOTICE OF DELINQUENCY—TAX DEED—PAROL EVIDENCE—PRESUMPTIONS.

1. Where property is sold and transferred after the completion of the assessment, and continues to figure on the assessment roll in the name of the vendor, the notice of delinquency of taxes may be addressed to such vendor; and by serving on the purchaser or present owner a notice so addressed the tax officers comply with the law requiring notice to be served on the taxpayer.

2. The official return of the officer showing the manner in which a tax notice was served, and even parol evidence, is admissible to correct an erroneous recital in the tax collector's deed.

3. Where property is acquired after the completion of the assessment roll, the person who then was president of the corporation acquiring the property will be presumed, in the absence of proof to the contrary, to have continued to hold the same position down to the time of the serving of the notice of delinquency.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by Edith Harvey and others against the Gulf States Land & Improvement Company. Judgment for plaintiffs, and defendant appeals. Reversed.

J. Zach. Spearing, for appellant. Harry H. Hall, amicus curiæ. Charles Louque, for appellees.

PROVOSTY, J. The plaintiffs sold to R. McWilliams, Limited, on a credit, two lots of ground, with improvements, retaining a mortgage on the property for the price. The sale was made after the completion of the assessment of the year, so that for the year in which the sale took place the property stood on the assessment roll in the name of the plaintiffs. R. McWilliams, Limited, failing to pay the taxes thus assessed, the property was sold at a tax sale, and was bought by the defendant, and plaintiffs bring this suit to set aside the tax sale on the ground that the notice of the delinquency of the taxes was not served on the taxpayer as required by law. The notice in question is provided for by sections 50 and 51 of Act 170 of 1898, which require that the tax collector shall address a notice "to each taxpayer who has not paid his taxes," and shall "either deliver to each taxpayer in person or shall leave at his residence or place of business in the parish of Orleans one of said notices." With a view to complying with this law, the tax collector made out a notice containing the requisite recitals of description of property, notification of delinquency of

taxes, and announcement of sale of property in case of nonpayment, and caused same to be served on R. McWilliams, president of R. McWilliams, Limited. The notice was served in person, at the place of business of the company. It was addressed, however, to the parties in whose names the property stood on the assessment; that is, to the plaintiffs. The question is whether this was a sufficient compliance. We think it was. The purpose of the proceeding is to give warning to the taxpayer, and we have heretofore had occasion to say (In re City of New Orleans, 51 La. Ann. 972, 25 South. 686), and we repeat, that the strict adherence to form which has been enforced in matters of citation is not required in the matter of these tax notices. It is sufficient if the purpose of the law in requiring the notice to be given is accomplished; and no one could say that the notice in question did not bring home to R. McWilliams, Limited, notification of the fact that the taxes of the year were delinquent on the property which it had bought from the plaintiffs. The manner in which the notice was addressed could not mislead, for R. McWilliams, Limited, knew, or must be conclusively presumed to have known, that the sale made to it by the plaintiffs had taken place after the completion of the assessment, and that the assessment had not been changed, and that, therefore, the property stood on the tax roll in the name of the former owners, and that this was the reason why the notice was addressed to them. It is to be noted that our law makes special provision for the giving of notice to mortgage creditors, and that the plaintiffs had the full benefit of this notice. In urging their present complaint they are standing in the shoes of their debtor, R. McWilliams, Limited, and are in no better position than the latter would be to urge want of notice; in other words, if the notice was good as to R. McWilliams, Limited, it was good also as to the plaintiffs.

Plaintiffs objected to the admission in evidence of the official written return of the officer who had served the notice, and also to parol evidence showing the manner of the service, on the ground that "the act of sale declares that service was made on Clarence J. Harvey and others, and defendant cannot contradict this declaration in that act." We think this evidence was admissible. The recital of the deed was an error, and such errors in sheriffs' deeds may be shown by parol. *Gladdish v. Godchaux*, 46 La. Ann. 1571, 16 South. 451; *Vigne v. Brady*, 35 La. Ann. 560; *Armstrong v. Armstrong*, 36 La. Ann. 549; *Clauss v. Burgess*, 12 La. Ann. 142. See, also, *Ker v. Evershed*, 41 La. Ann. 15, 6 South. 566; *Gee v. Clark*, 42 La. Ann. 918, 8 South. 627.

Plaintiffs contend that the record fails to show that R. McWilliams was the president of R. McWilliams, Limited. The act evidencing the sale to R. McWilliams, Limited, so

§ 2. See Evidence, vol. 20, Cent. Dig. § 1993.

recites, and this act and the 14 notes sued on are signed by R. McWilliams as president; and there is no evidence showing that he ever ceased to be president. We think this was sufficient proof of his official relation to the company at the time the service was made.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the plaintiffs' suit be dismissed, with costs in both courts.

(On Application for Rehearing.)

(June 30, 1902.)

PER CURIAM. The court did not fail to observe that among the grounds of nullity alleged in the petition was the one that the property had not been assessed in the name of the owners; but the counsel for plaintiffs not having offered the assessment roll, or an extract thereof, or any other evidence, to show how the property was assessed, and not having complained of the finding of the learned judge a quo to the effect that the property "was correctly assessed in their [the owners'] names," and not having pressed this ground of nullity in argument or in brief, having in fact expressly admitted that "the evidence shows that plaintiffs had at one time been the owners of the property, which was correctly assessed in their names in 1898," the year for the taxes of which the property was sold, it was considered that this ground had been abandoned. In connection with the notice, plaintiffs, on this application for rehearing, have mended their hold. Their objection was that the notice had been addressed to the former owners, instead of to the actual owner. Their objection now is that the notice was addressed to Clarence J. Harvey et al., instead of to all the owners, giving their names. What is said in the opinion is equally applicable to this new phase of the question.

Rehearing refused.

(107 La.)

STATE v. ELIA. (No. 14,471.)¹

(Supreme Court of Louisiana. June 23, 1902.)

CRIMINAL LAW—TRIAL—REDUCTION OF EVIDENCE TO WRITING—LARCENY—EVIDENCE—BURGLARY.

1. The defendant in a criminal prosecution is not entitled, before the offer of any evidence, to an order that the testimony of the state witnesses, thereafter to be taken, shall be reduced to writing. All that he can require is that such testimony shall be taken down as may be necessary to enable this court to understand and intelligently rule on the objections as made by him in the course of the trial, and the question whether he has been denied his right in that respect must be presented to this court by means of a bill of exceptions.

2. Under an indictment for stealing "fertilizer" it is competent to prove the larceny of "phosphate fertilizer" or "fertilizer of phosphate," and, for the purposes of a question

propounded to a state witness, it is immaterial which expression is used.

3. In a prosecution for burglary in the nighttime, the question, "When, if at any time, was the warehouse * * * broken open?" can of itself work no injury to the accused; and, if the record discloses no complaint as to the answer, if any answer was given, it will be presumed that no injury was sustained.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Claiborne; Benjamin P. Edwards, Judge.

Martin Elia was convicted of burglary and larceny, and appeals. Affirmed.

Richardson & Richardson, for appellant. Walter Gulon, Atty. Gen., and John C. Theus, Dist. Atty. Gen. (Lewis Gulon, of counsel), for the State.

MONROE, J. Defendant, having been convicted of burglary and larceny, and sentenced to imprisonment at hard labor, presents his case to this court by means of the following bills of exception:

Bill No. 1 was taken to the refusal of the trial judge, upon a request made before any witness had been sworn, to grant permission for the court stenographer to take down the testimony of the state witnesses. The reasons assigned for this refusal are as follows: "By the Court: At this time there was no evidence introduced and no objections raised; no question for the court to pass on. The request was made by the defendant's counsel that all the evidence for the state be reduced to writing. (There was no bill of exceptions to the charge of the court, or any portion of it.) The court held that, when any question arose as to the admissibility of the evidence, or any mixed question of fact and law arose, that then the evidence should be reduced to writing, which was done, and so stated and informed defendant's counsel, and for the further reasons as stated in *State v. Downs*, 50 La. Ann. 694, 23 South. 456." There was no error in this ruling. The law contemplates the taking down, when an objection shall be made and a bill of exception reserved, "of the facts upon which the bill has been retained." Act No. 113 of 1896. This may fairly be interpreted to mean that such testimony shall be taken down as may be necessary to enable this court to understand and properly rule upon the particular objection made and bill reserved, but it affords no support for the proposition that a defendant in a criminal trial may require the clerk or court stenographer to take down all the testimony adduced on behalf of the state in advance of possible objections or bills of exception to be made and reserved in the course of the trial. *State v. Downs*, 50 La. Ann. 694, 23 South. 456; *State v. Judge of Criminal Dist. Ct.*, 104 La. 63, 28 South. 902. And this view of the matter is recognized by the counsel for the defendant, who admit that they had no right to have all the testimony for the state taken down. They, however, say: "We * * * submit that the reasons

¹ Rehearing denied June 30, 1902.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1599.

given by the judge in this bill are part of the record of this appeal, and rely on the statement therein in support of our other bills." They further say: "(1) That the court did not give the reasons for the ruling at the time the bill was reserved, but waited until after the case had been finished. * * * (2) That the court recognized at that time the mandatory provisions of Act No. 113 of 1896, when it 'holds that when any question arose as to the admissibility of evidence, or any mixed question of fact and law arose, that then the evidence should be reduced to writing'; and (3) that the court erred in stating, 'which was done,—that is, reduced to writing.' So far as we are informed by the record, reasons sufficient for the ruling in question were given when the ruling was made, and their sufficiency is not affected by the fact that thereafter, when the bill was signed, the judge, in incorporating them therein, referred to the occurrences of a later stage of the trial.

Bill No. 3 (which the counsel say should have been marked "2," and which they next take up for argument) reads as follows: "Be it remembered, that on the trial of this cause J. R. Madden, a witness for the state, * * * was asked by the state, 'when, if at any time, did your firm consent to any fertilizer of phosphate being taken by Mr. Elia?' Defendant, by counsel, objected to said evidence on the ground that there is no charge against the accused of taking phosphate. The allegations and proof must correspond; therefore the evidence is inadmissible. By the Court: The question put by the district attorney was, 'When, if at any time, did your firm sell or consent to any phosphate fertilizer being taken by Mr. Elia?' That the phosphate in question had been shown to be sold and used as a fertilizer. A complete note of the question was taken down by the court stenographer, as well as all other objections, which is hereto attached, and marked 'Exhibit A.'" It appears that the court stenographer made a note of the question, objection, and ruling referred to, which he subsequently corrected. The original reads as follows:

"Q. By the State: 'When, if at any time, did your firm consent to any fertilizer of phosphate being taken by Mr. Elia?' Objected to by counsel for defendant upon the ground that there is no charge against the accused for taking that kind of fertilizer. The allegation and charge must correspond. Ruling of the court: Objection overruled. Bill reserved. The court declines to have this evidence taken down, and will give its reasons in the bill. Preliminary evidence already having been taken, defendant objects to any evidence in this case to show a different time or different date of taking or entering, except as alleged in the bill of indictment; that the date, or nighttime, is alleged in the bill of indictment, and no evidence can be received except in accordance with that

allegation. Ruling of the court: Objection overruled. Bill reserved. The court will state its reasons in the bill.

"The above is a true and correct transcript of all shorthand notes taken in the above numbered and entitled case. This May 2, 1902. [Signed] E. H. Fortson, Stenographer."

In the corrected note the question propounded reads: "Q. When, if at any time, did your firm sell or consent to any phosphate fertilizer being taken by Mr. Elia?" In other respects the corrected note is identical with the original. And to the corrected note is appended a certificate by the stenographer and an affidavit by the district attorney to the effect that the question was asked as it appears in the corrected note, and that the other is incorrectly reported. It will be observed that in their bill of exceptions the counsel for defendant reserve no other objection than that the question asked was inadmissible, for the reason that there was no charge against the accused for taking "phosphate"; the objection being predicated upon the fact that the accused was indicted for the stealing of "fertilizer," and upon the supposed fact that the question referred to "phosphate." By the very terms of their objection, however, as appears from the note upon which they rely, the counsel recognized that the question to which they objected related to fertilizer of a particular kind, and, whether we consider the original or the corrected note of the stenographer, it relates to the same kind, since we can discover no difference in meaning between "fertilizer of phosphate" and "phosphate fertilizer." The question really presented, then, is whether a charge of stealing "three sacks of fertilizer," as contained in the indictment, can be sustained by proof that the accused stole three sacks of "phosphate fertilizer" or "fertilizer of phosphate," and this question, we think, should be answered in the affirmative, for the same reason that a charge of stealing "thirty yards of cloth" and "one coat" was sustained by proof as to "one piece of casimere" and "one blue pilot coat"; and that a charge of stealing two head of cattle might be sustained by proof of the stealing of a Jersey cow and a Durham bull. Whart. Cr. Ev. (9th Ed.) § 121 et seq.

The learned counsel say, in their brief, "Over and above all this, we call the court's attention to the fact, stated in the Exhibit A, 'The court declines to have this evidence taken down.'" and they refer to the statement of the court in Bill No. 1 to the effect that, "when any question arose as to the admissibility of evidence, or any mixed question of fact and law arose, * * * the evidence should be reduced to writing, which was done"; and it is argued that it thus appears that they asked to have the evidence—that is to say, the question that we have just been considering, and, presumably, the answer thereto—taken down, and that it was error in the judge, and in conflict with his previous interpretation of the law, for him to have refused to permit it.

The ruling of the judge was, however, made the subject of a bill of exception, in which the matter thus suggested was not incorporated, and such matter is therefore not before this court for review. Moreover, even if we should give to the defendant the benefit of that version of the disputed question for which his counsel contend, we should, as we have shown, be obliged to rule against him, and to hold that the question was admissible.

Bill of exception No. 2 recites that the question was asked a state witness, "When, if at any time, was the warehouse of J. O. Madden & Sons broken open?" and that defendant's counsel objected "to evidence being received to show a different time or different date of breaking or entering, except as alleged in the bill of indictment; that the date and nighttime is alleged in the bill of indictment, and no evidence can be received except to prove that date and the time,—nighttime. The court overruled the objection, and admitted the evidence for the following reasons, viz.: By the Court: The court did not overrule the objection, but restricted the proof of the breaking to nighttime, as alleged in the bill of indictment, and charged the jury that, in order to make out the offense, the state must show that the breaking was done in the nighttime, as alleged." In their brief, the counsel again refer to Exhibit A, attached to the bill No. 1, as showing that their objection was overruled. It suffices to say, in regard to this bill, that the question at which it is leveled could of itself have worked no injury to the defendant, and the fact that the record discloses no complaint as to the answer, if any answer was given, justifies the presumption that no injury was sustained. A motion for new trial, based entirely upon an allegation as to the sufficiency of proof, was filed, and a bill of exceptions was taken to the overruling of the same, but neither motion nor bill contain anything with which this court is authorized to deal.

For these reasons, the judgment appealed from is affirmed. "

(107 La.)

STATE v. BATSON. (No. 14,454.)

(Supreme Court of Louisiana. June 21, 1902.)
MURDER—INDICTMENT—DUPLICITY—JURY—
SELECTING AND SUMMONING—QUASHING
VENIRE—APPEAL—REVIEW—RULINGS ON
EVIDENCE—HANDWRITING.

1. Though a criminal act may operate on more than one person or thing, nevertheless, if it be but one act, consummated at one time, it may be charged as one offense, and an indictment charging in one count the murder of six persons is not bad for duplicity unless it appears upon its face that the deaths resulted from two or more distinct acts. But if, upon the trial, it is shown that all the deaths did not result from the same act, the accused may then compel the state to elect upon which charge it will proceed.

2. Under the statute of 1898 (Act No. 135), a venire is not to be quashed merely for irregularities or for noncompliance with the literal requirements of the law in the matter of

selecting and summoning the jurors, but only "where fraud has been practiced, or some great wrong committed in the selection and summoning of the jury, that would work irreparable injury." Hence the constructive injury resulting to the accused in a criminal prosecution from the facts that the names on the slips placed in the general venire box are written by the clerk and the jury commissioners, instead of being written by the clerk alone, and that the name of one juror is by accident duplicated, so that the whole number in the box falls one short of that contemplated by the statute, does not justify the quashing of the venire, in the absence of proof of fraud or actual injury.

3. The jury list and venire box are to be supplemented twice a year, or oftener, as the judge may require, so that the list shall contain 300 names of "competent, good and true" jurors, from which 20 are to be selected for the grand jury, leaving 280 to be put in the box. Save, however, upon the occasions when the box is thus supplemented, it is not required that it should contain 280 names; but it should at all times, barring accidents and oversights, contain that number, less the number previously and legally drawn since it was last supplemented.

4. The ruling of the trial judge that a question asked a state witness on cross-examination was intended to impeach the testimony of a witness previously examined, and was inadmissible because no foundation for such impeachment had been laid, will not be disturbed upon the claim that such question was legitimate by way of cross-examination, when the testimony given upon the examination in chief is not brought up, and the question objected to has all the appearance of having been asked for the purpose attributed to it by the judge.

5. Where it appears that the accused, on a trial for murder, had, after the murder had been committed, left certain movables in the hands of a citizen at the parish seat, and had then disappeared from the parish, and that, among the movables so left, some of which had belonged to the deceased, was a vest, supposed to be the property of the accused, in the pocket of which was a document purporting to have been written and signed by the accused, and indicating a purpose to take his own life, the vest and the document are properly admitted as relevant circumstantial evidence, without proof of the handwriting or signature of such document.

6. The rules of evidence to be applied in the prosecution in this state of crimes, offenses, and misdemeanors are those of the common law of England, save where it is otherwise provided by statute. Rev. St. § 978. There has been no statutory modification of the common-law rule that, in prosecutions for murder, documents otherwise irrelevant, and which have not been admitted in evidence, are inadmissible when offered merely to prove handwriting by comparison. Article 2245, Civ. Code, and article 325, Code Prac., establishing a different rule, are applicable only to civil proceedings.

Breaux, J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund Denis Miller, Judge.

A. E. Batson was convicted of murder, and appeals. Reversed.

Paul A. Sompayrac and Winston Overton, for appellant. Walter Guion, Atty. Gen., and Joseph Moore, Dist. Atty. (A. R. Mitchell and Lewis Guion, of counsel), for the State.

MONROE, J. The defendant, having been convicted of murder and sentenced to death,

has appealed to this court, and presents his case by means of the following motions and bills of exception:

1. A motion to quash the indictment for duplicity, in that it charges six offenses in one count. The indictment charges that the defendant " * * * did feloniously, maliciously, and of his malice aforethought, kill and murder L. S. Earle, Mrs. L. S. Earle, Ward Earle, Fay Earle, John Earle, and Lemuel Earle. * * *" Our law does not require that the manner of the killing shall be set forth, but that "It shall be sufficient in every indictment for murder to charge that the defendant did, feloniously, wilfully, and of his malice aforethought, kill and murder the deceased." Rev. St. § 1048. The charge, as made, is therefore in strict accordance with the statute, and there is nothing upon its face to indicate that the persons named were not killed at the same instant and by the same act. It is true, in general, that a count of an indictment charging two or more substantive offenses is bad for duplicity, and that a substantive offense is one that is complete in itself and is not dependent upon another. And from this it is argued that, the murder of one person being a substantive or complete offense, an indictment charging in one count the murder of six persons is necessarily bad. There are, however, but few rules which are without exceptions inherent in or predicated upon the same reasons or necessity as the rules themselves. Thus charges of greater crimes include those that are less in degree. Every indictment for murder and every trial for murder includes a substantive charge of and trial for manslaughter; the reason for this being that whereas the uniting in one charge or count of offenses differing in character, and resulting from distinct acts, committed at different times, is calculated to confuse the issues, and to embarrass both the prosecution and the defense, such consequences do not flow where the offenses charged result from the same act, and merely differ in degree, but, on the contrary, in such cases it is to the interest of the accused and of the orderly administration of justice that the legal consequences of the one act should be determined by one trial. Whilst, therefore, the view suggested by the learned and zealous counsel, who by appointment of the court have defended the accused, is not without support, the weight of authority and of reason sustains the proposition that, though a criminal act may operate upon more than one person or thing, nevertheless, so long as it is one act, consummated at one time, it may be charged as one offense. Bish. New Cr. Proc. § 437; Hughes, Cr. Law & Prac. § 2720; 9 Am. & Eng. Enc. Law (2d Ed.) p. 641; 10 Enc. Pl. & Prac. p. 454; Gordon v. State, 46 Ohio St. 626, 23 N. E. 63, 6 L. R. A. 749; People v. Adams, 17 Wend. 475; Rucker v. State, 7 Tex. App. 549; Chivarrio v. State, 15 Tex. App. 330; Ben v.

State, 22 Ala. 9, 58 Am. Dec. 234; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Wilkinson v. State, 77 Miss. 705, 27 South. 639; Forrest v. State, 13 Lea, 103; Kannon v. State, 10 Lea, 390; Com. v. McLaghlin, 12 Cush. 613; Rex v. Benfield, 2 Burr. 990; Com. v. Griffin, 21 Pick. 523; Com. v. Livermore, 4 Gray, 18. "If, however, the testimony shows that the killing of two persons was not by one act, the defendant has the right to compel the state to elect upon which charge it will proceed." Forrest v. State, 13 Lea, 104; Long v. State, 56 Ind. 182; 10 Enc. Pl. & Prac. p. 534. In the instant case it does not appear that the state was called on to make such an election, and, as the motion which we are now considering was predicated upon the face of the indictment, it was properly overruled.

2. A motion to quash the venire on the grounds: "First, that the general venire box * * * did not contain the names of 300 competent, good, and true men, as provided by law, at the time that the jurors were drawn; second, that the said general venire box did not at any time contain the names of 300 competent, good, and true men, whose names had been written on separate slips by the clerk of the court."

The following provisions of law applicable to the questions presented are to be found in Act No. 135 of 1898:

Section 3 of that act provides, in substance, that the judge of the district court shall appoint five good citizens, who are able to read and write the English language, and who, with the clerk of the court, or, in case of his disability, his deputy, shall constitute a jury commission, and that the commissioners shall be sworn faithfully to discharge their duties; and it contains other provisions which require no special notice at this time.

"Sec. 4. * * * That, within thirty days after their appointment, or sooner, if so ordered by the district judge, the members of the commission, or a majority of them, shall meet at the office of the clerk, * * * and, in the presence of two or more competent and disinterested witnesses, of lawful age, competent to read and write the English language, and residents of the parish, who shall be summoned by the clerk, for that purpose, select, from the persons qualified under this act to serve as jurors, * * * the names of three hundred competent, good and true men, a list of whom shall be made out by the clerk, under the supervision of the commission, and said witnesses [box] and said list shall be kept complete and supplemented from time to time as hereinafter enacted. Each of the names on said list shall be written by said clerk on a separate slip of paper with the number of the ward, or place of residence, of each person, and the slips of paper, or ballots, selected, except those containing the names of the persons chosen to serve as grand jurors, shall be placed in a box which shall

be labeled 'General Venire Box.' Immediately after completing said general venire list, the commission shall select therefrom the names of twenty citizens, who shall be subject to duty as grand jurors. * * * The names of the persons so selected shall be written on slips of paper by the clerk in the presence of the commissioners, and they shall place the slips in an envelope, seal the same and endorse thereon the words: 'List of Grand Jurors.' Thereupon, the slips contained in the general venire box shall be well mixed, and one of the members of the jury commission, in the presence of the others and of the witnesses, * * * shall draw therefrom, one at a time, the names of thirty persons to serve as petit jurors for the first week on the next ensuing session of court, and, if, in the judgment of the commission, a jury may be so required, or if the district judge should so direct, they shall draw, in the same manner, thirty additional names, for service as jurors during the second week of the session. * * * It is further provided that the clerk shall keep a record of the drawings, with a list of the names, which, latter, is to be delivered to the sheriff and published, or posted; and that " * * * whenever the judge shall deem proper * * * to direct the commission to draw additional jurors for service during any session of the court, or during a continuous session, no publication of the list shall be necessary," etc.

"Sec. 6. * * * That not less than twice in each year, or once in every six months, the jury commission shall meet at the clerk's office, and, after being furnished by the clerk with a list of grand jurors and those who have served as regular jurors since the previous drawing of the general venire, shall, in the presence of said witnesses, examine the original venire list and strike therefrom the names of those who have served, as well as the names of others on the list who are known to have died, removed from the parish, become exempt, or disqualified to serve as jurors, since their names were entered thereon; and the names of those who have died, removed, become exempt, or disqualified shall also be taken from the general venire box. The commission shall then supplement the original list and the ballots in the box with the names of the same number of good and competent men from the qualified jurors of the parish as have been taken from the box and erased from the list, so as to keep the number of names in the general venire box and on the jury list at the original standard of 300 contained therein. It shall be the duty of the clerk of the district court, at each meeting of the commission, to make a procès verbal of its acts, in detail, and record the same in a book to be provided for the purpose by the police jury, which shall, at all times, be open for the inspection of the public. Said procès verbal shall be signed by the clerk of court, the members of the commission present, and the witnesses."

"Sec. 10. * * * That, in districts composed of more than one parish, the jurors drawn for the first week of the session shall constitute the petit jury for that week and those drawn for the second shall serve for the time they are drawn: provided, that, if the jury drawn for any week of the session do not serve as jurors during that week, they may be required to serve during a subsequent week of any session of the court until a second venire shall have been drawn by the commission, unless sooner discharged by the district judge," etc.

"Sec. 11. * * * That, whenever the district judge thinks proper, he shall require the jury commission to select additional jurors, or talesmen, pursuant to the formalities prescribed in section 4 of this act, except as to the publication of the list of jurors so drawn, which shall not be necessary, * * * but nothing herein contained shall be so construed as to limit the right of the judge, in criminal cases, after the list of jurors or talesmen drawn by the commission is exhausted, after the trial commenced, to order the summoning of talesmen from among the bystanders, or persons in the proximity of the court house, or from any portion of the parish, remote from the scene of the crime, which the judge may designate."

"Sec. 15. * * * That it shall not be sufficient cause to challenge the general venire for any session of the court, or portion thereof, or for any service, at any time, in any parish or district of the state, or set aside the venire, because some of the jurors on the list are not qualified to act, nor because of any other defect or irregularity in the manner of selecting the jury as above provided, and to [no] such defect or irregularity in the selection thereof, or the summoning of the jury, shall be sufficient cause, if it do not appear that some fraud has been practiced or some great wrong committed, in the selection and summoning of the jury, that would work irreparable injury: provided, that it shall be good ground to challenge, for cause, any juror who is not qualified to act under the provisions of this act."

It appears from the evidence taken on the hearing of the motion now under consideration that the jury commissioners were appointed July 5, 1900, and that they held a meeting on the 28th of the same month at which they selected 300 jurors, and caused a list to be made, and the names, after selecting those required for the grand jury, to be written on separate slips and placed in the general venire box. It is objected on behalf of the defense that the selection thus made was not original, but that the commissioners merely supplemented a selection, which had been previously made, of jurors whose names were already in the box, so as to bring the number up to that required by the act of 1898. Assuming this to be true, though the evidence makes it probable, rather than certain, the objection is not well founded; there

being neither allegation nor proof that the names in the box were not those of competent, good, and true men, qualified under the act of 1898 to serve as jurors, and the mere fact that their names were in the box not disqualifying them or affording any reason why they should not be selected. Whether all of the names were at that time written on slips by the clerk, or whether some of them were written by that officer and some by the jury commissioners, is not altogether clear, but it is quite certain that upon subsequent occasions, when the names were supplemented, the latter course was pursued; that is to say, some of the names were written on the slips by the clerk, and some by the jury commissioners. The allegation in the motion "that the said general venire box did not at any time contain the names of three hundred competent, good, and true men, whose names had been written on separate slips by the clerk of the court," is therefore true, to the extent that the names had not been written by the clerk when the box was filled upon the occasion last preceding the trial, and it is probably true as made. The names were, however, written, either by the clerk or by the jury commissioners; and the lawmakers seem to have taken into account the possibility that the law might not at all times and in all respects be literally complied with, and to have provided that the ends of justice should not thereby be defeated. Section 15 of the act of 1898, hereinbefore quoted, expressly denies to the accused the right to set aside the venire for any defect or irregularity in the selection or summoning of the jurymen, unless it (slightly paraphrasing the language) "shall appear that some fraud has been practiced, or some great wrong committed, * * * that would work irreparable injury." It is evident from this that a mere constructive injury, having no other basis than the implication resulting from the failure of the officers designated to comply with the letter of the law, is insufficient to justify the quashing of the venire, and that, in order to entitle the defendant to a judgment on his motion, it would be necessary for him to show not only the noncompliance complained of, but that some fraud had been practiced, or some great wrong committed, that would (not might) work him actual and irreparable injury. The defendant has alleged neither fraud nor injury of any kind, and conceding that such an allegation would be unnecessary if the facts which he has alleged and proved could be said, of themselves, to constitute fraud, or to constitute injury of the character mentioned, he has nevertheless failed to make out a case within the meaning of the statute. It was, no doubt, the duty of the clerk to have written, "under the supervision of the commissioners," the names upon the slips that were placed in the general venire box; and it is to be regretted that he did not discharge that duty, and that the commissioners did not confine themselves to supervising instead of

assisting him in so doing. But the clerk and the commissioners are alike sworn officers, and the fact that the latter participated in the work in question, which it would have been their duty in any event to supervise, did not of itself amount to fraud, or to a great wrong that would work to the defendant any actual and irreparable injury. And this is equally true of the complaint that, among the names contained in the box after it was last supplemented, that of Thomas Patrick was duplicated. The clerk explains that this was an accident resulting from the fact that the name of Patrick, being already in the box, was overlooked, and was included in the supplemental list. It is the purpose of the law that the list and the box shall be supplemented so that the former shall contain the names of 300, and the latter the names of 280, competent jurors, at least twice a year; but it does not follow that the general venire is under all circumstances to be quashed if the requirement in that respect is not literally complied with. Thus by section 6 of the act of 1898, when the list and the box are supplemented the commissioners are required to strike therefrom "the names of such as have so served, as well as the names of others * * * who are known to have died, removed from the parish, become exempt, or disqualified." But it could not reasonably be contended that the venire should be quashed because of the leaving on the list or in the box of the name of a juror whose death, removal, exemption, or disqualification was unknown to the commissioners. And yet the situation would be precisely the same as where by accident the name of a juror is duplicated; i. e., there would be less than the contemplated number of names of competent jurors on the list and in the box. In neither case, however, would there be any actual injury to the litigant or party accused. In fact, no actual injury would be inflicted if, under the law, the jury commissioners, as well as the clerk, were required to write the names, and fewer names were required for the purposes of the general venire. It will be observed that from the list of 300 names required to be prepared there are first to be selected 20 names for the purposes of a grand jury, and that the remaining 280 names, written on slips, are to be placed in the box for the purposes of the general venire; and from those names the petit juries are to be drawn until the box is supplemented at the end of six months, or sooner if so ordered by the court. According to the testimony, the list and the box were supplemented in this instance on December 31, 1901; and thereafter, and prior to the drawing of the venire for the week during which the instant case was set for trial, there were selected and drawn for grand and petit jury service the names of 110 jurors, leaving 190 names in the box, when, by order of the court, two venires, of 30 jurors each, were drawn for service during the weeks beginning April 14th and April 21st,

respectively; the case against the defendant being then fixed for the week beginning April 14th. It therefore appears that the names had been supplemented up to the required number within six months preceding the drawing of the venire of which the defendant complains, and hence, although that venire was not drawn from a box containing 300 or 280 names, he has no legal cause for complaint. In the case of *State v. Love*, 108 La. 658, 31 South. 289, to which we are referred, there was an allegation of legal fraud and great injury; and it was shown that the jury commissioners, in undertaking to supplement the general venire, added only eight names, when they should have added a much greater number. This was held to be so gross a disregard of the mandates of the law as to amount to an injury with respect to which the accused was entitled to relief, but the ruling thus made cannot reasonably be applied to the facts here presented.

3. John W. Downs, a witness for the state, was asked by counsel for defendant on cross-examination: "Did Mr. Gauthier, within the last ten days or two weeks, approach you and ask you what day Batson was here, and you told him February 14th? Mr. Gauthier then pulled out a memorandum book, on one page of which was 'April 14th'; he then turned that page over, and wrote down 'February 14th,' and Gauthier then asked you if it was morning or evening?"—to which the counsel for the state objected for the reason that the question indicated that it was asked for the purpose of contradicting and impeaching the testimony of Gauthier, already given as a witness for the state, and no proper foundation had been laid. This objection was sustained, reserving to defendant the right to put Gauthier on the stand in order to lay a foundation. Counsel for defendant then asked, "Did he not do the same thing on Tuesday and Wednesday of this week?" to which the same objection was made, and sustained, whereupon counsel for defendant took a bill of exceptions. It is contended that the questions were competent for the purposes of the cross-examination of the witness on the stand; but the testimony previously given by the witness has not been brought up, and as the questions appear to have been intended for the purpose of impeachment, and the answers might well have had that effect, we are unable to say that the trial judge committed any error in excluding them.

4. The state offered in evidence a document marked "P5," to which counsel for defendant objected on the grounds: "(1) That there was no proof that it was written by defendant; (2) there is no positive evidence that he wrote it, or by comparison of handwriting,"—which objections were overruled by the court "because this purported to be written by the accused, and was found in the said vest pocket in said buggy left by accused at Down's stable when he took flight from Lake Charles." The document in question reads as follows:

"P. D. Plantation, Welsh La.

"Welsh, La. Dec. 1901

"To any one whom it may concern thereof. I, one Edwin Batson, hereby giving my signature to this date, give my whereabouts to the public or to any one who finds this slip of paper my name is as follows Albert Edwin Batson was born in Atchison Mo Apr 8 1881 my father and M John and J Batson lived in said places J my father lives in Nodaway Co Mo my mother being now Mrs Joe Bayne lives in Spickards Mercer Co Mo my sister Mrs C M Vredenburg lives in Princeton Mercer Co. Mo my brother J. N. Batson I do not know where he is but he that finds this will do the dead a justice by sending my mother or my sister word of my death, and how it occurred. This is all I request of the dear friends. So a long and happy life I do wish to you all signed a rit x — 2 .. y. 1-fare well

"A. E. Batson

"friend to all. Ha. Ha bye bye I'm gone."

The fact that this instrument, purporting to have been written by the accused, was found in the pocket of a vest shown to have been left by him upon the occasion of his flight from the parish seat of the parish where the murder had been committed, was of itself a circumstance in the case which might well have been relevant, and which, together with the authorship of the writing, was properly submitted to the consideration of the jury. *State v. Bradley*, 6 La. Ann. 554.

The state offered in evidence the signature of W. B. Earle on the document marked "P12," for the purpose of comparing the same with the document marked "P4," which offering was objected to as inadmissible and irrelevant. The objection was overruled on grounds thus stated by the trial judge, to wit: "Because P12 had the genuine signature of Ward Earle, one of the victims, and the state was endeavoring to show that the notice on the door of the house where dead bodies were found had not been written or signed by him. This notice, marked 'P4,' was to the effect: 'Gone, will be back Sunday or Monday, Ward Earle;' and P1 was a piece of paper picked up in the house where the bodies were found, containing thereon, 'I wont be back for,' and further down, 'gond, will be back Monday or Tuesday,' in the same handwriting as notice 4; indicating that the writer had practiced before adopting form of notice." And to the ruling so made, counsel for defendant objected and excepted. The document P12 is a written contract between Ward Earle and a land company, which has no relevancy to the prosecution or the defense in this case; the sole purpose of the offer being to establish a comparison between the writing of the signature and that of the documents P1 and P4, the latter of which the state was endeavoring to prove had been written by the accused, though purporting to have been written and signed by Ward Earle, and posted on the door of the house where the bodies

of the victims were found. Section 976 of the Revised Statutes of this state provides that "all crimes, offences, and misdemeanors shall be taken, intended and construed according to, and in conformity to, the common law of England; and the forms of indictment (devoided, however, of unnecessary prolixity), the method of the trial, the rules of evidence, and all other proceedings whatsoever, in the prosecution of crimes, offences and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided." This is merely a re-enactment of section 33 of the act of 1905, but, dealing with it as of the date of the adoption of the Revised Statutes, there has since then been no other provision made with respect to "the rules of evidence" which are to be applied in the prosecution of the crime of murder; and it therefore follows that we have only to ascertain what the common-law rule applicable to the question at issue is, in order to determine whether that question has been correctly decided. The rule is thus stated in *Doe v. Suckermore*, 5 Adol. & E. 708 (31 E. C. L. 40), in which the early English cases were exhaustively reviewed: "A direct comparison of handwriting by a witness has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that a jury has been allowed to institute such a direct comparison, and even that has been confined to comparison between documents proved and given in evidence in a cause, being relevant to the issues raised in the record, and which, being before the jury, it is hardly possible to prevent a comparison being instituted. [Citing a number of cases.] One authority to the contrary is to be found in *Allesbrook v. Roach*, 1 Esp. 351. But this court recently, in the case of *Doe v. Newton*, Nev. & P. 1; *Id.*, 5 Adol. & E. 514 (31 E. C. L. 382),—has expressly determined that documents irrelevant to the issue on the record shall not be received in evidence at the trial in order to enable a jury to institute such comparison. Much less can it be permitted to introduce them in order to enable a witness to do so." See, also, 15 Am. & Eng. Enc. Law (2d Ed.) p. 264, and notes. This doctrine has been distinctly affirmed by this court in the only case in which, so far as we are informed, the question has been presented; *Mr. Justice Wyley*, as the organ of the court, saying: "It is true, American decisions are not uniform on the subject, but as the rule has been so clearly settled, and upon the highest authority, in England, we think it best to adhere to it. We are not aware that the question has heretofore been presented to this court for adjudication. The writing offered to the jury in this case, and received by the court, for the purpose of instituting a comparison of handwriting only, was not admissible, and the defendant has been convicted upon illegal evidence." *State v. Frits*, 23 La. Ann. 57. It may be remarked in this

connection that the author of the article under the title "Handwriting," in 15 Am. & Eng. Enc. Law (2d Ed.) pp. 270, 271, and note, includes the state of Louisiana among states which have statutes authorizing the proof of handwriting by comparison, and he makes the comment that the case above cited was "apparently decided without reference to the statute." The statute law to which the learned author refers is, however, that contained in article 2245 of the Civil Code and article 325 of the Code of Practice, which relate to civil proceedings, whereas by section 976 of the Revised Statutes, heretofore quoted, it is provided that "the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes shall be according to the common law, unless otherwise provided." And no other provisions concerning the prosecution of the crime of murder have been made.

There are other bills of exception in the record, as also a motion for new trial, but they present no points of merit which have not been considered.

For the reasons assigned, it is ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and annulled, and that this case be remanded to be proceeded with according to law.

BREAUX, J. (dissenting). The rule of the common law against admitting proof by comparison of handwriting has given rise to many discussions. Unquestionably, under the strict rule of the common law, this evidence is not admissible at all. In England the rule was abolished by special enactment, and proof by comparison is now admitted. *Whart. Cr. Ev.* § 5553 et seq. In a number of the states of this Union the rule has been changed by statute, and in some of the states without statutory enactment the courts chose not to follow the strict rule of the common law. In this connection it may be stated that generally the rules of evidence are the same in criminal cases as in civil cases. There are exceptions, as stated by *Best* in his book on *Evidence* (page 89). The text in *Best* does not exclude proof by handwriting. It refers to other proof as falling under the rule, but it does not include this mode of proof as coming within the exception. If the mode of proof is generally the same in civil and criminal proceedings, and the exception does not include proof by comparison of handwriting, the proof by comparison of handwriting under required condition, in my view, is admissible. Beyond question, the rule is recognized in civil proceedings in this state, and the evidence would have been admissible in a civil case under the Codes. It is not convincing that the rule in question does not apply to civil and criminal cases, and that, admissible in one, it is not in the other. The majority of the court has arrived at the conclusion that it is best to adhere to the common-law rule in criminal

cases. While I have not agreed with that view, I have not the most remote criticism to offer. I can only say that this court has held that the proof of defendant's letters was "made by comparison of handwriting. We have only to deal with the mode of proof, and the law justifies it,"—and admitted the evidence. *State v. Barrow*, 31 La. Ann. 692. I respectfully dissent.

ROTHROCK CONST. CO. et al. v. PORT GIBSON MFG. CO.

(Supreme Court of Mississippi. June 13, 1902.)

CONTRACTS—PARTIES—EVIDENCE—ATTACHMENT OF DEBTS.

1. Where, in a suit against a corporation, the cross bill avers that defendant is a corporation, and the answer thereto does not deny the averment, it must be taken as true.

2. Where, in a suit against a "company," the written contract showed it was made with an individual, and there was no proof of his agency, there could be no recovery, though the company was a partnership, and the individual a partner thereof.

3. Where money was donated to an academy for building purposes, and an agreement of the academy with the builder provided that no payment should be made to him from such sum until all debts for labor and material were paid, and then only on the approval of his account, a foreign attachment will not lie against the contractor based on the debt due him for labor and material, where the conditions of the original contract as to payment of labor and material and approval of the account have not been complied with.

On suggestion of error. Suggestion overruled.

For former opinion, see 32 South. 116.

H. C. Mounger, counsel for appellee, filed a suggestion of error, making the following points: "(1) The court overlooks the contention, supported by evidence, that there was no such corporation as the Rothrock Construction Company. (2) That complainant sued by the name under which the contract was made,—the Rothrock Construction Company; that, if there was any such corporation, that S. W. Rothrock was acting as agent in getting the contract; that the Rothrock Construction Company was engaged in the erection of the buildings; and that the academy paid all bills, which were made out against the Rothrock Construction Company. The chancellor took the view that the name Rothrock Construction Company was merely a fictitious name. (3) The proceeding is not purely statutory, for while it asks for the fixing of the money due under Code, §§ 486, 487, 2714 (not section 2702, as the court thinks), it also asks the benefit of the two contracts which were made by the academy with the construction company, or Rothrock, as a third party beneficially interested, although not a party. (4) As far as the statutory part of the proceeding is concerned,

the court seems to have overlooked that the proceeding is founded on section 2714 of the Code, for the protection of material men. (5) Section 2714 does provide for a personal judgment, and we were entitled and got judgment against the academy. A judgment against the construction company or Rothrock did not amount to anything. We are entitled to a judgment or decree for the amount of the indebtedness due from the academy to the construction company or Rothrock, whichever name he sails under. (6) I would like for the court to read this section particularly with this case in view. Section 2702 was not the foundation of this suit. (7) Section 2714 is not confined to circuit courts. It does not mention circuit court; it merely uses the words 'suit' and 'court.' (8) The court seems to have overlooked *Dollman v. Moore*, 70 Miss. 267, 12 South. 23, 19 L. R. A. 222, where there was a proceeding precisely like this. We would like for the court to examine this case. (9) The evidence and pleadings show that there was the sum of \$50,000 donated by Mr. McComb to the Chamberlain-Hunt Academy to build a school building; that Rothrock could not make his bond, and Mr. McComb had the academy to enter into a second contract with him, by which it was provided that no money should be paid to Rothrock until all material and labor should be paid for out of this \$50,000; that this donation was given on this condition, and under these express terms, and this was the express contract between the academy and Rothrock, and we claim that we are entitled to the benefit of it. 7 Am. & Eng. Enc. Law, p. 106 et seq., and authorities cited in my brief. At the time the notice was served on the academy only about \$1,100 of this \$50,000 had been paid to Rothrock. As for the contention that there was nothing due, see *Rosenbaum v. Carlisle*, 78 Miss. 882, 29 South. 517. The court seems to have overlooked the fact that our brick were put in the building, and we have never been paid for them. We do not see how they can get our goods, and use them, and not pay for them."

CALHOON, J. The fourth clause of the answer of the Rothrock Construction Company, which answer is made a cross bill, avers that "said company is an incorporated company under the laws of the state of New York, and not a copartnership." The answer of the Port Gibson Manufacturing Company to this cross bill does not deny the averment, and so it follows, on elementary principles, that it must be taken to be incorporated. It is clearly manifest from this record that the academy contracted with Samuel W. Rothrock by name as an individual. The written contract itself shows this, and it nowhere shows that it made any contract with him as agent, or had any sort of notice

of any agency. Upon a breach of the contract, no one could contend that the academy could hold liable anybody but Samuel W. Rothrock. This would be true if the construction company was in fact a simple partnership, and Samuel W. Rothrock a partner, because the contract was with the individual. In proceedings simply to enforce the liens of mechanics and material men under Code, c. 77, in the circuit court, it is provided that personal judgment may go for the debt ascertained. The opinion expressly declines to hold that such proceedings must be in the circuit court, and need not have referred to it except to show that the personal judgment feature could not apply in a case like that before us, which is not a proceeding to enforce such a lien, but is purely and simply one to subject a debt by foreign attachment in chancery under section 486. It is this, and nothing more, and correctly stated to be such in the beginning of counsel's statement of facts, and again in the very first clause of his argument. In such cases we adhere to the opinion that personal decree is not warranted as against the foreign debtor. This conclusion is not affected by *Dollman v. Moore*, 70 Miss. 270, 12 South. 23, 19 L. R. A. 222. No such decree appears in that case, nor was any such prayed for in the bill. On the contrary, the prayer was for decree that the home debtor pay complainant the amount of the debt due from him to the nonresident out of the funds in his hands due to the nonresident. If no such debt be owing the nonresident, there ends the jurisdiction under the foreign attachment statute, of course. We had not overlooked the case of *Dollman v. Moore*, as counsel thinks, nor did we fail to read his brief, as he seems to apprehend. We read the whole of the 75 pages of it with care and interest. Neither did we overlook the plain fact that the brick went into the academy's building, but we cannot see how this can make the academy liable if it owed the contractor nothing when notified of appellee's claim. There is no hint in the evidence that the academy ever paid a bill not approved by the superintendent, as stipulated in its contract with Samuel W. Rothrock. If it did, it would be liable to Mr. Rothrock for any resultant hurt. In this record the account is not so approved, and yet the superintendent is not made a party to be compelled to approve, and Samuel W. Rothrock, the contractor, is not made a party. It is hard to see how the academy is protected if it paid under the decree below. The fact of the donation by the capitalist cannot affect the situation. *Rosenbaum v. Carlisle*, 78 Miss. 882, 29 South. 517, is not at all in point here. Of course, a change of agreement between the owner and contractor could not affect rights previously fixed by notice. There is no such case here. We have been thus full out of deference to counsel.

Suggestion of error overruled.

ZION FOUNTAIN LODGE, NO. 54, F. & A. M., et al. v. FOLKES.¹

(Supreme Court of Alabama. June 10, 1902.)

APPEAL—BILL OF EXCEPTIONS—SIGNING IN VACATION.

1. Where a bill of exception shows that it was signed by the judge in vacation, and the record does not show an order authorizing this to be done, the bill will be stricken out on appeal, though the bill recites the making of such an order.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Ejectment by J. P. Folkes, for use, etc., against the Zion Fountain Lodge, No. 54, F. & A. M., and others. From a judgment for plaintiff, the defendants appeal. Motion to strike bill of exceptions sustained.

This was a statutory action of ejectment, brought by the appellee, J. P. Folkes, for the use of W. R. McKenzie, against the Zion Fountain Lodge, No. 54, F. & A. M., and others. There were verdict and judgment for the plaintiff, and the defendants appeal. At the end of the bill of exceptions, just preceding the judge's signature, is the following recital: "On Friday, the 10th day of May, during the term of said court, the court made an order granting the defendant 20 days in which to prepare and present its bill of exceptions, and now, within the time allowed by the court, comes the defendant, and presents this as his true bill of exceptions in the said cause, and asks that the same be signed by the Hon. John P. Hubbard, judge presiding, which is accordingly done." In this court there was a motion made to strike the bill of exceptions because it was not signed in term time and it does not sufficiently appear that there was an order made extending the time within which the bill of exceptions might be signed.

Ernest Hill, for appellants. Espy, Farmer & Espy, for appellee.

DOWDELL, J. The motion to strike the bill of exceptions in this case will have to prevail. The bill shows that it was signed by the presiding judge in vacation. It does not appear from the record that any order was made by the court authorizing this to be done. The recital in the bill that an order was made by the court for the purpose cannot aid in the matter. Such recital in the bill is nothing more than a statement by the judge of his recollection of such order having been made by the court. Such an order made by the court becomes a part of the records of the court, and on appeal must appear in the transcript as a matter of record. It cannot be supplied by the mere statement of the presiding judge. *Railroad Co. v. Marcus* (Ala.) 30 South. 679; *Dantzler v. Mill Co.* (Ala.) 30 South. 674. There are no as-

¹ Rehearing denied June 27, 1902.

signments of error on the record proper, the only one being on matter that can only be presented by bill of exceptions.

Affirmed.

McKISSACK v. McCLENDON et al.¹
(Supreme Court of Alabama. April 24, 1902.)
SHERIFF—OFFICIAL BOND—FAILURE TO SIGN SURETIES.

1. Under Code 1896, § 3089, providing that whenever any officer required by law to give an official bond acts under a bond which is not in the penalty or conditioned or with the sureties prescribed by law, the bond is valid and binding on the obligors therein as the official bond executed according to law, where a sheriff filled out his official bond, and procured the signatures of the sureties thereto, and the bond was filed and approved, and he acted thereunder, such sureties are bound by the obligation, though the sheriff did not sign it, and they did not know of his failure to sign.

Tyson, J., dissenting.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Action by R. L. McKissack against W. A. McClendon and others. From a judgment for defendants, plaintiff appeals. Reversed.

This action was brought by the appellant, R. L. McKissack, against the appellee W. A. McClendon, as sheriff, and the sureties on his official bond, and sought to recover for the breach of a bond, in making a wrongful levy of writs of attachment upon the property in the possession of the plaintiff. The defendants pleaded the general issue and several special pleas. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the defendants, instructed the jury as follows: "If the jury believe the evidence, they must find for the defendants." To the giving of this charge the plaintiff duly excepted. There were verdict and judgment for the defendants. The plaintiff appeals, and assigns as error the giving of the general affirmative charge requested by the defendants.

Wm. C. Oates and Walker & Thompson, for appellant. H. A. Pearce and W. W. Sanders, for appellees.

DOWDELL, J. This is an action against the sheriff and the sureties on his bond as such for the breach of said bond. There is but one question in the case, and that is whether the obligors in said bond are liable on said bond as a statutory bond. The defense is rested upon the fact of the failure of the sheriff, McClendon, the principal obligor, to sign the bond. The facts show that the defendant McClendon, before entering upon the discharge of his duties as sheriff, to which office he had been elected, procured and obtained from the judge of probate a form or blank bond to be filled out by him as his offi-

cial bond, and executed with proper sureties; that he filled out said bond, writing his own name three times, and the names of the sureties, in the body of the bond, but through oversight failed to sign the bond as principal obligor, though the same was signed by the coappellees here as sureties; that the bond so filled out and signed was by the said McClendon delivered to the probate judge for approval as the said sheriff's official bond, and was duly approved and recorded by the probate judge of Henry county; that said McClendon entered upon the discharge of his duties as such sheriff, having otherwise qualified by taking the oath of office, under said bond, and acted as sheriff and was acting as such under said bond at the time of the breach complained of.

In *Sprowl v. Lawrence*, 33 Ala. 674, which, like the present case, was an action on the sheriff's bond, and where the bond had not been filed and approved as required by the statute, it was said by this court, in construing section 132 of the Code of 1852, being the same as section 3089 of the present Code (also sections 120 and 126 of the former Code, which are the same as sections 3072 and 3073 of the present Code): "An examination of the various provisions of the Code in reference to the bonds of public officers will satisfy any one of the studious solicitude with which the legislature has sought to afford the most ample protection to all persons interested in the performance by such officers of their official duties. The section we are considering is a part of the legislation designed to effect this general object, and it is our duty to put upon it such a construction as will harmonize with the substance and spirit of the text to which it belongs. It is a remedial statute, and we must construe it largely and beneficially, so as to suppress the mischief and advance the remedy, or, in the language of Lord Coke, so as 'to add force and life to the cure and remedy, according to the true intent of the makers of the act, pro bono publico,'" citing *Heydon's Case*, 8 Coke, 7; *Sedg. St.* 359, 360. "It must be admitted that the words of this section [section 132, Code 1852, section 3089, Code 1896] are not as clear and precise as they might be; and it is a well-settled rule that, when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable and best suited to accomplish the object of the statute, and a construction which would lead to an absurdity ought to be rejected." In that case it was argued by counsel, as here, that inasmuch as the bond was in the penalty, payable and conditioned, with sureties of requisite qualification and sufficiency, as prescribed by law, the defect—namely, in that case that it was not "approved and filed according to law"; in the present case, that the bond was not signed by the principal obligor, the sheriff—was not one of the defects or omissions specified in the statute, and consequently did not fall within the provisions of that

¹ Rehearing denied June 12, 1902.

statute. Without reiterating what was said in *Sprowl v. Lawrence*, arguendo, in response to the insistence of counsel, we further quote from that case, on page 687, where it was said in conclusion on that proposition: "This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval, or filing, provided the officer executing it has acted under it. Much more clearly does it apply to a bond which the officer executing it has acted under, and which does conform to all the requirements of the law, except the last two,—approval and filing. To hold otherwise would be to maintain the paradox that the validity of the bond is enhanced by its increased imperfections, that a total is less hurtful than a partial departure from the statute, and that an instrument in fact gets better as it grows worse." The approval and filing is as much a requirement of the statute as the signing by the sheriff, the principal obligor, and yet neither is among the omissions specified in the section. The fact that the sheriff acted under the bond as his official bond is made the controlling principle, under the reasoning employed in *Sprowl v. Lawrence*, supra. We can see no difference in principle between that case and the one at bar. In *Steele v. Tutwiler*, 68 Ala. 107, the court, after citing approvingly *Sprowl v. Lawrence*, supra, says: "We construe the phrase, then, 'a bond which is not payable or conditioned as prescribed by law,' as having reference to irregularities or imperfections in both the body and the condition of the bond; and, as there can be no legal bond at all without signatures, the statute has also necessary reference to any want of formality or imperfection in the execution or signing by the obligors." The summary proceeding in that case on the bond was sustained.

Under the principle laid down in these cases, our conclusion is that the bond here, as to the sureties signing it, stands in the place of the official bond of the sheriff, subject, on its condition being broken, to all the remedies which the person aggrieved might have maintained on the official bond of such officer, executed, approved, and filed according to law. Section 3089, Code 1896. The case of *Painter v. Mauldin*, 119 Ala. 88, 24 South. 769, 72 Am. St. Rep. 902, where the guardian's bond was held not to be a statutory bond, but good as a common-law obligation, as to the sureties, is distinguishable from the present case in this: that a guardian's bond does not fall within the provisions of section 3089.

It is of no consequence that the sureties did not know of the failure of the sheriff to sign said bond, and that he was acting under it, without having first signed the same. They signed it for the purpose of his acting under it, and, he having acted under it, they became bound by it.

The court erred in giving the general charge

requested by the appellees, and for this error the judgment will be reversed, and the cause remanded.

TYSON, J. (dissenting). While I concur in a reversal of the judgment in the cause, I cannot assent to the principles announced in the opinion of the other members of the court. They hold the sureties upon the bond sued upon liable, and exonerate their principal from liability on the ground that he did not sign the bond. And this they do by virtue of section 3089 of the Code. They impliedly concede that, were it not for the provisions of that statute, the sureties could not be held liable; thus recognizing the principle that a surety is never answerable upon an undertaking unless his principal is bound thereby,—a principle thoroughly settled by the decisions of this court. In *Evans v. Keeland*, 9 Ala. 46, it is said: "The contract of suretyship has been defined to be a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation accessory to that of the principal debtor. The debt is due from the principal, and the surety is merely a guarantor for its payment. * * * A corollary from this definition is that it is of the essence of such a contract that there be a valid obligation of the principal debtor. And as, upon a recovery by the creditor against the surety, he could reimburse himself by a suit against his principal, it also results necessarily that the surety may, in general, make any defense which his principal could make." See, also, *White's Adm'r v. Association*, 63 Ala. 424, 85 Am. Rep. 45; *State v. Parker*, 72 Ala. 183. The holding of the majority of the court, followed to its logical conclusion, necessarily results in imposing a liability upon the sureties never contracted by them, and leaving them without a right of reimbursement from their principal. In other words, if they have no principal, they have no right to reimbursement. It destroys an essential element of the contract of suretyship, and makes the sureties liable as principals,—an obligation never assumed by them. Neither of the cases which they cite and quote from in support of their contention goes to the length that they have gone in this case. In both of those cases the bond was signed by the principal. Indeed, in *Sprowl v. Lawrence* the learned judge was careful not to extend the provision of the statute to a bond which the officer had not signed, as is clearly shown by the exception ingrafted by him upon the general doctrine he announced; for he says: "This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval, or filing, provided the officer executing it has acted under it." That this is the proper construction of the statute is made apparent from its language. It reads, "Whenever any officer, required by law to give an official bond,

acts under a bond which is not in the penalty," etc. How can it be said that an officer acts under a bond when he has never executed it? It is no bond at all unless it is signed by a principal. And this is made the plainer when we read further in the statute this language: "Such bond is valid and binding on the obligors therein." Again we have at least an implied, if not an express, recognition that there must be an official bond, with obligors on it. And as said above, if the principal did not sign it we have no bond and no obligors. For by no rule of construction can the statute be converted into an instrument for the purpose of creating a bond which has never been executed. Furthermore, it seems to me entirely clear that the words "such bond" mean official bond. How is it possible to have an official bond when the official whose duty it is to give it has never signed it? My conclusion, therefore, is that unless the principal is bound the sureties are not.

But I do not concur in the opinion that McClendon, the principal, is not bound. It is clear to my mind that, upon the facts stated in the opinion of the majority of the court, as to whether he signed the bond is a question which should be submitted to the jury. It is of no importance that he did not affix his name at the bottom of it. He is only required to "give bond with surety," no formality as to its execution being prescribed by the statute. Code 1896, § 3735. Nor is a seal necessary to its efficaciousness. *Id.* § 9. In regard to the place of the signature, there is no restriction. It may be at the top or in the body as well as at the foot. The material question is whether or not he wrote his name in the body of the bond, with the intention to be bound by it. It is true, it may be that if he intended a further signature at the bottom, and this fact appeared beyond adverse inference, the court would be at liberty to say, as matter of law, that he had not executed it. But in the absence of any legal testimony showing that he intended a further signature, it cannot be affirmed, as matter of law, under the facts of this case, that he did not intend when he wrote his name in the body of the bond that his act in doing so should not be his signature,—a signing of it by him. And indeed if the record contained positive evidence that he intended to affix his name at the bottom as a final signature, as to whether he signed it would still be a question for the jury under the facts of this case, for the obvious reason that notwithstanding this positive evidence the jury would have the right to infer from his acts and conduct in writing the bond himself, procuring the sureties to sign it, delivering it as his act and deed to the probate judge, and acting under it as though it had been formally executed by him, that he intended the act of writing his name in the body of it to be his signature. In *Penniman v. Hartshorn*, 13 Mass. 87, one of the questions involved was

whether the contract for the sale of merchandise was a sufficient memorandum in writing, signed by the defendant, so as to satisfy the second section of the statute of frauds of that state, which provided that "no contract for the sale of any goods," etc., "for the price of ten pounds or more shall be allowed to be good, except the purchaser shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The memorandum was signed at the top instead of at the bottom by the purchasers of the goods, who were sued by the seller in assumpsit for a breach of the contract, and this was made the basis of the objection to it. The court said, after stating the ground of objection, "But we think this a slight objection, as it is well known that such a signing has been held good in instruments of much more importance and solemnity than the one before us." In *Saunderson v. Jackson*, 2 Bos. & P. 238, Lord Eldon held that a bill of parcels in which the vendor's name is printed in the body, delivered to the vendee by him at the time of an order given for the future delivery of goods, was a sufficient memorandum of the contract, within the statute of frauds. In *Johnson v. Dodgson*, 2 Mees. & W. p. *660, Lord Abinger said: "The cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." In *Holmes v. Mackrell*, 3 C. B. (N. S.) p. *789, Cockburn, C. J., said: "The only question that remains is whether there is sufficient signature. The defendant does not, it is true, put his name at the bottom of the document. But the whole is in his handwriting, and he has affixed his name at the top. I entertain no doubt that this is a sufficient signature." In *Ogilvie v. Foljambe*, 3 Mer. 53, the name of the party attempted to be charged was written in the body of the paper by himself, as here, and the court held that it was a sufficient signing, as "it does not matter in what part of the instrument the name is found." In *Schneider v. Norris*, 2 Maule & S. 286, Lord Ellenborough held that a bill of parcel in which the name of the vendor is printed and that of the vendee written was a sufficient signing by the vendor. In *Knight v. Crockford*, 1 Esp. 190, the agreement sought to be enforced was written by the party attempted to be charged, and was in this language: "I, James Crockford, agree," etc. The court held it a sufficient signing by Crockford. In *Higdon v. Thomas*, 1 Har. & G. 139, in a very learned and ex-

haustive opinion, in which all the cases are reviewed, the court held: "A bond which recited the names of the parties to and the terms of a contract for the sale of land, and contained a condition to secure a performance of such contract, prepared and written by the vendee, who was also the obligee of the bond, executed by an agent of the vendor, and delivered by him to the vendee," was a sufficient signing by the vendee. In *Clason v. Bailey*, 14 Johns. 484, the defendant's name only appeared in the body of the agreement, which was written by his authorized agent. The court held that he had signed it. In *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 681, a bill was filed to enforce the specific performance of a contract relating to lands. The court said: "The signing will be sufficient in the caption or body of the memorandum, or by a subscription to it." In *Wise v. Ray*, 3 G. Greene, 430, it was held, where an instrument was written by R. and subscribed by W., and stipulates that W. has sold and agrees to deliver pork to R. at the place and price mentioned in the undertaking, that W. was bound; the signature in the body being written there by him. The same doctrine was recognized in the case of *McMillen v. Terrell*, 23 Ind. 163, and recognized and enforced by the supreme court of the United States in *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295. See, also, *Browne, St. Frauds* (5th Ed.) § 357; 2 Bouv. Law Dict. p. 1001; *Roberts, Frauds*, p. *125, top page 125; 1 Greenl. Ev. (16th Ed.) Append. 2, p. 855, § 268; 8 Am. & Eng. Enc. Law (1st Ed.) 717.

WARD v. SHIRLEY.¹

(Supreme Court of Alabama. Feb. 13, 1902.)
SALES — FRAUD — RETENTION OF POSSESSION
BY SELLER — PRESUMPTION.

1. In detinue against a sheriff for goods levied on as those of another, in whose possession they were at the time of the levy, plaintiff claimed that he had purchased them from such person, and introduced a bill of sale, which recited that the seller might retain possession until the purchaser demanded possession; and the court excluded the evidence of the one who drew the bill of sale, to the effect that the sale was an absolute one, without reservation of any interest. *Held* proper; the question as to reservation of interest depending on the terms of the bill, and deductions to be drawn from the subsequent acts of the parties.

2. The purchaser testified that he paid cash and made the trade because he thought it a good bargain, that he did not need the property at the time, and that, because he contemplated making advances to the seller, he agreed to permit him to retain the property. *Held*, that the evidence of plaintiff did not remove the presumption of fraud arising under Code, § 2150, which provides that all transfers of chattels made in trust for the transferor are void as to his creditors.

Appeal from Tuscaloosa county court; J. J. Mayfield, Judge.

Detinue by H. J. Ward against C. S. Shir-

ley to recover possession of a mule, and the value of the use and hire thereof during the detention. The defendant pleaded the general issue, and the cause was tried upon the issue joined upon said plea. Judgment for defendant, and plaintiff appeals. *Affirmed*.

On the trial of the cause the plaintiff testified that he bought the mule involved in this suit, together with other property, from one Ed. W. Anderson, during the last part of December, 1899; that he paid a cash consideration of \$200 for all the property so purchased; that at the time of making the purchase his son, W. T. Ward, who was an attorney, was present, and, by plaintiff's instruction, prepared a bill of sale to carry out the purpose of said sale; that at the time of making the purchase the plaintiff was not in need of said property, but made the trade in perfect good faith, because he thought he was getting a bargain, though the price he paid was not greatly disproportioned to its real value; that because he did not need the property at the time, and, further, because he contemplated making advances to said Anderson during the year 1900, he agreed to permit said Anderson to retain possession of said property until he (plaintiff) should call for it, and directed his son, acting as his attorney, to incorporate this agreement in the bill of sale, with the understanding that said Anderson was not to pay the plaintiff any rent for the use of said property; that W. T. Ward, the plaintiff's son, prepared the bill of sale, and it was signed, duly witnessed, and executed by said Anderson, who delivered it to the plaintiff on January 1, 1900. The bill of sale was then introduced in evidence, and was in words and figures as follows: "Know all men by these presents that I, Ed. W. Anderson, in consideration of the sum of two hundred dollars to me in hand paid by H. J. Ward, the receipt whereof is hereby acknowledged, do bargain, sell, and convey to the said H. J. Ward the following goods and chattels, to wit: One iron-gray mare mule, named 'Dixie,' one red or sorrel mule, named 'Jack,' and set of harness for both; one Studebaker wagon; one Winchester rifle; one double-barrel shotgun; one cow and yearling, or young cow. It is also agreed, but without consideration, that I, the said Ed. W. Anderson, may retain possession of said property until the said H. J. Ward, his agents or assigns, shall make demand for same. Witness my hand and seal this, the 1st day of Jan'y, 1900." The plaintiff further testified that, at the time said bill of sale was executed and he paid the \$200, said Anderson was not indebted to any one, so far as he knew or believed; that said Anderson, for the reasons as above stated, kept possession of the property until March, 1900, when most of the property embraced in said bill of sale (not the mule involved in this suit) was converted or taken possession of by the brother of Ed. W. Anderson, one Wesley Anderson, who claimed that the prop-

¹ Rehearing denied June 18, 1902.

erty belonged to their father's estate, and that Wesley was entitled to the possession thereof as administrator; that at that time the plaintiff had not demanded any of the property from Ed. W. Anderson; that thereupon Ed. W. Anderson instituted two suits against Wesley Anderson, and, being cast in one of them, judgment for the costs was rendered against him, and execution upon said judgment being placed in the hands of the defendant in the present suit, who was the sheriff of Tuscaloosa county, he (the defendant) levied upon the mule sued for in this action as the property of Ed. W. Anderson, and took possession of the same; that thereupon the plaintiff, by his attorney, demanded of the defendant that he surrender to him possession of said property; that the defendant refused to comply with said request, and, though forbidden to do so, sold said property under the execution, and became the purchaser thereof himself, and had possession of the property at the time of the institution of the present suit. The value of the property and the value of its use were proven. There was introduced in evidence a letter written by W. T. Ward, which it was admitted would be his testimony. This letter was introduced subject to legal objections. This testimony of the witness W. T. Ward was as follows: "I was at home the latter part of December, 1899, at the time my father bought the mule and other things set out in the bill of sale; and I was at that time instructed to prepare the paper, and, in pursuance of such instructions, did prepare and mail the paper to my father to be executed. The sale was an absolute, unconditional sale, without any reservation of interest to Ed. He agreed to take care of the property until my father called for it." The defendant objected and moved to exclude the statement of the witness upon the ground that it was a legal conclusion. The court sustained the objection, and to this ruling of the court the plaintiff duly excepted. The defendant, C. S. Shirley, testified, as a witness in his own behalf, that as sheriff he levied an execution upon the mule in question as the property of Ed. W. Anderson; that he found the mule in a stable of said Anderson, and, after he had taken possession of it, said Anderson claimed said mule as belonging to him. He further testified to the selling of said mule as shown by the testimony of the plaintiff. There was another witness introduced by the defendant, who testified to said Ed. W. Anderson claiming the property after it was levied upon. The cause was tried by the court without the intervention of a jury, and, upon the hearing of all the evidence, the court rendered judgment in favor of the defendant. To the rendition of this judgment the plaintiff duly excepted. The plaintiff appeals, and assigns the rendition of said judgment as error.

Robison Brown, for appellant. Foster & Oliver, for appellee.

McCLELLAN, C. J. The question whether the alleged sale to Ward was an absolute and unconditional sale depended upon the facts and circumstances of the transaction, including the bill of sale, and was not determinable by the opinion of the witness W. T. Ward. So, too, whether any interest was reserved to the seller dependent upon the terms of the bill of sale, and deductions to be drawn from what the parties did with reference to the property afterwards; and it was not for said witness to state his conclusion or opinion that the sale was without any reservation of interest to the seller. The court properly excluded the statement, referred to, of the witness W. T. Ward.

There is a stipulation in the bill of sale that the seller is to retain possession of the property until it should be demanded of him by the purchaser or his agents, etc. This rendered the sale *prima facie* fraudulent as to existing or subsequent creditors, under section 2150 of the Code. See authorities there cited. The evidence on the part of the plaintiff in attempted explanation of this retention of possession by the seller, offered to overturn the *prima facie* presumption of fraud, was all oral, as was also the evidence in rebuttal. Considering all this evidence as it is reproduced here in writing, we are not satisfied that it removes the presumption of fraud arising from the stipulation referred to. And when we consider further that the judge of the county court had opportunities and means of reaching a correct conclusion on the evidence which we have not,—had before him, indeed, other evidence than that now before us, in the manner and appearance of the witnesses on the stand, etc.,—and apply the doctrine of *Woodrow v. Hawving*, 105 Ala. 240, 16 South. 720, we are far from being able to say that his conclusion of fact that, as to the defendant, the sale by Anderson to Ward was fraudulent and void, was plainly erroneous. And so the judgment rendered by the judge below, sitting without a jury, must be affirmed.

HENDERSON v. PILLEY.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

TROVER—RECEIVERS—TITLE—TERMINATION OF RECEIVERSHIP.

1. After the termination of a receivership, the receiver may not maintain trover for personality of which he had charge as receiver, notwithstanding that he had falsely reported to the court a sale of such property, and turned in the alleged proceeds; the property rights of the person of whose property the receiver had charge not having been divested.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by Charles Henderson against S. A. Pilley. From a judgment for defendant, plaintiff appeals. Affirmed.

¹ Rehearing denied June 12, 1902.

Foster, Samford & Carroll, for appellant.
Worthy & Gardner, for appellee.

DOWDELL, J. The appellant brought his action in trover against appellee to recover damages for the conversion of four mules and two wagons. Upon the trial of the cause, upon the undisputed evidence in the case the court gave the general affirmative charge at the request of the defendant in writing, and refused it to the plaintiff. Upon this action of the court is based appellant's assignments of error.

To support the action of trover, the plaintiff must have, at the time of suit brought, either a general or special property right in the chattel alleged to have been converted; and, if a special or qualified right of property, then coupled with a right of immediate possession. *Elmore v. Simon*, 67 Ala. 526; *Kemp v. Thompson*, 17 Ala. 9; *Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. It must be a right to the property itself, as distinguished from a mere lien upon it. *Street v. Nelson*, 80 Ala. 230. Applying these principles to the undisputed evidence in the case, the defendant was entitled to the affirmative charge as requested, and the court committed no error in giving the same.

It is a conceded fact that the property in question originally belonged to one Monjeau, who owned a plantation in the county of Pike, and upon which the wagons and mules were used in farming operations; and it is also a conceded fact that the defendant purchased said property from the said Monjeau. It is shown by the evidence on the part of the plaintiff that, prior to such purchase by defendant, proceedings were had in the chancery court of said county, wherein the said Monjeau was a party, and that in said proceedings the appellant, Charles Henderson, was appointed receiver, and, as such receiver, was by an order of the chancery court directed to take possession of the property in question, together with other property of the said Monjeau, pending said litigation in said chancery court; that said Henderson, as such receiver, did not take the actual possession of the wagons and mules in question, but by an agreement with the appellee, S. A. Pilley, who was then the agent of said Monjeau, left the same in his possession. It is further shown by plaintiff's testimony that in the course of said chancery proceedings there was a decree obtained against said Monjeau in favor of one Folmar, and an order of said chancery court directing the receiver to make sale of the property of said Monjeau in his hands as such receiver, and report his actions to said court. It is further shown that said receiver, as such, reported to said court a sale of the property in question, together with other property in his hands as such receiver; but, as a matter of fact, it is shown by the plaintiff himself that there was no sale of

the wagons and mules, the foundation of this suit. The receiver accounted, under the orders of the court, to the register, for the proceeds of the pretended sale, and paid the same over to the register, which said fund was afterwards, under a consent order, applied to the costs of the suit on the decree which had been rendered in favor of said Folmar. After this no further orders were taken in the chancery cause, and said cause was thereafter left off the docket. There was no formal order of the court discharging the receiver, nor was this essential. The fund which came into his hands as such receiver having been paid into court, and there distributed under a final decree, the duties of his office as such receiver terminated. The property in question was at that time in the hands of the defendant, claiming it under a purchase from the said Monjeau. It is quite clear from this statement that Henderson had, at the time of suit brought in this case, no such qualified right in the property as would support an action of trover for the conversion of the same; for as such receiver his duties had terminated, and whatever of property remained unsold under the orders of the court belonged to the original owner, Monjeau, from whose possession it had been taken by said receiver in said chancery proceedings under the orders of said court. As stated above, there was in fact no sale of this property made by the receiver, and the fact that he reported a sale, and accounted as such receiver for the proceeds of a pretended sale, did not operate to divest the property rights of the said Monjeau in and to said wagons and mules. The amount paid by the said receiver into the court as the proceeds of such pretended sale was a gratuitous and voluntary payment by him. It is insisted that, as Monjeau received the benefit of the fund paid into court by said receiver as proceeds of the pretended sale, he is thereby estopped from denying the plaintiff's rights to said property, and his vendee, the defendant in this action, with knowledge of these facts, is likewise estopped. Whatever may be the rights of the plaintiff against the said Monjeau for accepting benefits under plaintiff's report and accounting as receiver, we do not care to express any opinion as to the same, as that question is not before us; but it is quite clear that the report of the sale, when in fact there was no sale, and the voluntary and gratuitous accounting of the receiver, and the payment of funds into the court, did not transfer the title to the wagons and mules to the receiver. So under neither phase of appellant's contention—whether as having a general property right, or a qualified and special property right—could he recover in this form of action. The title to the property could not pass under a mere report of sale, when in fact there was no sale. As receiver, he had no qualified right, with immediate right of possession at the time of

suit brought, for his duties as receiver with regard to the property had ceased.

As stated above, the court committed no error in refusing the general charge requested by the plaintiff, and giving it at the instance of the defendant. Affirmed.

RUSSELL v. PEAVY.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

HUSBAND AND WIFE—MORTGAGE OF WIFE'S PROPERTY—SECURITY FOR HUSBAND—ESTOPPEL—AGENCY—EVIDENCE.

1. A mortgage by a married woman of her property to secure her husband's debt is void, her incapacity to give such security being the same since the married woman's law of 1887 as before.

2. Where a wife executed a mortgage of her property to secure her husband's debt, believing his statement that the mortgage was on his property, and there has been no fraud, concealment, or suppression on her part, she is not estopped to assert the invalidity of the mortgage.

3. Where a husband negotiated a mortgage of his wife's property, to secure his own debt, with one who stated that he was agent of the mortgagee, such statement, together with the mortgagee's acceptance of and foreclosure of the mortgage, is sufficient to show such agency and bind the mortgagee with the knowledge of the agent that the mortgage was given to secure the husband's debt.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Sallie I. Russell against Silas W. Peavy. From a judgment for defendant, plaintiff appeals. Reversed.

Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the following written charge: "If the jury believe the evidence they will find a verdict in favor of the plaintiff." The court refused to give this charge, and to this ruling the plaintiff duly excepted. The plaintiff also duly excepted to the court's giving, at the request of the defendant, the following written charge: "The court charges the jury that if they believe the evidence they will find for the defendant."

Powell & Dickinson and Banks & Selheimer, for appellant. Jas. E. Webb, for appellee.

DOWDELL, J. The appellant brought her action in ejectment against Silas W. Peavy, the tenant in possession, to recover a certain lot in the city of Birmingham. Mrs. E. E. McLemore, on her application, was admitted to defend as landlord.

The right of plaintiff to recover is based on the invalidity of a mortgage, executed by plaintiff and her husband, under which defendant claims title, and which plaintiff contends is invalid because given to secure the debt of her husband. The undisputed facts show that James M. Russell, the husband of plaintiff, having seen in a newspaper an ad-

vertisement to the effect that Dr. Chas. Wheelan had some money to lend, went to see said Wheelan, and told him he wanted to borrow \$1,000 for his own use. Wheelan told him he had some money to lend for Mrs. E. E. McLemore, and asked him what security he could give. Russell replied that he would give a mortgage on a lot on Twelfth avenue and Thirty-Second street. Wheelan told Russell that would be sufficient, and asked him to bring an abstract of the title. Before leaving, Russell told Wheelan that he (Russell) had mortgaged all his own property, and that the lot belonged to his wife. Wheelan said that would be all right if the title was good. Russell had an abstract prepared, and took it to Wheelan, who had an attorney to examine it. Several days afterwards Wheelan told Russell the title was satisfactory, and that he could get the money immediately upon the execution of the mortgage. Wheelan had the mortgage prepared, and gave it to Russell to be executed. Russell carried it to his wife, and told her to sign it. She asked what property he was mortgaging, and he told her it was his North Birmingham property. Russell owned property in North Birmingham at the time, but the property described in the mortgage was not situated in North Birmingham. The wife then signed the mortgage without reading it, although she was able to read, and after its complete execution Russell delivered it to Wheelan and received the money thereon. The money so received he used in paying his individual debts. Mrs. Russell, the plaintiff, did not make any application for the loan, and did not authorize her husband to make any application for her or in her name. She did not know that her husband had made or intended to make an application for a loan. She did not know until after the foreclosure of the mortgage that her property was embraced in the mortgage, and she never received the use or benefit of the money loaned on the mortgage. The mortgage recites that the debt was that of the wife, and that the husband was surety. Mrs. McLemore foreclosed the mortgage, and is now claiming under it, having bid in the property at foreclosure sale. It will thus be seen that the wife committed no positive act of fraud in obtaining the loan and in the execution of the mortgage. If any fraud at all was committed, it was upon the wife. The mortgage was executed on the 1st day of February, 1891, and foreclosed on the 29th day of March, 1893. With respect to her power to mortgage her property to secure her husband's debt, a married woman is under the same incapacity as before the adoption of the married woman's law of 1887. Her attempt to convey her property for this purpose is a nullity. It does not operate to divest her title, and she can maintain ejectment for real estate so conveyed by her. *Elston v. Comer*, 108 Ala. 76, 19 South. 324; *Richardson v. Stephens*, 122 Ala. 301, 25 South. 39, and cases there cited.

¹ Rehearing denied June 16, 1902.

² 1. See *Husband and Wife*, vol. 24, Cent. Dig. § 671.

In *Richardson v. Stephens*, supra, it was said: "The statute forbidding a married woman to become surety for her husband is founded upon public policy, which is to protect the wife's estate against the influence of her husband or other person, or her own inclination in respect to subjecting it to her husband's debts. Being by the law prohibited to so contract, appellee could not by attempting to do so estop herself to deny her want of power. Equity will not, by setting up an estoppel against her, accomplish that which the law and public policy have forbidden." It was not intended by this to assert that the wife may not estop herself by positive acts of fraud, or by concealment and suppression, which in law would be equivalent thereto; nor, on the other hand, do we intend in what is here said to intimate a contrary opinion, the decision of that question being unnecessary to the determination of this case; but that the doctrine of estoppel, in the absence of fraud,—such, for example, as might sometimes arise from mere silence,—would not operate to divest her of her title. As stated above, there was no positive act of fraud on the part of the wife, nor any concealment or suppression that would amount thereto, and consequently her silence at the time that an extension was given in the advertisement for the foreclosure of the mortgage will not create an estoppel against her.

The declaration of Whealan of his agency, and the acceptance of the mortgage and note by Mrs. McLemore and her subsequent foreclosure of the same, were sufficient to show Whealan's agency, and this being shown, knowledge and notice to Whealan of the loan being made to J. M. Russell, the husband, and that the wife was the mere surety of the husband, would be visited on Mrs. McLemore, the principal.

It follows, therefore, that the court erred in giving the general charge as requested by the defendant and refusing the same to the plaintiff. The judgment of the circuit court will be reversed and the cause remanded.

BIRMINGHAM RY. & ELECTRIC CO. v. DORSE¹

(Supreme Court of Alabama. Jan. 14, 1902.)
WATERS AND WATER COURSES—OVERFLOWING LAKE—OUTLETS—UNPRECEDENTED RAINFALL—BURDEN OF PROOF.

1. In an action for injuries alleged as the result of an overflow from a lake controlled by defendant, and not having a proper outlet provided, it was not error to refuse to instruct that if the water came from the lake because of an unprecedented rainfall defendant was not liable; there being evidence that if the outlets had been maintained in proper condition the injury would not have occurred.

2. The burden was on plaintiff to show that the lake was controlled by defendant.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Hannah B. Dorse against the Birmingham Railway & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit instituted by the appellee to recover damages for an injury which is alleged to have been caused by negligence on the part of defendant in failing to provide or maintain in good condition proper outlets to prevent the overflow of a certain lake, known as "Lake View," which is alleged to have been in the possession of, or under the control of, defendant, when the alleged overflow and injury are claimed to have taken place. It was averred in the complaint that, by reason of the overflow caused by the negligence of the defendant in failing to have a proper outlet, large quantities of water flowed from said lake upon or against a cottage occupied by the plaintiff, and caused the porch or gallery of said cottage to fall, and furniture in said house to fall, and the plaintiff was struck and knocked or caused to fall, and suffered the injuries complained of. Among the other charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, were the following: "(5) If you believe from the evidence that the water that ran down upon or against the cottage and curtilage and garden came from the lake because of an unprecedented and unlooked for storm, rainfall, or cloud-burst, your verdict must be for the defendant. (6) If you believe from the evidence that plaintiff's alleged injury and damage were caused by an unprecedented rainfall, you must render your verdict in favor of the defendant." There was verdict for the plaintiff, whereupon the defendant made a motion for a new trial.

Walker, Tillman, Campbell & Porter, for appellant. Bowman & Harsh, for appellee.

TYSON, J. There are sixteen assignments of error on the record. Of these only three are insisted upon in brief of counsel for appellant. Two of these are based upon the refusal to defendant, by the trial court, of charges numbered 5 and 6.

The negligence complained of was the failure of defendant to provide or maintain in good condition proper and sufficient outlets, or proper and sufficient ways, means, or appliances, to prevent the lake from overflowing. The evidence tended to show a failure by defendant to maintain the outlets, etc., in good condition. So, too, it afforded an inference that, had the outlets, etc., to prevent the lake from overflowing, been in good condition, the injuries complained of would not have been inflicted, notwithstanding the unprecedented rainfall. The charges were properly refused.

The other assignment relates to the action of the court in overruling the motion for a new trial. The motion contained five grounds. Only the fifth ground is insisted upon here. It is in these words: "For that the great

¹ Rehearing denied June 12, 1902.

weight of the evidence supports the contention of defendant that defendant was not in the possession of the said lake at the time of the alleged overflow, nor was defendant controlling or claiming to control said lake at said time." It must be conceded that the burden of proof was upon the plaintiff to establish to the reasonable satisfaction of the jury that defendant was in possession of and claiming to control the lake and grounds contiguous thereto on the occasion of the alleged injuries to plaintiff. After a consideration of all the evidence we are unwilling to affirm that the trial court erred in overruling the motion.

Affirmed.

FRITH et al. v. HOLLAN.¹

(Supreme Court of Alabama. April 24, 1902.)
SALES—IMPLIED WARRANTY—LIABILITY FOR
PURCHASE PRICE—ABATEMENT.

1. Where, in an action for the balance of the price of onion sets, the evidence showed that they were in bad condition when delivered, it was for the jury to determine whether the agreed price should be abated, though the purchaser had not returned them to the seller, as he could retain them and bring his cross action for breach of implied warranty of merchantableness, or prove their real value and abate recovery *pro tanto*.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by Frith & Co. against J. W. Hollan. From a judgment for defendant, plaintiffs appeal. **Affirmed.**

This was an action of assumpsit, brought by the appellants, Frith & Co., against the appellee, G. W. Hollan, to recover the balance due upon the purchase price of onions, which had been sold by the plaintiffs to the defendant. On the trial of the cause the evidence for the plaintiffs tended to show that the defendant had bought 25 barrels of onion sets from the plaintiffs; that he had paid for them, except a balance for which the suit was brought. The evidence for the defendant tended to show that when the onion sets were received by the defendant they were badly sprouted, and much damaged, and that they were not worth more than half the price the defendant agreed to pay for them, and that they were damaged in at least the amount claimed by the plaintiffs in the present suit. It was further shown that the price agreed to be paid for the onions was \$144; that the defendant had paid \$104, leaving \$40 due, which was the amount sued for. It was further shown by the evidence that upon receipt of the onion sets the defendant proceeded to put them in his store for sale, and to fill orders which had been previously left with him for future delivery. Upon the introduction of all the evidence, the plaintiffs requested the court to give to the jury the following written charges, and separately excepted to

the court's refusal to give each of them as asked: (1) "If the jury believe the evidence they will find for the plaintiff." (2) "An implied warranty is not a guaranty that the article or thing sold is the best of its kind, or such as might have been represented at the time of sale,—only that such article shall be reasonably suitable for the purpose for which it was intended to be used; and if the testimony shows that the defendant used said sets, they will find for the plaintiff." (3) "If the evidence shows that the onion sets delivered to defendant did not come up to warranty, expressed or implied, the defendant must rescind by an offer to return the article in a reasonable time after discovery of the defects; and if he failed to rescind, you will find for the plaintiff." (4) "The defendant must act with promptness when he discovers that the property was not such as was contemplated and offer to return it. If he neglects to do so immediately upon discovering a breach of warranty or fraud, and keeps it, and treats it as his own, as by offering to sell it, he cannot reject the contract, and is liable." (5) "If the evidence shows that the defendant accepted the goods by using them as his own by selling them, it is immaterial whether any of the goods were returned by the persons to whom Hollan had sold them, or whether he sold them at a reduced price, or lost half." There were verdict and judgment for the defendant. The plaintiffs appeal, and assign as error the refusal of the court to give the several charges requested by them.

Worthy & Gardner, for appellants. Foster, Samford & Carroll, for appellee.

TYSON, J. This action was brought to recover the balance claimed to be due on the purchase price of onion sets sold by plaintiffs to defendant. The sale of the sets was at Troy, Ala., to the defendant as a merchant and by description. When delivered they were in bad condition, much of them being unmerchantable. In such case there is an implied warranty that the sets delivered shall not only answer the description, but that they shall be salable or merchantable. *Gachet v. Warren*, 72 Ala. 292; 15 Am. & Eng. Enc. Law (2d Ed.) 1229. The defendant, upon discovery of the condition of the sets, had the right to rescind the sale within a reasonable time and return them; or retain them and avail himself of the damage he had suffered, either by bringing his cross action for the breach of warranty, or to prove their real value and abate the recovery *pro tanto*. *Brown v. Freeman*, 79 Ala. 410; *Eagan Co. v. Johnson*, 82 Ala. 233, 2 South. 302; *Young v. Arntze*, 86 Ala. 116, 5 South. 263; 15 Am. & Eng. Enc. Law (2d Ed.) 1255; *Benj. Sales* (Bennett's 7th Ed.) p. 965. There is no evidence in the record tending in the remotest degree to support the theory that the sale counted on was by inspection and not by de-

¹ Rehearing denied June 12, 1902.

scription. Under the evidence, it was a question for the jury to determine whether the price agreed to be paid by defendant should be abated to the extent of the balance claimed by plaintiffs against him. It follows that the affirmative charge was properly refused to the plaintiffs. The other charges requested by them were at variance with the principles we have declared, and were correctly refused.

Affirmed.

SHOWS v. FOLMAR et al.¹

(Supreme Court of Alabama. April 24, 1902.)

PARTNERSHIP—DISSOLUTION—ACCOUNTING —EVIDENCE.

1. Where one partner made a settlement and division of the assets of another partnership of which his firm was a member, and his firm accepted and retained the assets allotted to it in the settlement, the firm was bound thereby, though none of the other members were present.

2. Evidence considered, and held sufficient to show that an accounting and division of the proceeds was had on dissolution of a partnership.

Appeal from chancery court, Crenshaw county; W. L. Parks, Chancellor.

Bill by James Folmar Sons & Co. and another against T. W. Shows. From a decree for plaintiffs, defendant appeals. Reversed.

Rushton & Powell, for appellant. Foster, Samford & Carroll, for appellees.

DOWDELL, J. The bill in this case is filed by James Folmar Sons & Co., a partnership, and Folmar Bros., another partnership, which is alleged to have succeeded to the rights of the former, and is claiming the benefits of whatever decree James Folmar Sons & Co. may be entitled to under the allegations of the bill. The purpose of the bill is to have an account and settlement of the partnership of T. W. Shows & Co., which said firm, it is averred, was composed of James Folmar Sons & Co., owning one half interest, and T. W. Shows, who is made defendant in the bill, owning the other half interest, in said partnership of T. W. Shows & Co. The bill alleges that the partnership of T. W. Shows & Co. was formed on the 16th day of October, 1893, and the object of its formation was to conduct and carry on a livery and sale stable business in the town of Luverne, Ala. It is averred that James Folmar Sons & Co. contributed to the capital stock of the concern at the time of its creation the sum of \$700, and that T. W. Shows contributed \$599.50, or \$100.50 less than the other partner. It is also averred in the bill that Shows managed and controlled the business of the partnership, and that the partnership continued in business until on or about the 14th day of August, 1894, when it was dissolved by mutual consent; but it alleges that no

settlement of the partnership business was ever had. The bill contains the further apparently inconsistent allegation and statement that from the 16th day of October, 1893, to the 8th day of February, 1895 (the latter date covering a period of about six months after the day of the alleged dissolution of the partnership), James Folmar Sons & Co. contributed to the capital stock of the partnership the additional sum of \$4,372.88; and, as to the defendant Shows, it states that "he contributed no money or other thing of value to said partnership, except said sum of \$599.50, and from time to time deposited the sum of \$2,298.89 in the bank of James Folmar Sons & Co., known as the 'Bank of Luverne,' on account of his share of the capital stock of said partnership." It is averred that the money so contributed went into said business, and became a part of its capital stock. The bill also avers that Shows had brought suit in the circuit court of Crenshaw county in his own name against James Folmar Sons & Co. and Folmar Bros., but the matters involved in said suit were partnership matters of the firm of T. W. Shows & Co., which said suit is prayed to be enjoined. There are other averments as to agreement by James Folmar Sons & Co. to discount certain notes and mortgages when taken by T. W. Shows & Co. in the sale of mules. The prayer of the bill is for a settlement of the partnership, and for an accounting "of all and every of said partnership dealings and transactions." The bill is in no aspect, whether considered in reference to the averments or the prayer for relief, one to falsify and surcharge. It is round in its allegations that there has never been any settlement of the partnership, and prays for a settlement and an accounting. The respondent Shows, answering the bill, admits the formation of the partnership of T. W. Shows & Co. on the 16th day of October, 1893, and its dissolution in August, 1894. He denies that James Folmar Sons & Co. contributed any sum in money to the capital stock of the partnership, but avers that they contributed horses, mules, and vehicles at an agreed valuation of \$1,400, of which the respondent paid them on the same day \$599.50, and \$100.50 was charged to him on the books of James Folmar Sons & Co., and which was afterwards paid; that this was all the money or property contributed by either party to the concern. He expressly denies that James Folmar Sons & Co. afterwards contributed said sum of \$4,372.88, or any other sum, or that the respondent afterwards contributed any other sum, to the capital stock, other than as stated as to paying one-half of the agreed valuation of the horses, mules, and vehicles furnished by James Folmar Sons & Co. The answer shows that the defendant ran an individual account in his own name with James Folmar Sons & Co., and made deposits in the Bank of Luverne, which was run by James Folmar Sons & Co., and for which certificates were issued to him in his

¹ Rehearing denied June 12, 1902.

individual name, and that his individual account with James Folmar Sons & Co. and with the Bank of Luverne had no connection whatever with the partnership matters of T. W. Shows & Co. It is also shown by the answer of respondent that there were mutual accounts between the firm of T. W. Shows & Co. and the firm of James Folmar Sons & Co. The answer further denies that the partnership matters of the firm of T. W. Shows & Co. are unsettled, and avers that upon the dissolution there was a division of the assets of the partnership between himself and James Folmar Sons & Co., and a full settlement of the partnership matters. The cause was heard for final decree upon the pleadings and proof, and what we have stated above as to the allegations of the bill and the denials in the answer are sufficient for present purposes.

There are questions suggested and discussed in the brief of appellant's counsel relative to the pleadings which we deem it unnecessary to consider, as we think the case may be properly determined on the main issue by the proof. The bill alleges the formation and dissolution of the partnership, and then alleges that no settlement of the partnership affairs was ever had. The answer admits the allegations as to the formation and dissolution, but expressly denies the allegation that no settlement of the partnership matters was made. The evidence, without conflict, shows that R. H. Folmar, one of the firm of James Folmar Sons & Co., and who is a complainant in the bill, had the active management and control of the business of his said firm, and that he (representing the firm of James Folmar Sons & Co.), with T. W. Shows, effected the partnership of T. W. Shows & Co. and also its dissolution. The evidence further shows, and we might say without dispute, that upon the dissolution of said partnership a division of its assets was made, in which division T. W. Shows received the horses, mules, and vehicles on hand, and the book accounts of the concern, amounting to about \$100, while James Folmar Sons & Co. received the notes and mortgages due the concern, amounting to about \$1,400; that, immediately upon the dissolution and division of the assets, T. W. Shows, with the property allotted to him, set up and carried on the livery and stable business in his own name, and James Folmar Sons & Co. proceeded to collect the notes and mortgages so received by them; and that neither party afterwards pretended to claim any interest in the property of the other under said division and allotment until T. W. Shows began to press the collection of an individual claim which he held against the firm of James Folmar Sons & Co. The evidence also shows that at the time of the dissolution the firm of T. W. Shows & Co. owed only two small debts, one of which was a disputed claim, and that these debts were subsequently settled in accordance with an agreement made between Shows and R. H.

Folmar at the time of the dissolution, by James Folmar Sons & Co. paying one, and T. W. Shows and James Folmar Sons & Co. each paying one-half of the disputed claim after the same had been reduced to judgment against the firm. The evidence also shows that during the existence of the partnership mutual accounts were run between T. W. Shows & Co. and James Folmar Sons & Co., and it is claimed by the defendant that in the settlement on the dissolution, by agreement, these accounts were settled by set-off of one against the other. This is disputed by the complainants, but it is a pertinent fact in support of defendant's contention that the difference in the two accounts was small, and, further, no question as to them was ever raised until the defendant Shows began to press the collection of his individual demand and claim against the complainants. Upon the whole evidence, it is quite evident that the theory of the complainants that there had never been a settlement of the partnership affairs is based largely upon the erroneous supposition that the individual account of T. W. Shows with James Folmar Sons & Co. and with the Bank of Luverne, a branch business of James Folmar Sons & Co., entered into the partnership business of T. W. Shows & Co. The nature and character of this individual account, the items which enter into it, the way in which it was carried on the books of James Folmar Sons & Co. and the Bank of Luverne, undoubtedly, we think, support the testimony of T. W. Shows that the account had no connection whatever with the partnership matters of T. W. Shows & Co.

R. H. Folmar, who is made a complainant in the bill, and who is conceded to have been the active managing partner in the firm of James Folmar Sons & Co., is not examined as a witness in the case, but an affidavit made by him is put in evidence by the respondent as an admission against interest. In this affidavit it is admitted that there was a full and complete settlement of all the partnership matters of T. W. Shows & Co. upon its dissolution. This admission is conclusive against him, as a complainant, to any relief under the bill. It is of no consequence that the other partners of the firm of James Folmar Sons & Co. were not present at the time of the settlement and division of the assets of the firm of Shows & Co. by T. W. Shows and R. H. Folmar, the managing partner of the business of Folmar Sons & Co., since the fact remains that this firm accepted the assets allotted to it in the division, and has continued to hold and enjoy the fruits of the settlement. If a ratification of the conduct of R. H. Folmar in making the settlement and division were necessary, this is sufficient from which to infer a ratification. But the purpose of the bill is not to falsify and surcharge. It is not pretended that the settlement was fraudulent or unfair, but that in fact there never was a

settlement. Without discussing the testimony of the witnesses in detail, but giving to each full and fair consideration, when taken in connection with their opportunities of knowing the facts, and also in connection with attendant circumstances and facts that are undisputed, we are firmly persuaded that a settlement of the partnership affairs of T. W. Shows & Co. was had at the time of its dissolution between T. W. Shows, representing himself, and R. H. Folmar, a member of the firm of James Folmar Sons & Co., representing the latter firm, which the bill alleges constituted one of the members or partners of the firm of T. W. Shows & Co.

It is insisted by counsel for appellees that every presumption should be indulged in favor of the finding of the chancellor on the facts, and that, unless the preponderance of the testimony is against the finding of the chancellor, this court should not disturb his decree. The doctrine here invoked is directly opposed to the express language of the statute (section 3826, subd. 1), which reads as follows: "The supreme court has authority (1) to exercise appellate jurisdiction coextensive with the state, under such restrictions and regulations as are prescribed by law; but in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the supreme court shall weigh the evidence, and give judgment as they deem just." It is thus made plain by the statute that no presumption can be here indulged in favor of the chancellor's finding on the facts, and our plain duty is to weigh the evidence, and give judgment as we deem just.

Our conclusion is that the allegations of the bill are not sustained by the proof. And it follows that the decree of the chancellor must be reversed, and a decree will be here rendered dismissing the bill. Reversed and rendered.

FINDLEY et al. v. HILL et al.¹

(Supreme Court of Alabama. May 22, 1902.)

DEEDS—CONSTRUCTION—LIFE ESTATES—REMAINDER—ESTATES TAIL.

1. A grantor executed a deed in trust for the use and benefit of the heirs "of his son at the time of his death, and their heirs and assigns forever, but, in case he shall leave no heir or heirs living at the time of his death," then the real and personal estate shall go to the "heirs at law" of the grantor living at the death of the son. *Held*, that as the successive limitations over on the son's death would be to the same persons, as both dead and living, if the word "heirs" were given its technical meaning, the word "heirs" in the first limitation should be construed to mean "children, issue, or descendants."

2. The construction is also sustained by the fact that part of the property granted by the same clause was personally, a limitation of which over on indefinite failure of issue was void at common law.

3. A grant in a deed of trust to the "heir or heirs" of a life tenant "living at the time" of

such tenant's death, and, on failure of such persons to take, the estate to go to the heirs of the grantor, does not make a limitation on an indefinite failure of issue, thereby creating an estate tail, but creates remainders to the children of the life tenant, and limitations would not run against them until after the death of the life tenant.

Appeal from circuit court, Tuscaloosa county; S. H. Spratt, Judge.

Ejectment by Murk Findley and others against Dave Hill and others. From a judgment in favor of the defendants, the plaintiffs appeal. Reversed.

H. B. Foster and Foster & Oliver, for appellants. Daniel Collier and H. A. Jones, for appellees.

TYSON, J. This is an action of ejectment to recover a certain tract of land described in the complaint, brought by the children of Murchison Findley, who died on the 16th day of March, 1900. The defendants claim title under warranty deeds executed by Murchison in 1836, under which they, and those through whom they hold, have been continuously in possession of the lands, claiming them adversely. It appears that one Kenneth Findley, being the owner of these lands, in 1826 conveyed them to his son John in trust for the use of his infant son Murchison, then some 14 years old, for life, and at his death "for the use and benefit of the heirs of Murchison Findley at the time of his death, and their heirs and assigns forever. But in case he shall leave no heir or heirs living at the time of his death, then and in that case the same real and personal estate shall go to the heirs at law of the said Kenneth Findley living at the time of the death of the said Murchison Findley, and to be distributed according to the laws of the state of Alabama for distribution of intestate estates." John Findley, the trustee, lived near the lands until his death in 1894. Kenneth Findley, the grantor and father of John and Murchison, had other children living at the date of the deed to John. The oldest child of Murchison was 48 years of age at the commencement of the suit. On the foregoing state of facts, the trial court, at the request of the defendants in writing, gave the general affirmative charge in their favor.

If the deed to John created a fee in Murchison, or if it created an estate tail in him, or if the statute of limitations operated to effect a bar against the estate limited to the plaintiffs, of course they have no right to recover, and the instruction to the jury was proper. If, however, the estate was limited to the children or issue of Murchison, the statute of limitations would not bar the rights of the plaintiffs, because the conveyance to John was a dry use, which under the statute of uses passed the legal title to Murchison for life, in all respects as if the deed had been made without the intervention of a trustee. *You v. Flinn*, 34 Ala. 409; *Gindrat v. Railroad Co.*, 96 Ala. 162, 11 South. 372, 19 L. R.

¹ Rehearing denied June 16, 1902.

A. 339; *Webb v. Crawford*, 77 Ala. 440. In such case the remainders over to the unborn children of Murchison, and, in default of such living at his death, to the heirs of the grantor living at the death of the life tenant, whether vested or contingent, would await the termination of the life estate, unaffected by the conveyance and warranty of Murchison; the remainder-men being without right or power to disturb the estate created by the deed of the life tenant. *Tied. Real Prop.* § 481; *Pope v. Pickett*, 65 Ala. 491; *Pickett v. Pope*, 74 Ala. 122; *Bass v. Bass*, 88 Ala. 408, 7 South. 243; *Allen v. De Groodt* (Mo. Sup.) 11 S. W. 240, 14 Am. St. Rep. 626, and note on page 635; *McCorry v. King's Heirs*, 39 Am. Dec. 165. So, then, the only question in this case is, what was the effect of the limitation over upon the death of Murchison? In determining the intention of the grantor, we may look not only to the words used, but to the situation and circumstances of the parties, the context of the instrument, and the fact, if it exists, that it was written by a person unacquainted with the use of legal technical words. In this case we have a father, with a number of living children, making provision for his minor son, and, to that end, giving him an estate expressly for life, with remainder for the use of his "heirs at the time of his death, and their heirs and assigns forever," and, in default of "heir or heirs living at the time of his death," over to the heirs of the grantor living at the death of the life tenant, and to be then distributed according to the law for the distribution of intestate estates. Now, looking first at the second limitation, there can be no doubt that by it the estate would vest in the persons answering to the description of "heirs" of Kenneth Findley, the grantor, living at the death of Murchison, the life tenant. *Roberts v. Ogbourne*, 37 Ala. 174. These persons, however, would be also the heirs of Murchison if he had died without descendants. To hold, then, that the first limitation, upon the death of Murchison, is to the heirs general of the life tenant, would make the second limitation over to the same persons as living. It is impossible to suppose that any grantor would intend such a result. It is certain, then, that the first limitation to the heir or heirs of Murchison living at his death was not, and could not have been, intended for the same persons as the second limitation. This being true, the only other meaning open for our adoption is that the first limitation was to the children, issue, or descendants of Murchison living at his death. Adopting this construction, the deed is congruous in all its parts.

While it is true that courts will respect and enforce the technical meaning of "heirs" or "heirs of the body," so as to make them strict words of limitation, after a life estate to the ancestor, where there is nothing to show that they are not used in a different sense, there is a disposition, especially since the abolition of estates tail, to seize upon slight circum-

stances to make them words of purchase. *May v. Ritchie*, 65 Ala. 602; *Price v. Price*, 5 Ala. 581; *Williams v. McConico*, 36 Ala. 22; *Dunn v. Davis*, 12 Ala. 140; *Watson v. Williamson*, 129 Ala. 302, 30 South. 281. The fact that the successive limitations over on the death of Murchison would be limitations to the same persons, as both dead and living, when the words are given a technical meaning, shows that the deed was written by a person unskilled in the use of technical words, and that the grantor must have used "heir or heirs" in the first limitation in the narrower sense of "children, issue, or descendants." *Bell v. Hogan*, 1 Stew. 539; *Twelves v. Nevill*, 39 Ala. 175; *Campbell v. Noble*, 110 Ala. 382, 19 South. 28; *May v. Ritchie*, supra; *Williams v. McConico*, supra; *Roberts v. Ogbourne*, supra; 15 Am. & Eng. Enc. Law (2d Ed.) 324. There is another circumstance which adds force to this construction. The conveyance was of real and personal property, consisting of "slaves," "horses," "hogs," and "one set of carpenter's tools." A limitation of personal property over on indefinite failure of issue is void at the common law. 1 Brick. Dig. 786, § 9. It is entirely clear that the grantor did intend to make a limitation over after the life estate, but he could not have intended, both from the nature of some of the property and the prohibition of the law, to limit the personal property after an indefinite failure of issue. And as the real and personal estate is limited by the same clause, the courts are disposed the more readily to infer an intent to limit on a definite failure of issue. *Bell v. Hogan*, supra; *Alford's Adm'r v. Alford's Adm'r*, 56 Ala. 350; 2 Jarm. Wills, c. 40 (T).

In this case the clause in the deed prescribes that the first limitation, on the death of Murchison, shall be an absolute fee in the "heir or heirs" of Murchison "living at the time" of his death, and, in default of such living person to take, over (in fee) to the persons answering to the description of "heirs" of the grantor at that time. There is no room for saying that there was the least purpose to make a limitation upon indefinite failure of issue. The definite time fixed for division and for the vesting of a fee in any event is the death of Murchison. No estate tail, therefore, is limited, since the purpose in such case is a limitation upon indefinite failure of issue, and not to a particular person or a particular class of persons. Here a person claiming as a remainder-man would have to show not only that he was an "heir" of Murchison, but, by the express words of the deed, that he was living at his (Murchison's) death, which excludes the idea of the creation of estates tail,—an indefinite failure of issue. *Roberts v. Ogbourne*, supra; *Fearne*, Rem. 199. It follows that, under the deed, Murchison took a life estate, with remainder to his children living at his death, and consequently the plaintiffs are entitled to recover.

Reversed and remanded.

DAVIS v. SANDERS.¹

(Supreme Court of Alabama. April 24, 1902.)

FALSE IMPRISONMENT—TRESPASS—CASE—MALICIOUS PROSECUTION—COMPLAINT—ALLEGATIONS—CHARACTER OF PLAINTIFF.

1. A count of a complaint alleged that plaintiff claimed damages for maliciously, and without probable cause, causing the plaintiff to be arrested and imprisoned on the charge of larceny. *Held*, that the count was one in trespass for false imprisonment.

2. An amendment of the complaint by adding to it that the said charge, before the commencement of the action, had been judicially investigated, and the prosecution ended, and plaintiff discharged, did not render it one in case for malicious prosecution; an averment of the issuance of process, properly describing it, and plaintiff's arrest and imprisonment thereunder being essential in an action on the case for malicious prosecution.

3. In an action for false imprisonment, evidence as to the character of plaintiff is immaterial.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Tom Davis against Edward Sanders. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint contained two counts, which were as follows: "First count. The plaintiff claims of the defendant \$3,000 damages for maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on the charge of larceny for, to wit, 10 days, on, to wit, the 1st day of December, 1899. Second count. The plaintiff claims of the defendant \$3,000 damages for maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on the charge of larceny for, to wit, ten days, on, to wit, the 1st day of December, 1899; and plaintiff avers that he was, by reason of such arrest, confined in the city prison of Birmingham for ten days; that said city prison was in a filthy, uncomfortable, and unhealthy condition; that same was overcrowded; and that the plaintiff was exposed while in said prison to smallpox, and confined in said prison where persons were confined who had smallpox; and was deprived of the privilege of making bond; wherefore plaintiff brings this suit." The second count was subsequently amended by adding thereto the following words: "Plaintiff avers that said charge, before the commencement of this action, has been judicially investigated, and said prosecution ended, and the plaintiff discharged." The plaintiff introduced evidence tending to show that, upon the complaint of the defendant, he was arrested upon a charge of larceny of a watch; that he was tried in the inferior criminal court of the city of Birmingham, and discharged. The defendant introduced evidence tending to show that

there was probable cause for him to believe that the plaintiff was guilty of the larceny of the watch as charged. The plaintiff introduced in evidence the testimony of several witnesses that they knew the plaintiff's character, and that it was good. To the introduction of these witnesses, the defendant separately objected upon the grounds that such evidence was immaterial, irrelevant, and illegal, and that the character of the plaintiff was not involved in the issue in this case. The court overruled the objection, and the defendant duly excepted. Among the charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, was the following: "The jury in this case cannot, under the evidence, find any verdict against the defendant for malicious prosecution." There were verdict and judgment for the plaintiff, assessing his damages at \$500. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

H. K. White and John London, for appellant. B. M. Allen, for appellee.

DOWDELL, J. The complaint contained two counts, the first being in Code form (Code, p. 946, No. 19) for false imprisonment; the second being the same, with additional averments of matters showing aggravation. Both counts are in trespass. *Ragsdale v. Bowles*, 16 Ala. 62; *Sheppard v. Furniss*, 19 Ala. 760; *Holly v. Carson*, 39 Ala. 345; *Rhodes v. King*, 52 Ala. 272; *Rich v. McInerney*, 103 Ala. 345, 15 South. 663, 49 Am. St. Rep. 82; 13 Enc. Pl. & Prac. 427-429, note 1.

The amendment of the second count by the additional averment that "said charge, before the commencement of this action has been judicially investigated, and said prosecution ended, and the plaintiff discharged," did not change the character of the count from one in trespass for false imprisonment to one in case for malicious prosecution. As amended it was still wanting in averments essential to constitute a count for malicious prosecution. An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential in an action on the case for malicious prosecution. See authorities, *supra*. The second count after amendment was wanting in such averment. The court erred in refusing the second written charge requested by the defendant.

The action being in trespass for false imprisonment, the character of the plaintiff was immaterial; and proof by him of his good character, his character not having been assailed, was wholly irrelevant under the issues; and the court erred in allowing this evidence against the objection of the defendant. For the errors pointed out, the judgment will be reversed and the cause remanded.

Reversed and remanded.

¹ Rehearing denied June 16, 1902.

² See *False Imprisonment*, vol. 22, Cent. Dig. § 162.

POSTAL TEL. CABLE CO. v. JONES.¹

(Supreme Court of Alabama. April 9, 1902.)

TELEGRAPH COMPANY—NEGLIGENCE—PERSONAL INJURIES—WIRES IN HIGHWAY—JUDICIAL NOTICE—PLEADING—EVIDENCE—INSTRUCTIONS.

1. The complaint in an action for personal injuries alleged that it was the duty of defendant telegraph company to exercise due care to keep its wire above a road crossed thereby, notwithstanding which it negligently allowed the wire to remain such a short distance above the road that plaintiff's team came in contact with the wire, and were thereby made unmanageable and injured plaintiff. *Held* to state the negligence relied on with sufficient particularity.

2. The defendant's duty to keep its wires out of the way of travelers was sufficiently alleged.

3. The court will take judicial notice that it is the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road.

4. Plaintiff alleged that he was injured by defendant telegraph company's negligent failure to keep its wire from obstructing a public road. Defendant pleaded the general issue, and specially that neither defendant nor its employes knew, or by the exercise of reasonable care could have known, that the wires were detached from the poles so as to obstruct the road, and that it used reasonable care to prevent its wires from obstructing the road. *Held*, that the special pleas were demurrable, as the facts pleaded could have been proven under the general issue.

5. Where there was evidence that defendant telegraph company's wires had been detached from a pole so as to obstruct a highway for two days prior to an injury to plaintiff occasioned thereby, it was a question for the jury whether or not defendant had exercised due care in discovering and remedying the condition of the wires.

6. Plaintiff was injured in consequence of his team becoming unmanageable by coming in contact with defendant's telegraph wire, which sagged so as to obstruct the road, and there was evidence that the wire became detached because of being fastened to a rotten arm. *Held* sufficient to warrant a finding that the use of the cross arm was negligence proximately causing plaintiff's injury.

7. An instruction that, if plaintiff employed no physician, the jury might consider that fact as evidence that he was not seriously injured, erroneously singled out and gave undue prominence to one fact.

8. Where the evidence in a personal injury case showed that plaintiff had suffered from the injury from the time of its infliction to the time of trial, evidence that after the injury witness had heard plaintiff give expression to pain and suffering was proper.

9. In an action for injuries caused by defendant's failure to keep its wires from obstructing a highway, there was evidence that the falling of the wires was caused by the negligent use of a rotten cross arm. The court charged that if the line was inspected on a certain date, and at that time the poles, wires, and cross arms were in good condition, the jury should find for defendant. It was uncontroverted that there was such inspection. *Held*, that a refusal to give a general affirmative charge for defendant was not inconsistent with the special charge, as the special charge left the jury free to find that the cross arm was not in good condition, while directing a verdict would have been a holding that it was in good condition.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by C. A. Jones against the Postal Telegraph Cable Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

This was an action brought by the appellee, C. A. Jones, against the Postal Telegraph Cable Company, to recover damages for personal injuries received by him while traveling along a public highway, by the side of which the defendant had its wires strung. The complaint, as amended, contained but one count. In this count the plaintiff alleged that on November 5, 1898, the defendant owned and operated a line of telegraph wire which was attached to poles along or near the public highway in Jefferson county; that said line of telegraph wire was heavily charged with electricity, "and it became and was the duty of defendant to use due care to have and keep said wire high up from the said road, yet, notwithstanding said duty, defendant negligently caused or allowed said wire to be or remain on or such a short distance above said public highway that the public traveling said highway were liable to be injured thereby." It was then averred that on the day above named the plaintiff was traveling along said highway in a wagon to which a team was attached, and that said team came in contact with the said wire, and, as a proximate consequence thereof, the team became unmanageable, plaintiff was thrown from the wagon, and came in contact with the wire, charged with electricity, and sustained the damages complained of. The plaintiff claimed \$500 as damages. To this complaint the defendant demurred upon the following grounds: (1) It fails to aver any duty that the defendant owed to the plaintiff in the matter of the manner of maintaining its wires. (2) That the complaint fails to show that the defendant did not discharge its duty to the plaintiff. (3) The complaint fails to show with reasonable certainty in what the alleged negligence of the defendant consisted. (4) It fails to aver what, if any, negligence on the part of the defendant contributed proximately to plaintiff's alleged injuries. This demurrer was overruled. Thereupon the plaintiff filed the pleas of the general issue and the following special pleas: "(4) For further answer to the complaint, the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, neither the defendant, nor the employes of defendant whose duty it was to see that its wires at the point named in the complaint were properly attached to the poles, knew that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles. (5) For answer to the complaint the

¹ Rehearing denied June 18, 1902.

¶ 8. See Evidence, vol. 20, Cent. Dig. § 331.

defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, neither the defendant, nor the employees of the defendant, whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles. (6) For further plea in this behalf the defendant says and avers that plaintiff ought not to have and recover of this defendant any sum, because it says and avers that the plaintiff contributed to his own injury, in this: that, knowing the wire referred to in the complaint was alongside of the alleged road, he, without due care, drove or allowed to be driven the alleged team against said wire, thereby contributing to his alleged injuries. (7) For further answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause, because, as it avers, that the defendant exercised reasonable care to prevent its said wires from becoming detached from its said poles, and that neither the defendant, nor the employees of the defendant whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles." To pleas 4 and 5 the plaintiff demurred upon the following grounds: (1) Said pleas do not interpose any defense which could not be set up under the plea of the general issue, and the facts averred in said pleas can be given in evidence under the general issue. (2) Said pleas fail to negative the negligence of the defendant in allowing the wire to be along or near the public road. The demurrer to each of these pleas was sustained. The judgment entry recites that there was a motion made to strike the seventh plea from the file. The grounds of this motion are not shown. Said motion, however, was overruled.

On the trial of the cause upon issue joined upon the remaining pleas, it was shown that on the night of November 5, 1898, the plaintiff, in company with two other men, was riding along a public road in Jefferson county in a wagon drawn by a horse and a mule; that when they were about 13 miles from the city of Birmingham the team came in contact with a wire which was swinging about two feet from the ground in the middle of said road; that this wire was charged with elec-

tricity, and the shock therefrom caused the team to rear and charge; that the wagon was broken, the occupants thereof thrown out, and the plaintiff fell on the wire, and the body of the wagon fell upon him; that this wire was owned, operated, and maintained by the defendant. The evidence for the plaintiff tended to show that on the day before, while plaintiff and his companions were going along the same road in the direction of Birmingham, the defendant's wire at the point on the road where the injury occurred had dropped from the cross arm of the post from which it was suspended, and was propped out of the road with a forked stick; that the cross arm by which the said wire was suspended from the post was rotten and broken. The evidence for the plaintiff further tended to show that the plaintiff's injuries were permanent in their character, and that the plaintiff had suffered a great deal, and was rendered less able to work. During the examination of one Lawler, who was with the plaintiff at the time of the accident, he was asked the following question: "Have you, or not, heard Jones, the plaintiff, give expressions of pain or suffering since that night?" To this question the defendant objected. The court overruled the objection, and the defendant duly excepted. The defendant, as a witness in his own behalf, testified in detail to the injuries sustained by him, and further testified that he did not have a doctor to attend him. The evidence for the defendant tended to show that the line along which the wire was running was maintained in good condition, and was of such material as was in use in well-regulated telegraph lines; that said line had been inspected by a competent lineman on October 14, 1898, just a short time before the accident; and that it was then found to be in good condition. One of the witnesses for the defendant, and who testified that he was the wire chief of the defendant, whose place of business was in Birmingham, further testified that by a system used by the defendant the wire chief could tell as soon as a wire was obstructed, and was enabled, by the use of an instrument called a "galvanometer," to approximate the distance from the office in Birmingham to the place of obstruction; that up to the time this witness went off duty at 4 o'clock November 5, 1898, nothing had interrupted the wire along the line where the accident occurred. Another witness, who testified that he was the night wire chief, testified that about 9 o'clock on the night of November 5, 1898, the instrument referred to indicated that there was an obstruction along the road on which the plaintiff was injured, about 13 miles from Birmingham. The evidence for the defendant further tended to show that the next morning a lineman was sent to the place in question, and found that the wire had dropped from the post, but was propped up from the road by a forked stick. Two of the witnesses introduced for the de-

fendant testified that the cross arm on which the wire was suspended from the post was not rotten or broken. The evidence for the defendant further tended to show that the current of electricity along the wire which was alleged to have caused the injury complained of was not of sufficient force to be dangerous.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that, if the jury believes the evidence introduced in behalf of the defendant, they must find for the Postal Telegraph Cable Company. (2) The court charges the jury that, if they believe the evidence, they must find a verdict in favor of the defendant, the Postal Telegraph Cable Company. (3) The court charges the jury that although the jury may find from the evidence that the cross arm which it appears from the evidence was detached from the pole at the point of defendant's line where the alleged injury occurred was rotten, or partially rotten, yet in this case no recovery can be had because of such alleged rotten or partially rotten cross arm. (4) The court charges the jury that, if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence." The court at the request of the defendant gave to the jury, among others, the following written charges: "(10) The court charges the jury that if they believe from the evidence that it is the custom of well-regulated telegraph companies to inspect the lines of such companies once a month; and if the jury further find from the evidence that the line which included the point where the alleged injury occurred had been inspected by a competent man on the 18th of October, 1898; and if the jury further find from the evidence that at the time of said inspection, provided they find there was such inspection by such man, the wires, poles, and cross arms were in good and safe condition, and such as were and are used by well-regulated telegraph companies; and if the jury further find that the defendant, the telegraph company, did not know the line was down until or after the alleged injury to plaintiff and that it was repaired the next morning; and if the jury further find from the evidence that the defendant used the ordinary and usual and reasonable care of well-regulated telegraph companies in ascertaining whether the line in question was down,—then the verdict should be for the defendant, the Postal Telegraph Company." There was verdict and judgment in favor of the plaintiff, assessing his damages at \$250. After the rendition of this judgment the defendant moved the court to set aside the verdict and judgment and grant

a new trial upon the ground that the court erred in refusing to give the several charges requested by the defendant, because the verdict was contrary to the law and the evidence, because the court erred in its ruling upon the pleadings, and upon the following ground: "(8) The court, by giving to the jury charge No. 10 at the request of defendant, held on the evidence that the plaintiff was not entitled to recover, yet refused to give charge No. 2, which respective actions of the court operated to the injury of the defendant on the trial, and will operate to the injury of defendant on appeal." This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

J. J. Altman, for appellant. Bowman & Harsh, for appellee.

MCCLELLAN, C. J. There is no merit in the contention for appellant that the complaint did not aver the negligence counted on with sufficient particularity. The rule is that, the duty to exercise care being shown, the failure to perform that duty—the negligence causing the injuries complained of—may be well averred in the most general terms, little if at all short of the mere conclusions of the pleader; and this upon the entirely sufficient consideration, among others, that, if the defendant has been guilty of negligence, he knows as well as or better than the plaintiff can in what that negligence consisted. *Railroad Co. v. Jones*, 88 Ala. 378, 8 South. 902; *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 287, 28 South. 488, 50 L. R. A. 620; *Railroad Co. v. George*, 94 Ala. 214, 10 South. 145; *Improvement Co. v. Campbell*, 121 Ala. 50, 25 South. 798, 77 Am. St. Rep. 17; *Armstrong v. Railroad Co.*, 123 Ala. 233, 26 South. 349; *Railway Co. v. Davis*, 92 Ala. 397, 9 South. 252, 25 Am. St. Rep. 47; *Stanton v. Railroad Co.*, 91 Ala. 384, 8 South. 798; *Railway Co. v. Chewing*, 93 Ala. 26, 9 South. 458; *Laughran v. Brewer*, 113 Ala. 509, 21 South. 415; *Railroad Co. v. Orr*, 121 Ala. 480, 26 South. 35; *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231; and many other cases.

The objection, taken by demurrer, that the complaint does not sufficiently show a duty on the part of the defendant to keep its wires out of the way of travelers along public roads, is too palpably unfounded to require discussion. The complaint does aver such duty, and the courts take cognizance of it even without averment. In this respect the case is analogous to that of *Louisville & N. R. Co. v. Marbury Lumber Co.*, *supra*, in which the complaint averred that the defendant negligently set fire to and burned plaintiff's cotton. We know in this case that it was defendant's duty to exercise care to avoid obstructing public roads, as we know in that it was defendant's duty to exercise care to avoid burning plaintiff's cotton.

All the facts averred in pleas 4, 5, and 7 were provable under the general issue. The averments of these pleas were mere denials of negligence, and on this ground the appellant can take nothing by reason of the court having sustained the demurrer to those numbered 4 and 5. Both those and plea 7 might well have been stricken on the ground referred to.

Plea 7 was allowed to remain in the case, however, and appellant's counsel insist that it was proved on the trial. We do not find that it was proved. The plea alleges that the defendant used due care to prevent its wires from becoming detached from its poles. The evidence for plaintiff was that the wires at the point they fell and obstructed the highway had been attached to the pole from which they became disengaged, by means of a rotten cross bar, etc. On this evidence it was clearly a question for the jury whether the due care alleged had been proved. The plea also alleges that the defendant did not know, and by the exercise of reasonable care could not have known, that the wires had become detached from the pole until after the injury to plaintiff; but the evidence for the plaintiff showed that the wires had been detached for more than two days before the injury was inflicted, and it was open to the jury to say upon this evidence that due care had not been exercised to discover and remedy the defective condition of the wires. Something is said in the case about an instrument in use in defendant's offices, by the use of which trouble with the wires may be detected and located. We do not understand that this instrument will indicate the detachment of a wire from a pole, and its consequent suspension in the way of travelers across a public road, or will indicate anything at all so long as the current of electricity carried by the wire is not obstructed. It indicated nothing in this case until the current was diverted from the wire in consequence of plaintiff's wagon and team and person coming in contact with it. The evidence about this instrument cuts no figure in respect of the inquiry whether defendant was negligent in allowing the wires to become detached from the pole and sag into the highway for two or three days.

What we have said in respect of the complaint applies to the third charge requested by defendant. On the evidence the jury were fully warranted in finding that the cross arm was rotten; that it was so rotten, or, being rotten, was used by defendant, in consequence of its (defendant's) negligence; and that such negligence in respect of the cross arm was the efficient cause of plaintiff's injury, entitling him to a verdict. There being not only the evidence as to the rottenness of the cross arm, from which damning negligence was inferable by the jury, but also evidence that the wires had been down two or more days before the injury, from which it was open to the jury to infer such negligence, and there being also evidence of the alleged injury,

it requires no argument to demonstrate that the affirmative charge requested by defendant was properly refused.

It becomes necessary to remark, only because the contrary is insisted upon, that a charge to the jury "that, if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that the plaintiff was not seriously hurt," is such a singling out and giving undue prominence to a part of the evidence as is unwarranted, and as has been over and over again condemned by this court.

The evidence tended to show that the plaintiff had continued to suffer more or less from the injury ever since it was received. The question to the witness Lawler, "Have you not heard the plaintiff give expressions of pain or suffering since that night?" covered the time under inquiry, and was not objectionable.

There was no inconsistency on the part of the circuit court in giving charge 10 for defendant, and refusing the general charge asked by defendant. The jury were left free by this tenth charge to find that the wires, poles, and cross arms of defendant's line were not in good and safe condition when Worthy last inspected the line, and upon that to return a verdict for the plaintiff, while all this would have been denied them by the affirmative charge. This matter is made a ground of the motion for a new trial, and is the only ground of that motion specially insisted upon by counsel. The contention in this connection is not that the court should have granted a new trial for having erroneously refused to give the general charge for defendant,—that is another ground of the motion,—but that a new trial should be granted to defendant because the court gave charge 10 at its request. We confess we do not see how the defendant can ask a new trial on the ground that the court in a specified instance ruled at his request in his favor.

We do not understand that any of the other grounds of the motion for a new trial, except such as we have above considered apart from that motion, are insisted on. Whether so or not, they are without merit. Affirmed.

SOUTHERN CAR & FOUNDRY CO. v. ADAMS.¹

(Supreme Court of Alabama. Nov. 27, 1902.)

MALICIOUS PROSECUTION—TERMINATION OF PROSECUTION—COMPLAINT—EVIDENCE—MISLEADING INSTRUCTION.

1. A count of a complaint for malicious prosecution alleging that the prosecutor appeared and dismissed the proceedings, and that the prosecution was thereby ended and plaintiff discharged, stated a cause of action, though it

¹ Rehearing denied June 16, 1903.

did not allege that the prosecution had been "judicially investigated."

2. In an action against a corporation for malicious prosecution, the officer who made the arrest testified that before the arrest, but while the warrant was in his hands, he met the general superintendent of defendant, who asked if he had arrested plaintiff, and stated that he intended to stop such depredations as plaintiff had been charged with, or "break somebody's neck." *Held*, that the evidence was not subject to an objection that it was not shown the superintendent had any authority to bind defendant by any such statement, but was admissible to show malice and motive.

3. The evidence was not subject to an objection that it was not part of the *res gestæ*.

4. In an action for malicious prosecution it was error to admit evidence to show defendant's financial standing, as bearing on the amount of punitive damages that might be awarded.

5. In an action against a corporation for malicious prosecution, a charge that the servant of defendant who swore out the warrant had "the right" to institute the prosecution of the plaintiff, without reference to his employment by the defendant, and that if he swore out the warrant "on his own responsibility, and not by the authority or at the instance of the defendant," then plaintiff could not recover, was properly refused, as misleading.

Appeal from circuit court, Calhoun county; John Pelham, Judge.

Action by Lewis Adams against the Southern Car & Foundry Company. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action to recover damages for malicious prosecution, brought by the appellee, Lewis Adams, against the Southern Car & Foundry Company. After demurrers to the original complaint were sustained, said complaint was amended, and as amended contained five counts, which were as follows:

"(1) Plaintiff claims of defendant the sum of \$5,000 damages for maliciously and without probable cause therefor, causing the plaintiff to be arrested upon a warrant issued by Elmore Garrett, a justice of the peace, on, to wit, the 6th day of January, 1900, on a charge of malicious mischief and injury to personal property, which charge before the commencement of this suit has been judicially investigated and said prosecution ended and plaintiff discharged.

"(2) Plaintiff claims of defendant the sum of \$5,000 damages for maliciously and without probable cause therefor, causing the plaintiff to be arrested upon a warrant issued by Elmore Garrett, a justice of the peace, on, to wit, the 6th day of January, 1900, on a charge of malicious mischief and injury to personal property, which charge, before the commencement of this suit, was dismissed in open court by said defendant, through its agent or agents and by its attorney, and said prosecution judicially ended and plaintiff discharged.

"(3) Plaintiff claims of defendant the sum of \$5,000 damages for that on, to wit, the 6th day of January, 1900, Chas. W. Cook,

who was on the date aforesaid night superintendent of the rolling mill of said defendant, Southern Car & Foundry Company, and whose duty and business it was, under said employment, to act as agent for said defendant in looking after and superintending the employes and machinery of said rolling mill, while acting in the line and scope of his authority as such agent, and at the instance of said defendant and by its authority caused plaintiff to be arrested and imprisoned, by appearing before Elmore Garrett, a justice of the peace, and maliciously and without probable cause therefor, upon affidavit, procured the issuance of a warrant against said plaintiff, charging him with malicious mischief and injury to personal property, and that by reason of said false and malicious affidavit, and the warrant issued thereon, defendant as aforesaid, was arrested and imprisoned on said charge, from, to wit, the 6th day of January, 1900, to the afternoon of the 8th day of January, at which time defendant appeared by its agent or agents and through its attorney dismissed said prosecution, and the same was judicially ended and terminated and defendant discharged."

The fourth count was substantially the same as the third count, except that it set out in *hæc verba* the affidavit of complaint made by Chas. W. Cook before a justice of the peace and the warrant of arrest which was issued by a justice of the peace. The averment as to the disposition and termination of the prosecution was the same as that contained in each of the preceding counts. The fifth count was substantially the same as the third count. The difference between the counts of the complaint, as amended, and those contained in the original complaint, is sufficiently shown in the opinion. The demurrers to the amended complaint are also sufficiently shown in the opinion. These demurrers were overruled, and thereupon the defendant pleaded the general issue.

On the trial of the cause, the plaintiff introduced in evidence the complaint which was sued out before Elmore Garrett, as justice of the peace, and which was signed by Chas. W. Cook. This complaint, omitting the signature and the state and county, were in words and figures as follows: "Before me, Elmore Garrett, a justice of the peace in and for said county, personally appeared C. W. Cook, who being duly sworn deposes and says that he is night superintendent of the rolling mill of the Southern Car & Foundry Company, at Anniston, Alabama, and that he has probable cause to believe and does believe that in said county and state and on or about January 5, 1900, Lewis Adams unlawfully and maliciously broke and injured a piece of machinery of the Southern Car & Foundry Company, to wit, a jaw of a large pair of shears, against the peace and dignity of the state of Alabama." The plaintiff also introduced in evidence the warrant issued by the justice of the peace upon this

¶ 4. See *Malicious Prosecution*, vol. 23, Cent. Dig. § 150.

complaint, which stated that the plaintiff in the present suit was charged with having committed the offense of malicious mischief and injury to personal property. It was further shown by the evidence for the plaintiff that he was arrested under the warrant issued upon said complaint on January 6, 1900, was imprisoned and remained until January 8, 1900, when the prosecution was dismissed by order of the defendant's attorney; the justice of the peace testifying that said attorney told him that he did not think the case as charged could be made out, and that he, the justice of the peace, could dismiss the case against the defendant, who was the plaintiff in the present suit. The justice of the peace further testified that the costs of the case were paid by direction of the general superintendent of the defendant's plant upon the order given therefor by C. W. Cook, who made the affidavit and complaint before him against the plaintiff in the present suit. It was then shown that in accordance with the order of attorney of the defendant said prosecution against the plaintiff in the present suit was dismissed and was so entered upon the docket of the court, and that the costs in the suit were paid by the defendant in the present suit. It was further shown that the prosecution was commenced by reason of shears used in the rolling mill of the defendant being broken while operated by the plaintiff; that these shears were used for cutting up scrap iron; and that they were broken while the plaintiff was trying to cut a large piece of steel, which the evidence for the defendant tended to show was contrary to the orders given to the plaintiff. It is unnecessary, however, to set out this evidence in detail. The facts relating to the ruling of the trial court upon the evidence are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence they will find the issues in favor of the defendant. (2) The court charges the jury that Chas. W. Cook had the right to institute the prosecution of the plaintiff without reference to his employment by the defendant, and that if he swore out the warrant on his own responsibility and not by the authority, or at the instance of the defendant, then they cannot find for the plaintiff."

There were verdict and judgment for the plaintiff, assessing his damages at \$250. Defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Willett & Brothers, for appellant. H. D. McCarty and D. O. Blackwell, for appellee.

HARALSON, J. This is an action for malicious prosecution under section 5090 of the Code.

1. The first count in the complaint is in Code form for such an action. Code, p. 947, Form 20. The demurrer to this count is, that the complaint being for "malicious mischief and injury to personal property," does not sufficiently describe the property. We need not notice the demurrer, however, since it is not insisted on in argument of counsel.

The demurrer to the other counts was, among other grounds, that they do not aver that said charge had been judicially investigated. The second count avers, that the "charge before the commencement of this suit was dismissed in open court by said defendant, through its agent or agents and by its attorneys, and said prosecution ended and plaintiff discharged." The others are to the same effect and in nearly the same language. The demurrers to these counts were sustained. The plaintiff amended, the second count as amended averring, "which charge, before the commencement of this suit, was dismissed in open court by said defendant, through its agent or agents and by its attorneys, and said prosecution judicially ended and plaintiff discharged," and the others, as amended, make the same averments in substance, the only difference between the amended and original counts, as to this matter being, that the word, "judicially," was inserted before the word, "ended," making them read, that the same were judicially ended and terminated and plaintiff discharged.

2. The defendant demurred to the second, third and fifth counts of the complaint as amended on the ground, that it does not appear therefrom, "that said charge has been judicially investigated;" and further as to the third count, that it does not sufficiently appear therefrom, that the said Cook was authorized by the defendant to cause the arrest and imprisonment of plaintiff, or that defendant ratified the same, if it was done. To the fourth, on the same grounds assigned as to the second, third and fifth counts, and further, that it does not appear therefrom, that it was any of Cook's duties in looking after the employes in (defendant's) said rolling mill, to cause the arrest and imprisonment of the plaintiff.

In *McLeod v. McLeod*, 75 Ala. 483, which was an action for damages for malicious prosecution, where a nolle prosequi was entered on the motion of the prosecutor, and which action resulted in a judgment for the plaintiff, it was held, that to maintain an action for malicious prosecution, three facts must be shown, proof of each of which rests on the plaintiff, viz., that the prosecution was instituted without probable cause, that it was malicious, and that it has been determined. It was further held that malice may be inferred from the want of probable cause; that the question in such cases is not whether the accused was in fact guilty, but whether the prosecutor, acting in good faith, and on the reasonable appearance of things, entertained the reasonable belief of guilt; that

it is not conclusive, or even *prima facie* evidence of a want of probable cause, that the prosecutor, after setting the prosecution on foot, abandoned it, or permitted a *nolle prosequi* to be entered, and that such abandonment should be considered in determining whether, at the institution of the prosecution, there was probable cause for believing the accused was guilty of the offense charged. *Foster v. Napier*, 73 Ala. 604; *Cotton v. Wilson, Miner*, 203.

It is everywhere held, that an action for malicious prosecution cannot be maintained before the termination of the prosecution; but it is held, that the criminal prosecution may be said to have terminated, when there is a verdict of not guilty, or when the grand jury ignores a bill; when a *nolle prosequi* has been entered, or when the accused has been discharged from bail or imprisonment. *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. 489; *Pope v. Pollock* (Ohio) 21 N. E. 356, 4 L. R. A. 255, 15 Am. St. Rep. 608, notes; 14 Am. & Eng. Enc. Law, 29-31, and notes. In the volume last cited, the principle is stated, sustained by citation of authorities, that "all that is necessary is, that the particular prosecution or proceeding shall have been disposed of in a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*."

In this case it is averred, in substance, in the several counts demurred to, that the prosecutor appeared and dismissed the proceeding against the plaintiff, and the prosecution was thereby ended and plaintiff discharged therefrom. If these averments are true, a wrong was inflicted on the plaintiff, the defendant in that prosecution, for which it would be anomalous if the law did not furnish him a remedy. If it be true that the plaintiff must, in order to sustain this suit, aver and prove that the prosecution against him had been "judicially investigated," in the sense, that the charge preferred against him had been regularly tried by and before the arresting magistrate, and plaintiff, as the result thereof, had been acquitted and discharged, it is manifest, he could not maintain his action for malicious prosecution, although he may have been damaged as much in such case, as if he had been tried and acquitted. It is also apparent, he could not maintain an action for false imprisonment, for his arrest and imprisonment, since it appears that he was arrested by a proper officer, under a warrant regular on its face and issued by proper authority. *Leib v. Iron Co.*, 97 Ala. 626, 12 South. 67. He would be left, therefore, remediless for what might have been a very great and improper violation of his personal rights. Such a result is not compatible with the law, which professes to furnish a remedy for every wrong. We think the counts state a good cause of action against the defendant, and the demurrers to them were properly overruled. There are

authorities apparently in conflict with this conclusion, and among them, the case of *Ragsdale v. Bowles*, 16 Ala. 62, and perhaps others of our cases following it. In so far as that case or others conflict with what is here determined, they must be modified.

The other grounds of demurrer to the complaint are manifestly without merit, and are not insisted on in argument.

2. The constable, one Sweets, testified that the magistrate placed the warrant for the arrest of plaintiff in his hands; that he went to the office of defendant company, where he found Mr. Cook,—who made the affidavit for arrest, and who described himself therein as "night superintendent of the rolling mills of the Southern Car & Foundry Company, at Anniston, Ala.,"—Mr. Coccolo and Mr. Stimson being there; that he was conducted to the office of the timekeeper, and there found and arrested the plaintiff and consigned him to jail, where he was kept until the afternoon of the 9th of January, the arrest having been made on the 6th of January, 1900. He also testified that Mr. Stimson, at the time of the arrest, was the general superintendent of the defendant company; was the "head boss," and had absolute charge and control of the plant. He was asked by plaintiff, if on the day of the arrest of Lewis Adams, he had any conversation with Mr. Stimson, the superintendent, with reference to the arrest, and to state the conversation. He answered: "Mr. Stimson stopped me on the street about noon of the day upon which I arrested Lewis Adams, and asked me 'if I had arrested him.' I answered that I had not, but that I would do so. Stimson then said, that he was going to have this thing of breaking his machinery stopped, or break somebody's neck." The defendant objected to the question when propounded, on grounds, "that the same was no part of the res *gestæ*; that it was not shown that Stimson had any authority to bind defendant by any such statement as called for by the question; that it was illegal and incompetent," and after the answer, moved to exclude the same. The answer was not subject to either of these grounds of objection. Stimson had been shown to be the defendant's general superintendent, in absolute charge and control of the defendant's plant. The declaration made by him to the witness was before the arrest was made, was in encouragement and instigation of it, and tended to show improper motive on his part. When a criminal prosecution is instituted by a corporation through its agent, for a malicious injury to property, the person in its employment who instigated the prosecution, and even made the affidavit for the arrest, is not the prosecutor, but the corporation for which he acted is. *Jordan v. Railroad Co.*, 81 Ala. 221, 8 South. 191; 14 Am. & Eng. Enc. Law, 38-40. Corporations are responsible civilly, the same as natural persons, for wrongs committed by their officers, servants or agents, while in the course of their employment, or which

are authorized, or subsequently ratified. *Jordan v. Railroad Co.*, 74 Ala. 85, 46 Am. Rep. 800; *Railroad Co. v. Whitman*, 79 Ala. 328; *Case v. Hulsebush*, 122 Ala. 217, 26 South. 155. The acts, conduct and language of a prosecutor on the day of the arrest, are competent for the plaintiff in an action for malicious prosecution as tending to establish malice. *Motes v. Bates*, 80 Ala. 382 (a. c. 74 Ala. 374); *Marks v. Hastings*, 161 Ala. 172, 13 South. 297.

3. The witness, Edmondson, testifying for plaintiff, was asked by him: "Do you know how many men are employed by the Southern Car & Foundry Company?" Defendant objected to the question, as calling for incompetent, illegal and irrelevant evidence, which objections were overruled. The witness answered: "About 800," to which answer defendant excepted. He was then asked: "What business is defendant engaged in?" Objection on same grounds as to the last question was interposed by defendant, and overruled. He answered, "Making cars," to which answer defendant also excepted. The court stated: "The court thinks it proper that the bill of exceptions should here state that the questions [stated above] and the responses thereto, are merely amplifications of proof already made, that defendant was a large concern and doing a large business, to which defendant made no objection. All the evidence was offered for the purpose of showing the financial standing of the defendant, in case the jury should see fit to give punitive damages, and was limited by counsel to that phase of the case."

The question is not new in this court. It arose, apparently, for the first time, in the case of *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489, where it was held that evidence of wealth was not admissible for the plaintiff in an action of slander, and it is admitted, that the same rule, if sound, is applicable to a case of malicious prosecution. The court in that case say: "We are aware that in many actions for torts, in which vindictive damages are allowed to be given by the jury, proof of the value of defendant's estate has been allowed to go to the jury, both in England and the United States, but this rule is by no means universal. Conflicting authorities upon the subject are to be found both in English and American books. * * * It would seem, that if such proof is allowable in order to aggravate the damages in such cases, when the defendant is wealthy, common justice would require, that a converse rule should prevail in the case of poor defendants, and they should be allowed to give their poverty in evidence to mitigate the damages. Yet nearly all the books declare, that this is not the case, and common sense revolts at the idea of its adoption. For, sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs, with comparative impunity, under the

assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice." *Adams v. Adams*, 29 Ala. 433; *Pool v. Devera*, 30 Ala. 675; 2 Greenl. Ev. § 269. The rule in many, and possibly in the majority of the states is different. 12 Am. & Eng. Enc. Law (2d Ed.) 47; *Newell*, Mal. Pros. 527. If the question were an open one with us, there could be much said, in favor of allowing such proof; but, we prefer to follow, and not to depart from our rulings on the subject, as we have been invited to do. The court erred in allowing the questions to be answered.

There was no room for the affirmative charge as requested by defendant, nor was there error in refusing its charge No. 2. If not otherwise faulty, it was misleading in instructing, that Cook had the right to institute the prosecution against the plaintiff. This assumes, and was calculated to mislead the jury into concluding, that there was no legal wrong in the prosecution. It was also calculated to mislead, wherein it hypothesizes, that "If he swore out the warrant on his own responsibility, and not by the authority or at the instance of defendant," then they could not find the defendant guilty. "By the authority or at the instance of defendant," might be understood to imply, that some formal action on the part of the corporate authorities was necessary, to enable Cook to swear out the warrant of arrest for defendant. Moreover, if the corporation, through any of its managing officers, acting for it in the line of their duty, in any way aided or abetted in suing out the warrant, the corporation would be liable.

For the error indicated, the judgment is reversed and the cause remanded.

The opinion heretofore rendered is modified, and the application for a rehearing is overruled.

Reversed and remanded.

SOUTHERN RY. CO. v. BUNT.¹

(Supreme Court of Alabama. Feb. 13, 1902.)
SERVANT—PERSONAL INJURY—WANTONNESS—
EXEMPLARY DAMAGES—PLEADING—ABANDONMENT OF COUNTS—EFFECT.

1. Where at the close of the evidence plaintiff announces that he will not claim a recovery on any of the counts in the complaint except one, the effect is equivalent to an amendment by striking out all the abandoned counts; hence any error in overruling demurrers to such counts is not subject to review.

2. A complaint alleging that an engineer wantonly or intentionally caused or allowed his engine to propel a car against other cars with too great force, "with knowledge or notice" that plaintiff was between the cars, and in great danger from the car being so propelled, does not state a cause of action for wantonness.

3. Under Code, § 1749, providing that, when

¹ Rehearing denied June 14, 1902.

a personal injury is received by a servant in the service of the master, the master is liable to answer in damages in certain cases as if the servant were a stranger, a master is liable to exemplary damages for wanton injury to a servant where death does not ensue.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action for personal injuries by John B. Bunt against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

After the introduction of all the evidence, the bill of exceptions contains the following recital: "Counsel for the plaintiff stated to the court and jury that they did not claim a recovery in this cause upon the first, second, third, fourth, or sixth counts of the complaint, but only claimed a recovery on the fifth count of complaint, charging wanton negligence or intentional injury to the plaintiff by Sam Watkins, who was the engineer of the engine attached to the train by which the plaintiff was injured." The defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that, if they believe all the evidence in this case, they must find a verdict for the defendant." "(8) The court charges the jury that, if they should find a verdict for the plaintiff, they can only award him actual damages. Plaintiff in this case is not entitled to vindictive or punitive damages." There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Smith & Weatherly, for appellant. Bowman & Harsh, for appellee.

DOWDELL, J. The appellee, John B. Bunt, sued the appellant railroad company to recover damages for personal injuries sustained by him while in the employment and service of said railroad company as a brakeman. The complaint contained six counts, all of which charged simple negligence, except the fifth and sixth, in which it was attempted to charge wantonness. Upon the conclusion of the evidence in the case the plaintiff stated to the court and jury that he would not claim a recovery on any of the counts in the complaint except the fifth count. The abandonment by the plaintiff of all the counts in the complaint except the fifth eliminates from consideration the rulings of the court relating to the counts of the complaint thus abandoned, so that, if there was error in the first instance in the rulings upon demurrers, such errors were rendered harmless by the action of the plaintiff. His announcement of the abandonment of all of the other counts in the complaint except the fifth, for all purposes of the trial, was in its effect the equivalent of an amendment of the complaint by striking out all of

said abandoned counts. *Iron Co. v. Andrews*, 114 Ala. 243, 21 South. 440. The question of error without injury, as here presented, is different from that presented in the case of *Railroad Co. v. Weems*, 97 Ala. 270, 12 South. 186, where the complaint contained but one count, in which several different causes of action were laid. There was no abandonment in that case of any of the causes of action laid in the complaint by the plaintiff, and the reasoning there stated as to what pleas the defendant might have filed, if but one cause of action had been laid and relied on in the complaint, is not applicable here, as in the form of pleading here adopted the defendant was in no wise prejudiced as to any defense which might have been set up to the fifth count; and we think the rule as laid down in *Iron Co. v. Andrews*, supra, controls in the present case.

The fifth count, as originally framed, was demurred to, and demurrer confessed, and thereupon it was amended; and as amended it averred that "the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force, with *knowledge* or *notice* [*italics are ours*] that plaintiff was between said cars, and in great danger from said car being propelled against said other car with such force." The averment in this count in the alternative, "with knowledge or notice," rendered it bad, as counting on wantonness. Wantonness in the doing of, or omission to do, an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of existing conditions attending the act or omission that causes the injury. Notice in such cases is not the equivalent of actual knowledge. *Brown v. Railroad Co.*, 111 Ala. 275, 19 South. 1001. In *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231, it was said: "Unless there was a purpose to inflict the injury, it cannot be said to have been intentionally done; and unless an act is done, or omitted to be done, under circumstances and conditions known to the person, that his conduct is likely, or probably will result in injury, and through reckless indifference to consequences he consciously and intentionally does a wrongful act, or omits an act, the injury cannot be said to be wantonly inflicted. These principles have been frequently declared by this court." In *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215, again speaking of what constitutes wantonness and intention to do wrong on the part of the employees of a railroad company, it was said: "This wantonness and intention to do wrong can never be imputed to them unless they actually know—not merely ought to know—the perilous position of the person on the track, and, with such knowledge, fail to resort to every reasonable effort to avert the disastrous consequences." To the same effect are the following cases: *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 280; *Railway*

Co. v. Vaughan, 93 Ala. 209, 9 South. 468, 30 Am. St. Rep. 50; Railroad Co. v. Vance, 93 Ala. 144, 9 South. 574; Railway Co. v. Ross, 100 Ala. 490, 14 South. 282; Railroad Co. v. Banks, 104 Ala. 508, 16 South. 547; Railroad Co. v. Burgess, 114 Ala. 587, 22 South. 169; Id., 116 Ala. 509, 22 South. 913; Railroad Co. v. Anchors, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; Railroad Co. v. Moorer, 116 Ala. 642, 22 South. 900; Electric Co. v. Bowers, 110 Ala. 328, 20 South. 345; Stringer v. Railroad Co., 99 Ala. 397, 13 South. 75; Railroad Co. v. Richards, 100 Ala. 365, 13 South. 944; Railroad Co. v. Hall, 105 Ala. 599, 17 South. 176; Burke v. Railroad Co. (Ala.) 26 South. 947. If the words "or notice," which are stated in the alternative, should be eliminated, the count as it would then stand would be a good count for wantonness. But when the averment is made in the alternative that the engineer caused the car to be propelled with knowledge or notice that the plaintiff was between the cars, "notice" not being the equivalent of "knowledge," it does not affirm that he did the act with knowledge of the plaintiff's situation, nor does it affirm that he did the act with notice of the plaintiff's situation. In other words, the averment, as it stands, in the disjunctive, embraces two different causes of action, and affirms neither, but merely that it is one or the other. Tinney v. Railroad Co. (Ala.) 30 South. 623; Porter v. Hermann, 8 Cal. 619. It follows that the fifth count of the complaint upon which the trial was had fails to state a cause of action, and, failing to state a cause of action, will not support a judgment.

As to the question of the measure of damages in such case (that is, as to whether exemplary or punitive damages may be awarded in an action under the statute where death does not ensue), we think there can be no doubt that such damages are authorized by the statute. The statute provides as follows (Code, § 1749): "When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employé, as if he were a stranger, and not engaged in such service or employment, in the cases following." It is quite clear from this language that as to the measure of damages the employé is put upon the same footing as if he were a stranger. In construing this statute, in connection with section 1751 of the Code, in cases where death results from the injury inflicted, a different rule as to recoverable damages has been established by this court. The right of action in such cases survives only by virtue of section 1751, and no one can sue except the personal representative. In Railroad Co. v. Orr, 91 Ala. 552, 8 South. 363, it was said: "The theory of the statute is that those for whom compensation is provided have a pecuniary in-

terest in the life of the person killed, and consequently the amount of the recovery is limited to the amount of such interest. These principles furnish a correct exposition of our statute, and consequently we declare that under the provision of section 2591 of the Code [which is the same as section 1751 of the present Code] neither exemplary nor vindictive damages are recoverable. * * * The amount of the compensation being limited to the pecuniary injury, nothing can be allowed on account of pain and suffering of the deceased before his death, or for the grief and distress of his family, or loss of his society." And this same doctrine as to measure of damages in case of death was laid down by this court in the case of Railroad Co. v. Trammell, 93 Ala. 350, 9 South. 870. The several sections of this statute, when taken together, make it quite clear that a different rule as to the measure of damages was intended where death ensued, from that where death does not result from the injury. The judgment of the circuit court is reversed, and the cause is remanded.

TAYLOR et al. v. DWYER.¹

(Supreme Court of Alabama. July 6, 1900.)

FRAUDULENT CONVEYANCES—COMPLAINT—SUFFICIENCY—RIGHTS OF CREDITORS—DEFECTIVE COMPLAINT—MOTION TO DISMISS—JUDGMENT IN TORT—EXEMPTIONS—EQUITABLE RELIEF.

1. A complaint which averred that an alleged sale was but a mere pretense to cover a transaction which in truth involved a mortgage to secure a pre-existing debt, the bill of sale operating by secret agreement of the parties to it as a mortgage, was sufficient, as under such circumstances it was void as to creditors of the mortgagor.

2. Averments in a complaint that at the time an alleged sale was made the seller was insolvent, that the buyer knew such fact, and that the transaction was without consideration, and for the purpose of delaying and defrauding a creditor, were sufficient to present a case for relief against a transfer of property by an insolvent debtor to another in secret trust for himself.

3. Averments in a complaint which merely set forth, arguendo, that 54 mules, and a sufficient number of wagons, etc., to employ them, must have been included in a bill of sale, because that property was embraced in a mortgage, and the bill of sale describes its subject-matter as "my mules that is now embraced in mortgage," were insufficient, at their face value, to support a general averment that the property transferred was worth \$8,000 or \$10,000, and a more general conclusion that a debt of \$1,390 was grossly inadequate as a consideration.

4. Even if these averments were sufficient on their face to establish a want of consideration, they cannot be taken at their face value where the complaint also avers that at the time the bill of sale was executed the seller had only 11 or at the most only 13, mules, and only a few drays and sets of harness, of inconsiderable value,—the balance having been otherwise disposed of,—and that the buyer took this property subject to the mortgage of \$2,500.

¹ Rehearing denied.

5. Where property transferred in consideration of a bona fide debt was not substantially all the property belonging to the debtor, the transaction could not be attacked by creditors.

6. The fact that creditors generally could come into chancery and have a transfer of property made a general assignment did not give one creditor the right to have the transfer declared fraudulent and void, that she might subject the whole property to the satisfaction of her claim, to the exclusion of all others.

7. Where a bill was capable of amendment by striking out a defective disjunctive averment, a motion to dismiss it for want of equity was properly overruled.

8. A bill to set aside a fraudulent conveyance, and for a receiver was objectionable where it failed to offer to do equity in respect to paying off a debt secured by a mortgage on the property proposed to be subjected to complainant's judgment.

9. A plea of exemption was not available against a judgment creditor in tort, seeking to have a transfer of property set aside as fraudulent.

10. A judgment creditor could maintain a bill in equity to set aside a fraudulent transfer of property which was an impediment to her legal remedy, though she could, by indemnifying the sheriff, take the property from the one to whom it had been transferred.

Appeal from chancery court, Montgomery county; W. L. Parks, Chancellor.

Bill in equity by Henrietta J. Dwyer against Frank G. Taylor and others. From a decree for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

The bill was several times amended, and as amended it averred that in 1893 the complainant delivered to Frank G. Taylor, her brother-in-law, the sum of \$3,000, which was received by him out of insurance upon the life of her deceased husband; that said money was to be loaned out by said Taylor on good security, at interest, for complainant's benefit; that said Taylor, in disregard of his trust and obligations, converted said money to his own use, and continued to deceive the complainant about said money, representing to her that he had loaned out the money, while, as a matter of fact, he had used it himself, and converted it to his own use; that, finding it impossible to collect said money from Frank G. Taylor, she finally instituted an action of trover against him, and on April 25, 1899, recovered a judgment against said Taylor for \$2,432.42; that an execution was issued upon this judgment, and put in the hands of the sheriff; that said sheriff found in possession of said Taylor a number of drays, wagons, gear, mules, and a horse and buggy and harness; that the sheriff levied said execution upon the drays, the horse, and buggy, and was proceeding to levy upon the mules, when J. Hunt Taylor, a son of respondent, made claim to all the property under and by virtue of sales claimed to have been made to him by his father in April, 1898, and in August, 1898; that thereupon the sheriff refused to levy further unless the complainant indemnified him in the sum of

\$2,000, which she was unable to do, having been reduced to insolvency by the conversion of her entire fortune by Frank G. Taylor, and being also a nonresident. It was then averred in the bill as follows: "Said J. Hunt Taylor claimed said property under and by virtue of what is claimed by him to be a bill of sale of date April 20, 1898, by his said father, Frank G. Taylor, to him of, 'all my drays, wagons and harness, plows and other tools; also my mules that is now embraced in mortgage to Merchants' & Planters' National Bank; also agreeing to better satisfy said debt sell the entire business interest I have known as a dray business'; and under another bill of sale of the 1st day of August, 1898, 'of one bay horse and buggy and harness, horse name Fred.' The sheriff levied on six drays and four pieces of drays claimed under said first bill of sale, and on the horse and buggy and harness claimed under the second bill of sale. * * * Oratrix avers that said pretended sales are frauds, pure and simple, made and agreed upon, oratrix believes, while said sheriff was making said levy, in the hopes of inducing him to desist, which it did; and oratrix avers that the entire consideration for said pretended sales is fictitious, simulated, and fraudulent, and that no money or other consideration of value was paid by said J. Hunt Taylor in either instance. That said respondent Frank Taylor has owned and run the principal dray line of the city of Montgomery for some years, and in such capacity has been the hauler of the bulk of the cotton crop marketed in said city, at remunerative prices therefor, and has also been the principal hauler for contractors engaged in doing public work for said city. Oratrix is not informed of the number of drays, wagons, harness, plows, tools, and mules used and owned by said respondent Taylor in the prosecution of said business, but knows from the recitals of the said mortgage given by him to the Merchants' & Planters' Bank of the city of Montgomery, of the date of February 15, 1898, that said Frank Taylor mortgaged to said bank, to secure a loan of twenty-five hundred dollars, forty-eight head of mare mules, and agreed to buy out of said money loaned by said bank six additional mules, to be subject to said mortgage. The number of drays owned by respondent Frank Taylor is not known to oratrix, nor is the number of wagons, nor dray and wagon harness; but oratrix is informed and believes, and therefore states, that the said Frank Taylor owned a sufficient number of drays, wagons and harness to employ said fifty-four mules in said dray business. All of said property was conveyed or attempted to be conveyed as aforesaid to said son, J. Hunt Taylor, by bill of sale of April 20, 1898, in consideration of past indebtedness of thirteen hundred and ninety-one dollars, except the said horse and buggy and harness, which said son, J. Hunt Taylor, claims by bill of sale of August 1, 1898, in consideration of two hun-

¶ 5. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 221.

dred dollars paid cash. Oratrix charges and avers that said pretended sale of April 20, 1898, is absolutely fraudulent and void, made to hinder, delay, and defraud her, and to put said property beyond her reach, and without any consideration whatever therefor; that along with said instrument of April 20, 1898, claimed to be a bill of sale, said J. Hunt Taylor presented to the sheriff at the time he was levying on the said writ of your said oratrix the notes on which he claimed the bill of sale was based; that one of and the smaller of said notes, expressing no date for payment, is for the sum of five hundred dollars, and is dated January 1, 1897; that the other and greater of said notes is for eight hundred and ninety-one dollars, without expressing date for payment, * * * is of date of January 3, 1898. Oratrix avers that this is a scheme of a corrupt and dishonest father and son, concocted, she believes, during the emergency of the levy of her execution, or in anticipation thereof, to induce the sheriff to desist, and is without consideration; that not being as adept in execution of as in planning fraud, the clumsy veneering but accentuates the true character of a conspiracy of this corrupt father and son to defraud your oratrix. And in substantiation of said foregoing averments, oratrix says after said pretended sale of April 20, 1898, said respondent Frank G. Taylor continued in all respects to manage and control said dray business as he had before said pretended sale; that the law day of said mortgage to said bank was about the 15th day of July, 1898; that prior to said pretended sale to said J. Hunt Taylor no part of said bank debt had been repaid said bank, but that after said pretended sale said respondent Frank G. Taylor began and continued to make payments to said bank on said mortgage debt until at the time of the levy of oratrix's execution as aforesaid on a portion of Taylor's effects, in May, 1899, there was unpaid on said mortgage only about two hundred and fifty dollars; that since said attempted levy on said mules said son, J. Hunt Taylor, to give a seeming virtue to his fraudulent claim, has for the first time individually made a payment to said bank of one hundred dollars, to be credited as a payment from him, and has for the first time informed said bank of his ownership of said property; that said Frank G. Taylor returned all of said property now claimed by J. Hunt Taylor, under oath, to the tax assessor of said county, on January 31, 1899, as his own, and that on the very day of the said attempted levy, as well as all the time intervening said sale of April 20, 1898, to said levy, said Frank G. Taylor was in open, notorious, possession of said property, doing public hauling for any one desiring it and willing to pay for it; that said J. Hunt Taylor is a young man, clerking in a shoe store on a small salary, and was without any visible property at the time of said transfer, and is and always has been an inmate of his father's household. Oratrix avers that said conveyance and bill of sale of April 20, 1898, were

made in trust for the use of the person making the same, and is therefore fraudulent and void as to her." It was then further averred in the bill that "the said Frank Taylor was insolvent at the date of said sale evidenced by said bill of sale of April 20, 1898, to his said son, J. Hunt Taylor, and that the said son, J. Hunt Taylor, knew of his insolvency; that by said sale the said Frank Taylor conveyed to his son, J. Hunt Taylor, substantially all the property of which he was possessed, and that the said sale was made with the purpose and intent of all parties thereto to hinder and delay and defraud your oratrix; that a benefit was reserved to said Frank G. Taylor; and that the said sale is without any consideration." The averment of the bill as to the inadequacy of the consideration expressed in the bill of sale is copied in the opinion. It was further averred in the bill as follows: "Oratrix further avers that, even should she be mistaken as to the lack of any consideration or its inadequacy, that said pretended bill of sale was, at most, given and intended to operate as a mortgage; that the same was never recorded as required by law, and is therefore void as to her." It was then further averred in the bill that the execution issued upon the judgment recovered by the complainant had been levied upon 10 mules and the horse and buggy and harness of the respondent Frank G. Taylor, and that J. Hunt Taylor had executed a bond and replevied said property, and there was now pending a claim suit for the same, and that, upon oratrix's information and belief, the respondent Frank G. Taylor had disposed of the larger portion of the property attempted to be and purported to be conveyed by the bill of sale of April 20, 1898; that, of the 54 mules, the complainant is informed and believes that there are only 13 mules in the hands of the respondent undisposed of; that the disposition of said property was made by Frank G. Taylor in anticipation of the levy of the complainant's execution, for the purpose of putting it beyond the satisfaction of the claim of the complainant. It was further averred in the amendment to the bill that at the time of the filing of the original bill the Merchants' & Planters' National Bank was the holder of a mortgage upon the mules for the amount of \$2,500; that at said time there was only due upon said mortgage \$150 or \$200; that the bank consented that the complainant should levy her execution upon said property, and sell and pay off said mortgage first out of the proceeds; that the property levied upon under said execution was replevied by J. Hunt Taylor; that the bank was not notified of the application for the appointment of a receiver prayed for in said bill, for the reason that it was willing and had consented that said receiver should be appointed; that after the application was made by the complainant for the appointment of a receiver, and after the appointment thereof by the register, James P. Bullock interposed a claim to the property under

and by virtue of a transfer by the bank to him of its mortgage and claim against Frank G. Taylor; that, while said James P. Bullock purported to be the assignor of the bank's mortgage and debt, the money paid to the bank was furnished by said Frank G. Taylor and J. Hunt Taylor; and that said Bullock simply represented them, and allowed them to use his name for their covinous purpose. To the bill as amended, Frank G. Taylor, J. Hunt Taylor, the Merchants' & Planters' National Bank, and James P. Bullock were made parties defendant.

The prayer of the original bill was that a receiver be appointed to take charge of the property involved in the suit, and that the property held and claimed by J. Hunt Taylor under said bill of sale be decreed to be held in fraud of the complainant; that said bill of sale be declared fraudulent, null, and void, and that the property be subjected to the payment of the claim of the complainant, and that the mortgage debt to the bank be declared settled and canceled; and that the complainant be given a personal decree or judgment against J. Hunt Taylor for any balance that may remain due. After the filing of the original bill the complainant made an application for the appointment of a receiver. The register, in response to this application, appointed a receiver, who was instructed to take charge of the property. From this decree making the appointment the defendants appealed to the chancellor.

The defendants Frank G. Taylor, J. Hunt Taylor, and James P. Bullock demurred to the original bill as amended upon the following grounds: (1) Said bill is filed in a double aspect, and each aspect fails to show that complainant is entitled to relief; (2) said bill contains alternative averments for relief, and it appears that each alternative does not entitle complainant to relief; (3) said bill purports to be filed by a judgment creditor of F. G. Taylor, and at the same time shows that her judgment obtained in the city court of Montgomery is invalid and void; (4) said bill fails to show that complainant, in any aspect, is entitled to the appointment of a receiver; (5) said bill fails to show, in any aspect, that complainant is entitled to relief; (6) said bill shows that complainant has, if any, an adequate remedy at law. And the said defendants separately demur to the first aspect in which said bill is filed, viz., that the bill of sale described, therein was made with the fraudulent intent and purpose of depriving complainant of her rights, and assigns the following ground: That the allegations of fraud and collusion are mere conclusions of the pleader, and without sufficient facts alleged to support the same. And to the second aspect in which said bill is filed, viz., inadequacy of consideration the said defendants each assign the following grounds: (1) That while

the allegations of the bill fail to support said charge; (2) that the allegations of said bill affirmatively show that the price paid to F. G. Taylor for the property mentioned and described in the bill of sale was the full and fair value of the interest of said F. G. Taylor therein. And to the third aspect in which the bill is filed, viz., that said bill of sale was, at most, given and intended as a mortgage; that the same was never recorded as required by law, and is therefore void as to complainant; that she was an execution creditor without notice,—the following grounds of demurrer are separately assigned by said defendants: (1) It is not shown that complainant was a creditor who had extended or given credit subsequent to the making of said bill of sale; (2) it is shown that complainant was a creditor prior to the execution of said bill of sale; (3) it is not shown that complainant had no actual notice of said bill of sale; (4) it is not shown that complainant was a creditor without notice, as contemplated by section 1009 of the Code of Alabama; (5) it is not shown by the allegations of the bill in this respect that complainant was an execution creditor, with a lien acquired without notice of said bill of sale, and subsequent to the execution thereof; (6) it is not shown by the allegations in this aspect that complainant was an execution creditor, with a lien acquired without actual notice of said bill of sale; (7) there is no law authorizing the recording of the bill of sale described, and the record of the same would not impute notice thereof, or notice that it was intended as a mortgage; (8) it is not alleged in this aspect that defendant F. G. Taylor was embarrassed or insolvent at the time of the execution of said bill of sale; (9) no facts are alleged in this aspect to bring the same within the influence of section 2150 of the Code of Alabama. To so much of the bill as averred that the bill of sale of April 20, 1898, was made in trust for the use of F. G. Taylor, and was therefore fraudulent and void as to complainant, the said defendants demurred upon the ground that such averment was merely a legal conclusion of the pleader, and did not present a traversable issue. To so much of the bill as averred that F. G. Taylor was insolvent at the date of the bill of sale of April 20, 1898, and that said Taylor by said bill of sale conveyed substantially all of his property to J. Hunt Taylor, the plaintiff demurred upon the ground that said bill not being a general creditors' bill, but only for the benefit of complainant, such averments presented no ground for relief, and that said averment was inconsistent with the other purposes of the bill, and contains allegations entitling complainant to different and inconsistent grounds of relief. The defendants F. G. Taylor and J. Hunt Taylor each filed separate pleas, in which they set up that Frank G. Taylor was a resident of Alabama, over 21 years of age; that the said

debt of F. G. Taylor was contracted since the 23d day of April, 1875, and that the total value of the property conveyed in the bill of sale of April 20, 1898, did not exceed in value the sum of \$800, and that said F. G. Taylor was entitled to claim said amount as exempt to him; and that for this reason the property could not be subjected to the payment of the complainant's claim. The defendants also moved to dismiss the bill for the want of equity.

The cause was submitted upon the defendants' demurrers to the bill, the motion to dismiss the bill for the want of equity, and the appeal of the defendants from the order appointing the receiver, and on the sufficiency of the pleas interposed by Frank G. Taylor and J. Hunt Taylor. Upon the hearing on this submission the chancellor rendered a decree in which he adjudged and ordered that the demurrers to the bill and the motion to dismiss be overruled, that the order appointing a receiver be sustained, and that said pleas of Frank G. Taylor and J. Hunt Taylor are insufficient, and do not present a valid and legal defense to the bill. From this decree the defendants appeal, and assign the rendition thereof as error.

Jno. G. Winter and Jack Thorington, for appellants. De Yampert & Hausman, for appellee.

McCLELLAN, C. J. The bill in this case was filed by Henrietta Dwyer, a creditor, by judgment in tort, of Frank G. Taylor, against said Taylor, his son, J. H. Taylor, and the Merchants' & Planters' National Bank. J. P. Bullock was afterwards made a party defendant by amendment. The purpose of the bill is to subject to the satisfaction of complainant's said judgment certain chattels which belonged to Frank G. Taylor, and which he sold or mortgaged to J. H. Taylor in alleged payment or security of a debt which said Taylor and his said son claim the former owed the latter. The bill is intended to attack this transaction on the grounds: First, that the consideration set up for said transfer (said alleged indebtedness) was wholly simulated and nonexistent; second, that, if mistaken as to simulation, the amount of said debt was grossly inadequate as a consideration for the property transferred; third, that said transaction between F. G. and J. H. Taylor was in form a sale by the former to the latter in payment of an antecedent debt, and was evidenced by a bill of sale, yet it was intended thereby merely to secure said debt, and said bill of sale was intended to operate as a mortgage only; and, fourth, that the transaction was a conveyance by F. G. to J. H. Taylor in trust for the grantor.

The bill, in its first aspect, is not attacked by the demurrers, except in so far as the whole bill is assailed for failing to offer to do equity, and because it states no case for equitable relief in its other alternatives; and

it needs only to be said here that the averments in this alternative clearly present a case of a conveyance of property by a debtor, on a simulated consideration, to hinder, delay, and defraud his creditors.

The averments intended to support the third alternative basis of the relief prayed are, in our opinion, quite sufficient to that end. They are to the effect that there was no real sale of the property, but the mere pretense of a sale, to cover a transaction which in truth and in fact involved a mortgage to secure a pre-existing debt; the bill of sale operating, by secret agreement of the parties to it, as a mortgage only. On these averments there was a secret benefit reserved to the insolvent debtor, which opens the transaction to the successful assault of creditors. *Hill v. Rutledge*, 83 Ala. 162, 4 South. 135; *Steiner v. Scholze*, 114 Ala. 88, 21 South. 428.

The fourth alternative presents a case for relief against a transfer of property by an insolvent debtor to another in secret trust for himself.

As to the second alternative upon which relief is sought, the averments of the bill having express reference to that aspect are the following: "Oratrix further avers that the consideration, to wit, thirteen hundred and ninety-one dollars, even if it passed between said Taylor and his son, is grossly inadequate; that there must have been, according to said bank mortgage, some fifty-four head of mules, and a sufficient number of wagons and drays and harness to employ that number of mules, and, besides, the said conveyance transfers all the dray business, which, as oratrix has averred, was well established, and paid well. There was on the mules at the time of the transfer a debt, secured by mortgage, of twenty-five hundred dollars. Oratrix is informed and believes, and therefore states, that said mules, drays, harness, and dray business were worth from eight to ten thousand dollars. Therefore oratrix avers that the said thirteen hundred and ninety-one dollars of debts made the consideration for the sales of such valuable property was a grossly inadequate price for the same. The said Frank G. Taylor was insolvent at the time he sold said mules, drays, wagons, harness, plows, tools, etc., by said bill of sale of April 20, 1898." The reference here made to the bank's mortgage will be understood when it is stated that in February, 1898, F. G. Taylor executed a mortgage to the Merchants' & Planters' National Bank on 48 mules, drays, wagons, harness, etc., to secure a debt of \$2,500; that Taylor therein agreed to purchase 6 other mules with a part of the \$2,500 borrowed from the bank, and that said additional mules should also be covered by the mortgage; and that in the bill of sale which is here attacked the mules sold by F. G. Taylor to J. H. Taylor are described as "my mules that is now embraced in mortgage to Mer-

chants' and Planters' National Bank." It is to be observed in this connection that the paragraph quoted does not aver what property was embraced in the bill of sale, and passed by it, in point of fact, to J. H. Taylor. It merely sets forth arguendo that 54 mules, and a sufficient number of wagons, drays, and harness to employ them, must have been embraced in the transaction, because that amount of property was embraced in the mortgage to the bank, and the bill of sale describes its subject-matter as "all my drays, wagons, and harness, plows, and other tools; also my mules that is now embraced in the mortgage to Merchants' and Planters' National Bank." Even the inference of the complainant is not supported by the bill of sale, except as to the mules. The other property is not described therein as being embraced in the mortgage to the bank. Yet the conclusion of the pleader that the property transferred was of the value of eight or ten thousand dollars is, as to every item set down in the bill of sale, except the dray business, as to which no separate valuation is stated, and no facts are stated upon which a value could be arrived at, based upon the assumption that a certain number of mules, wagons, drays, etc., are covered and conveyed by the bill of sale, which the pleader does not know to have been so embraced, and does not aver were embraced, but which she argues must have been embraced, because some of the items (the mules) are described as being those embraced in the mortgage, and it appears that 48 mules were embraced, and 6 others were to be purchased, and to pass, when purchased, under the mortgage. These argumentative averments, taken at their face value, are insufficient to support the general averment of the pleader that the property transferred was worth eight or ten thousand dollars, or her more general conclusion that the debt which the bill of sale purported to pay was grossly inadequate as a consideration for the property. But we are prevented taking these averments at their face value, even, by other positive averments of fact set forth in the bill. For it appears from affirmative allegations in other parts of the bill that, at the time of the execution of the bill of sale, Frank G. Taylor had only 11, or at the most, 13, mules; that only this number passed under it; that there were at that time only a few drays and sets of harness, of inconsiderable value,—all other mules and drays, etc., having been otherwise disposed of by him prior to the transfer to his son; and that the mules which were transferred were not worth over \$1,000 at the time of the transfer. It is also shown, as we have seen, that J. H. Taylor took this property subject to the bank's mortgage for \$2,500. It is clear, therefore, that the bill in the alternative under consideration utterly fails to present a case for equitable interposition. The facts averred not only do not support

the patently argumentative conclusion of the pleader as to the disparity in value between the property conveyed and the debt paid, but they affirmatively show that the property was not worth greatly or even materially more than the debt, or, we might say, even as much as the amount of the debt. In this alternative of the bill, the debt is conceded to be bona fide; and it is also conceded that the property was transferred by F. G. Taylor and received by J. H. Taylor in payment and satisfaction of the debt. If the property was not substantially all the property belonging to F. G. Taylor, the transaction is unobjectionable from any point of view, and is not open to attack by the complainant or any other creditor, or all the creditors combined, of said Taylor; and this wholly regardless of the intent beyond the payment of the debt which may have actuated the parties to the bill of sale. But it is further averred in the bill that the property thus transferred constituted substantially all the property owned by Frank G. Taylor, and that he is insolvent. On this state of case the transfer to J. H. Taylor by force of the statute is converted into a general assignment for the equal benefit of all F. G. Taylor's creditors, including complainant and J. H. Taylor; and it would be none the less so for that it was made with intent to hinder, delay, and defraud other creditors than J. H. Taylor. But the fact that the creditors generally, or that this complainant for herself and the other creditors, have the right to come into chancery and have the transfer to J. H. Taylor declared a general assignment, cannot possibly give any equitable footing to this complainant on the averments in the aspect we are discussing of her present bill. She does not seek at all to have the transfer declared a general assignment for the benefit of all creditors, but to have it declared fraudulent and void, to the end that she may subject the whole property to the satisfaction of her own debt, to the exclusion of the claims of all other creditors; and the presentation of a case of statutory general assignment by the averments of her bill is not in consonance with, but directly contrary to, her intent and purpose.

The bill, then, is to be taken as alleging that with intent to hinder, delay, or defraud oratrix and his creditors generally, F. G. Taylor transferred the property to J. H. Taylor upon a simulated and nonexistent consideration, or that, in the form of an absolute sale, F. G. mortgaged the property to J. H. to secure a bona fide debt, or that the former sold it to the latter in payment of a bona fide and commensurate debt, or that he conveyed the property to J. H. in secret trust for his (the grantor's) own use and benefit. The third alternative, as here stated, presents no case for relief; and, of necessary consequence, the bill, falling in one disjunctive aspect, fails as a whole to make a case of equitable cognizance, and the demurrer going

to this point should have been sustained. The bill is, however, obviously capable of amendment, by striking out the defective disjunctive averment or otherwise, and therefore the motion to dismiss it for want of equity cannot be rested upon that infirmity.

The bill, considered as one for the appointment of a receiver, is further objectionable because of his failure to offer to do equity in respect of the debt due the Merchants' & Planters' National Bank, secured by a mortgage on the property proposed to be subjected to complainant's judgment. It is true that mortgage is now held by Bullock, and that the bill alleges that he holds it fraudulently for the Taylors, who, it is further averred, paid it off, and had it transferred to him to hinder, delay, and defraud the complainant; but it should, notwithstanding these averments, which are made on information and belief, offer to pay Bullock the balance due on the mortgage debt in the event it should be determined that he is a bona fide holder of it. But this defect, being curable by amendment, furnishes no ground for dismissing the bill for the want of equity.

The pleas of both Frank G. Taylor and of J. H. Taylor were properly held insufficient by the chancellor. Frank G. Taylor never had any right of exemption against the claim in tort of the complainant, which she has reduced to judgment in trover. That her claim was in tort is concluded, for all the purposes of this case, by the judgment she recovered. That it was in existence at the time of the transfer of his property by Frank G. to J. H. Taylor is alleged by the bill, and not controverted. The covinous conveyance by him of property which was exempted to him from levy and sale for the payment of debts was as much a fraud on complainant in respect of her claim against which no property is exempt as if there were no exemption laws.

There is no merit in the contention that the bill is without equity for that it discloses that complainant had an adequate and complete remedy at law, by having her execution levied on the property transferred by F. G. to J. H. Taylor. The transfer was an impediment to the efficacious pursuit of her legal remedy, especially in view of the fact that it would have been necessary for her to indemnify the sheriff before he would or was in duty bound to levy the execution; and if it was a fraudulent transfer, as alleged, she had a right to come into chancery to remove the obstacle thus erected by the Taylors to a proper and satisfactory subjection of the property to the payment of her judgment. And having this standing, in a court of equity, her remedies there are the same as if she had no semblance of a legal remedy; and it is no objection to the appointment of a receiver that she had it in her power to take the property on execution by giving indemnity to the sheriff.

For the reason that the bill did not make a case for equitable interposition in one of the disjunctive sets of averments relied on for relief, the receiver should not have been appointed by the register in the first instance, and the appointment should not have been confirmed by the chancellor on the appeal to him. *Strickland v. Gay, Hardie & Co.*, 104 Ala. 875, 16 South. 77; *Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262, 24 South. 49.

The decree of the chancellor overruling the motion to dismiss the bill for want of equity will be affirmed. The decree overruling the demurrer is reversed, and a decree will be here entered sustaining the demurrer and dismissing the bill unless it be amended by allowance of the register within 10 days. The order of the chancellor confirming the register's appointment of the receiver is reversed, and as to that the cause is remanded, so that it stands before the chancellor on appeal from the register as it did before the order of confirmation was made by the chancellor. Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

WOODRUFF v. ADAIR et al.

(Supreme Court of Alabama. Feb. 13, 1902.)

CROSS BILL—DISMISSAL—MORTGAGES—SALE UNDER POWERS—BONA FIDE PURCHASER—DELIVERY OF DEED.

1. Whether motion to dismiss cross bill for want of equity should be or was properly granted is to be determined by inspection of cross bill alone, in its relation to the original bill; assuming its statements to be true.

2. Sale under power in a mortgage is voidable only on seasonable election by the mortgagor, or persons claiming under him, though the assignee of the mortgages without authority therein buys at his sale.

3. Sale under power in mortgage is a foreclosure, and cuts off equity of redemption, though the assignee of the mortgage, under authority therein, became the purchaser at his sale.

4. There is an enforceable equitable mortgage, not arising from the mere deposit of title deeds, where the assignee of a mortgage, having purchased at his sale under power in the mortgage, but not having received a deed, but merely a certificate of purchase, from the auctioneer, and thus having the right to compel conveyance to him by the mortgagor, borrows money, and as security delivers the mortgage and note secured thereby and the auctioneer's certificate indorsing each of them.

5. Where M. and A. make a sale to S. conditional on the title being satisfactory to S., and execute a deed, which is left with A. to be delivered if S. is satisfied, and S. declines to purchase, but A. has the deed recorded, and obtains a quitclaim from S., and then conveys, M. cannot assert nondelivery of deed to S., as against one subsequently taking mortgage from the record owner, without knowledge of the claim of M.

Sharpe and Dowdell, JJ., dissenting.

Appeal from city court of Talladega; G. K. Miller, Judge.

Suit by Mary J. Adair against Sarah E.

Woodruff and others. From decree for plaintiff, dismissing cross bill of Sarah E. Woodruff, she appeals. Reversed.

The original bill in this case was filed on November 20, 1896, by Mary J. Adair, and as amended it made parties defendant Mrs. T. S. Phillips and her husband, H. W. Phillips, Jesse W. Ryder, Mrs. Sarah E. Woodruff, M. L. Smith and E. J. Smith, individuals and as partners under the firm name of Smith Bros.

It was averred in the original bill that the complainant, Mary J. Adair, owned an interest in certain specifically described lands; that she acquired this interest under and by virtue of the fact that her deceased husband owned the same at the time of his death, and that said property being the homestead of her said husband, was duly set apart to her and three minor children as exempt from levy and sale under regular orders of the probate court, and that since said property was so set apart she had been in the continuous possession thereof; that her interest was a one-fifth interest in fee simple in said property or a life estate in the whole of the same; that while in possession of said property, the complainant, together with one John T. Adair, who had purchased all the other outstanding interest in said property negotiated a sale thereof to M. L. and E. J. Smith doing business under the name of Smith Bros.; that in conformity with said contract of sale, the complainant and John T. Adair signed a deed to said Smith Bros. on June 20, 1892, which was placed in escrow pending the investigation of the title to the property of Smith Bros. It being understood that Smith Bros. would not take the property unless the title was found to be acceptable to them; that said deed was delivered by the complainant to said John T. Adair; that as the result of the investigation Smith Bros. found the title to the property unsatisfactory, and therefore, declined to purchase the same, and hence said sale was not consummated and there was never any sale on complainant's part of any portion of said property to said Smith Bros. or any one else, and the title to said property was not passed under and by virtue of said deed; that said deed was never returned to the complainant, but remained in the possession of John T. Adair and H. W. Phillips; that said J. T. Adair, at the instance of H. W. Phillips, turned said deed over to said Phillips, and he filed the same for record, and said deed was recorded without any authority from the complainant, and without said deed ever having been delivered to said Smith Bros.; and that the filing of said deed for record was without the knowledge or consent of the complainant; that subsequently by the procurement of H. W. Phillips, Smith Bros. executed a quitclaim deed to said lands to John T. Adair; that after receiving said quitclaim deed, John T. Adair, on October 28, 1893, executed a warranty deed to D. E. Brasher and Henrietta Brasher, conveying the above-described lands

in fee simple to said parties; that said D. E. and Henrietta Brasher took said lands with full notice of the fact that the complainant had an interest in said property as above set forth, and also with notice that the deed to Smith Bros. had never been delivered; that afterwards on November 1, 1893, D. E. Brasher and Henrietta Brasher executed a mortgage on said property to Mrs. T. S. Phillips, the wife of H. W. Phillips; that Mrs. Phillips took said mortgage with notice of the fact that said deed from the complainant to Smith Bros. had never been delivered, and, therefore, conveyed no title. It was then further averred that one J. W. Ryder claimed an interest in said mortgage, which was executed by D. E. and Henrietta Brasher to Mrs. T. S. Phillips, by transfer or assignment thereof from Mrs. Phillips; that complainant is not informed as to what interest said Ryder has or claims in said property or mortgage, but that if he has any interest in the same, he took it with full notice and knowledge of the facts stated as to said deed from complainant to Smith Bros. never having been delivered. It was then averred in the bill that Mrs. S. E. Woodruff claims an interest to said property by and through said J. W. Ryder, by reason of a transfer made to her by said Ryder of said mortgage, but that said transfer was invalid and was taken with full notice and knowledge of the interest of the complainant in said property, and that said deed to Smith Bros. was in fact, never delivered. The prayer of the bill was that the interest of the complainant in said property be decreed and that each of said several conveyances be delivered up and canceled and annulled as a cloud upon complainant's title.

Mrs. T. S. Phillips and her husband, H. W. Phillips, filed an answer, which was made a cross bill, and Mrs. Sarah E. Woodruff also filed an answer and cross bill. The cross bill of Mrs. Phillips does not antagonize the limited interest claimed by the complainant in the original bill; but alleges that the Adair mortgage was executed to Mrs. Phillips to secure the bona fide debt therein mentioned, and the same with reference to the Brasher mortgage. And further, that while she was the owner and holder of the two mortgages and the notes secured thereby, she borrowed \$200 from the said Ryder and that she and her husband executed to him a note under seal therefor, and to secure that principal note of \$200 she, her husband joining to accomplish the transfer, in writing, assigned the Adair notes and mortgage, and the Brasher notes and mortgage to said Ryder as collateral security merely; and that on the 10th day of December, 1894, in pursuance of the powers of sale contained in the respective mortgages, said Ryder foreclosed them, bought himself at the sales and written memoranda of the sales were made. He bid in the Adair lands at the price of \$700, and the Brasher lands at the price of \$985.60. He paid no money. Before the sale was made, and in the making

of the sale, it was agreed between him and Mrs. Phillips that he might so purchase the lands under the mortgages without paying anything and that the amounts so bid by him should go towards discharging the respective mortgage debts, and that his purchase of the property should be for, and on account of the mortgagee, Mrs. T. S. Phillips, and that the title should be kept in his name as security, merely, for the \$200 which she owed, but had not yet paid him. In carrying out this agreement, made concerning the foreclosure and purchase by Ryder, Mrs. Phillips afterwards paid Ryder the \$200 which she owed him, took up her principal note under seal of \$200 and Ryder and his wife, in consideration thereof and as previously agreed, executed to her a deed, on the 5th day of February, 1897, conveying to her the lands embraced in both mortgages. The prayer of the cross bill of Mrs. T. S. Phillips and H. W. Phillips was that it be decreed that Mrs. T. S. Phillips owns all of said lands in fee simple subject only to the life estate of the complainant in the original bill, Mrs. Mary J. Adair. It was averred in the cross bill of Mrs. S. E. Woodruff that on October 26, 1893, John T. Adair being seised and possessed of certain lands conveyed the same by deed of mortgage for a valuable consideration to Mrs. T. S. Phillips; that on November 1, 1893, David E. Brasher and Henrietta Brasher being seised and possessed of the lands described in the original bill conveyed the same by deed of mortgage to Mrs. T. S. Phillips to secure the indebtedness; that on the 16th day of December, 1893, before any of the notes secured by said mortgages matured and before the law day of either had arrived, the said Mrs. T. S. Phillips who was then the owner and holder of both of said mortgages and of the notes described therein, did, for a valuable consideration then paid to her, and being joined therein by her husband, transfer in writing to the defendant, Jesse W. Ryder, both of said mortgages and the notes therein described and thereby secured; that said transfers were made at the same time and constituted but one and the same transaction and are indorsed on said mortgages. It was then further averred in the cross bill of Mrs. Woodruff that the payors of said note, who were the mortgagors, did not pay said debts when the same fell due, but made default therein; that thereupon said J. W. Ryder, who then held and owned said mortgages and the debts thereby secured, in strict conformity to the power of sale contained in said mortgages, sold the same at public sale, and at said sale said Ryder became the purchaser of both said tracts of land for a valuable consideration, and had a written memorandum of said sales made by the person conducting the same; that by so purchasing at said sale Ryder acquired the legal estate vested in the mortgagee and the equity of redemption residing in the mortgagors and was entitled in a court of chancery to have said sales confirmed and

all title to said lands divested out of any one of said persons and a perfect title thereto vested in him, subject only to the statutory right of redemption residing in the mortgagors. It was then further averred in said cross bill that after said Ryder became the owner of all of said lands as just above set forth, he, for a valuable consideration, paid by the cross complainant, did, on January 21, 1895, transfer to her, Mrs. Woodruff, all of his right, title and interest in and to said lands, by delivering to her as collateral security a note given to her on said deed; all of said mortgages, notes and memoranda of sale made by the person conducting the sale; that said Ryder did not pay his said note at maturity, and the whole amount thereof with interest is still due to the cross complainant Mrs. Woodruff; that in and by this transaction with said Ryder, the complainant "acquired all the rights that he had in and to all of said lands and especially the rights to have said sales confirmed in equity after the lapse of two years from said sale; and the mortgagors in said mortgages not having offered to redeem nor redeemed said lands within said two years which time expired on the 11th day of December, 1896." It was then further averred that after the maturity of said notes from Ryder, to the cross complainant, and after the expiration of the time within which the mortgagor had to redeem under the statute, and after the said Mrs. T. S. Phillips and her husband had actual notice of the rights of the cross complainant in the premises, they had some transactions with said Ryder, as a result of which they claimed that Mrs. Phillips had paid to Ryder the debt which she owed him, but that said transactions and agreement were not founded in fact and were not binding upon the cross complainant. It was further averred in the cross bill that when Mrs. Woodruff became the owner of said lands as hereinabove stated, for value, and when Ryder indorsed and transferred the notes and mortgages and memoranda of sale, she had no notice or knowledge of any writing, or title or claim of Mrs. Mary J. Adair or complainant in the original bill in the said lands; that even if the claim set up by her be true, she cannot now be heard to claim its enforcement as against this cross complainant, because she put it in the power of John T. Adair to commit the wrong and that the complainant being a bona fide, innocent purchaser without notice, cannot be made to suffer. It was then averred in said cross bill as follows: "That when said Ryder delivered said mortgages and notes as averred in section 4 of this cross bill, he indorsed the two notes of Brasher and wife in blank and indorsed on the two notes of John T. Adair the words 'the provisions and stipulations embodied in the case of the note are adopted and agreed to by the indorser herein.' [Signed] J. W. Ryder."

The prayer of the cross bill was as follows: "The premises considered, may it please the

court to decree that by the sales made by the said Ryder on the 10th day of December, 1894, that he acquired all the legal estate vested in the mortgagee Mrs. T. S. Phillips and also the equity of redemption residing in the mortgagors in said mortgages, John T. Adair and D. E. Brasher; and that he having bid at said sale for said lands a sum in excess of the amount due him by the mortgagee, T. S. Phillips, that thereby and thereupon the said debt was finally and fully paid and forever discharged and extinguished and that by the transfer and indorsement by said Ryder of said mortgages to your oratrix as shown, that she became invested with and entitled to, in equity all the rights that said Ryder had acquired in and to said lands upon his making default in payment of his note to your oratrix, and that two years having elapsed since the sale under said mortgages, and the right of redemption not having been exercised by any having the right to redeem said lands within the time allowed by law, that a perfect legal title to all of said lands be vested in your oratrix and all right, title and interest of every kind be divested out of all parties to this cause and vested in your oratrix."

The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

There was a motion made by the complainant in the original bill and the other defendants to the bill to dismiss the cross bill of Mrs. Woodruff for the want of equity. This motion was sustained.

On the final submission of the cause upon the pleadings and proof, the chancellor granted the relief prayed for in the original bill and in the cross bill of Mrs. T. S. Phillips, and ordered accordingly. From this decree Mrs. S. E. Woodruff appeals, and assigns as error the decree sustaining the motion to dismiss her cross bill for the want of equity, and the rendition of the final decree in the cause.

Saml. Will John, for appellant. Knox, Bowie & Dixon and Browne & Dryer, for appellees.

HARALSON, J. The motion to dismiss for want of equity, for all the purposes of the motion, admitted all the statements of the cross bill to be true, and the chancellor was not authorized in passing on the motion, nor are we, in review of his ruling, to look into the answers to the cross bill and proofs in the original cause, but the motion is to be determined upon an inspection of the cross bill itself, in its relation to the original bill.—*Trammell v. Pennington*, 45 Ala. 673; *Seals v. Robinson*, 75 Ala. 363.

Section 1640 of the Code provides, that "where a power to sell lands is given to the grantee in any mortgage, or other conveyance, intended to secure the payment of money, the power is part of the security, and may be executed by any person, or the personal rep-

resentative of any person, who by assignment, or otherwise, becomes entitled to the money thus secured."

Under the averments of the cross bill, the assignment by Mrs. Phillips to Jesse W. Ryder, of the two mortgages held by her, and of the notes they secured, invested him with the power to foreclose the same in equity, or to sell the property under the powers contained in the mortgages, as fully as the mortgagee herself, before she assigned said notes and mortgages, could have done.—*Wildsmith v. Tracy*, 80 Ala. 258; *Martinez v. Lindsey*, 91 Ala. 334, 8 South. 787; *Johnson v. Beard*, 93 Ala. 98, 9 South. 535.

The fact that Ryder,—the assignee of the Adair mortgage,—purchased at his own sale, not having the power to do so, conferred by the mortgage, did not on that account, avoid the sale. It was voidable at the option of the mortgagor, exercised within two years, but valid as to all other parties, notwithstanding the statute of frauds.—*Authorities supra*: *Comer v. Sheehan*, 74 Ala. 453; *Alexander v. Hill*, 88 Ala. 487, 7 South. 238, 16 Am. St. Rep. 55; *Cooper v. Hornsby*, 71 Ala. 62; *Harris v. Miller*, Id. 26; *McHan v. Ordway*, 76 Ala. 347; Code, § 2505.

In a case of the kind, the mortgagor, or person claiming under him in privity, may disaffirm the sale and redeem, the election to do so being seasonably expressed. As to him, until barred of his election to redeem, the mortgage has not been absolutely and finally foreclosed, and the mortgagor, or the person succeeding to his estate, continues, in contemplation of equity, to be the real owner of the fee.—*Lovelace v. Hutchinson*, 106 Ala. 417, 17 South. 623. The Brasher mortgage to Mrs. Phillips did authorize the mortgagee, or her transferee, to purchase at a foreclosure of the mortgage under his power; and, proceeding under the power conferred, Ryder, its transferee from the mortgagee, advertised and sold the lands mortgaged, and himself became the purchaser, as he did at the sale under the Adair mortgage. But, under neither did he receive a deed, but merely a certificate from the auctioneer, of sale and his purchase under each mortgage. This sale under this mortgage was a foreclosure and cut off the equity of redemption.

These purchases by Ryder, although he could not have maintained under them, actions of ejectment at law, did, however, give him a right to compel the mortgagee, Mrs. Phillips, by specific performance, to convey to him.—*Cooper v. Hornsby*, 71 Ala. 65.

After the purchase under the Adair mortgage, and after the two years for the exercise of Adair's right of redemption had passed, and after the foreclosure of the equity of redemption under the Brasher mortgage, Ryder, desiring to borrow money from Mrs. Woodruff, obtained from her, on the 1st January, 1896, a loan of \$775, and to secure the same, transferred to her, as is alleged, all his right, title and interest in and to said lands by delivering

to her as collateral security, each of said mortgages and notes, and the memoranda of sales made by the auctioneer, by indorsing said notes and mortgages and memoranda to her. The right of Ryder, under his sales, to seek and enforce in equity a confirmation thereof, and conveyances to him from the mortgagors, by this transaction by him with Mrs. Woodruff, inured to her benefit, and was intended by Ryder, and so accepted by her, as a security for the debt he owed her for the money he borrowed. He had an interest, incident to and inhering in the lands, bestowed by the mortgagors themselves, and an equitable right to the confirmation of his sales so as to secure the legal in contradistinction to the equitable title in himself to them, and this interest he duly assigned to Mrs. Woodruff as a security for the debt he owed her.—1 Jones, Mortg. § 820a; Wells v. Cody, 112 Ala. 278, 20 South. 381; Bank v. Young (Minn.) 53 N. W. 680. Whether this be styled an equitable mortgage or lien can make no difference, since the transfer was for the security for a debt. "There are many kinds of equitable mortgages, as there are variety of ways in which parties may contract for security by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, that is, of course, if it is not a legal mortgage."—Hall v. Railroad Co., 58 Ala. 10, 22. "If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage lien."—Flagg v. Mann, 2 Sumn. 486, 533, Fed. Cas. No. 4,847; 13 Am. & Eng. Enc. Law, 608.

In Newlin v. McAfee, 64 Ala. 364, it was said: "The form of the agreement is not material: Operative words of conveyance are not essential to the creation of a charge, or trust, which a court of equity will enforce as a mortgage. It is the intention of the parties to charge particular property, rights of property, or credits, with the payment of debts, which the court will regard. When that intention is deducible from their agreement, the court will give effect to it, and the equity created will prevail against all others than innocent purchasers for value."—3 Pom. Eq. Jur. § 1237; Wood v. Manufacturing Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56; Ross v. Perry, 105 Ala. 533, 16 South. 915.

On the averments of the cross bill, therefore, the right that Mrs. Woodruff derived by said transfers from Ryder, created in her as to Ryder and Mrs. Phillips a lien, in the nature of an equitable mortgage, on the lands in question. She is no intruder, therefore, in this litigation. She acquired by her transfers, according to the averments of the cross bill, the same right to a confirmation of Ryder's sale that he had, and to have said sale confirmed and the legal title to said lands invested in her, as a security for her debt.—1 Jones, Mortg. § 820a.

It is urged that this lien cannot be main-

tained, since the cross bill shows it arises out of a deposit of title deeds, which cannot be done under our decisions.—Lehman, Durr & Co. v. Collins, 69 Ala. 127. The bill, however, does not show that the lien claimed arose from the deposit of title deeds, but quite to the contrary, and the case cited has no relevancy to the facts of this case. The lien here arose from the transfer of a security of a debt presently contracted,—the right of Ryder to said mortgages and to have his sale under them confirmed in equity for his benefit,—and this, in the sense referred to in said decision, was not a mortgage arising from the mere deposit of title deeds.

The cross bill avers that complainant therein, at the time she made said loans to Ryder and received from him said transfers, had no knowledge or notice of any claim of Mary J. Adair in or to said notes and mortgages. She was, therefore, as to Mrs. Adair, on these averments, a bona fide purchaser for value without notice. Mrs. Adair's deed to Smith Bros., and theirs, by quitclaim to J. T. Adair, his conveyance of the same to the Brashers, and their mortgage to Mrs. Phillips, were all of record in the probate office. The deed from Mrs. Adair to said Smith Bros., was signed, not only by herself, but by J. T. Adair, the two being the joint owners of the property,—Mrs. Adair's interest arising under her exemption to the homestead of her deceased husband. Her bill, indefinite in averments of an escrow, shows that this deed was not delivered by her to Smith Bros., but was kept in the hands of J. T. Adair, her joint grantor, not to be delivered until Smith Bros. had time to examine and become satisfied with the title, and that they, accordingly, investigated the title and found it to be unsatisfactory. But the bill goes on to aver, that said deed was delivered to Smith Bros., through the agency and complicity of said J. T. Adair and H. W. Phillips,—the latter acting as the agent and husband of Mrs. T. S. Phillips in the transaction,—and that said Smith Bros., on the 12th October, 1893, conveyed the lands back to said J. T. Adair by quitclaim deed. It further shows that, thereafter, on the 26th October, 1893, said J. T. Adair and his wife, executed a warranty deed to said lands, to D. E. and Henrietta Brasher, who in turn, on the 1st November, 1893, mortgaged the same to Mrs. T. S. Phillips. It is further averred, that all this was done by the procurement of said J. T. Adair and H. W. Phillips, in order to divest the title out of complainant, Mrs. M. J. Adair, and to get it into said J. T. Adair, so that he could thereby, secure a debt he owed Mrs. Phillips, the wife of said H. W. Phillips.

Unless there was a delivery of the deed by the grantors to a third person, not a party to the instrument, it does not come within the meaning of an escrow. The grantor must have surrendered control over it. Nor can the deed be delivered for such purpose to the grantee.—1 Devl. Deeds, § 312; 11 Am. & Eng.

Enc. Law (2d Ed.) 333, 336. There does not appear to have been any person designated by the parties who was to receive the deed in escrow, but it does appear, that one of the grantors therein retained the deed in his custody and delivered it to Smith Bros. Mrs. Woodruff, as she avers, in making the loan to Ryder, acted bona fide, without any knowledge or notice of the claim by Mrs. Adair, growing out of the alleged nondelivery of the deed to Smith Bros., but she acted on the faith of the status of the title such as the public records showed it at the time to be. Under these conditions, we must hold that Mrs. Adair's deed to Smith Bros., as to Mrs. Woodruff was delivered and took effect as a deed from its date, and that Mrs. Woodruff is not to be hindered in the assertion of her rights by the claim of Mrs. Adair.

The decree dismissing the cross bill for want of equity must be reversed, and the cause remanded.

Reversed and remanded.

SHARPE and DOWDELL, JJ., dissent.

(107 La.)

L. J. MESTIER & CO. v. A. CHEVALIER
PAVING CO., Limited. (No.
14,029.)¹

(Supreme Court of Louisiana. Dec. 2, 1901.)

APPEAL—DISMISSAL—BOND—ARBITRATION
—RETURN—JOINT ADVENTURE—ACCOUNTING—CONSTRUCTION OF AGREEMENT—JUDICIAL SEQUESTRATION.

On Motion to Dismiss.

1. The appeal of particular appellant will not be dismissed in limine on the ground that he has no interest to appeal, when the whole case is before the court on appeals of others, and an examination of the entire record would be requisite to ascertain the relations of parties.

2. Where appellant furnishes an appeal bond for the amount fixed by the court, the appeal will be maintained as devolutive, even if the bond be too small for a suspensive appeal.

On the Merits.

3. The amicable compounder not having been sworn, and some of the facts not having been placed before him in the arbitration, his return was properly annulled.

4. An amount paid by one of the parties, which is charged on joint account, and afterward credited on the personal account, is a proper showing of indebtedness and credit.

5. The weight of testimony sustains an item for cement used for joint account.

6. Credit is entered corresponding with remittitur made by plaintiff.

7. A corporation may not have power to bind itself as a partner, but may bind itself to share in the profits of contracts it is authorized to perform with any one from whom it receives adequate consideration.

8. Plaintiff, under the agreements, had an interest in the sums earned.

9. Where, in an article of agreement to submit to an amicable compounder, parties make admissions in matters not to be submitted to him, there is no reason, in case it becomes evident that it was not at all a matter in which there was any difference between them, not to give it consideration; and, further, where it

was made manifest by the testimony that it was correctly charged, the finding of the district court decreeing that it was correctly charged will not be disturbed.

10. An amount earned in a joint venture under a contract with the United States government was properly charged.

11. The demand of the intervenor on appeal to set aside agreements between plaintiff and defendant in order that she may recover her claim is rejected, and the judgment in this respect remains undisturbed.

12. There was a judicial sequestration, and a sequestrator appointed contradictorily. The use of the word "receiver" was a misnomer. He was appointed to collect bills and to prevent loss. The sequestration was maintained, and the judicial sequestrator ordered to deliver the property, after deducting his costs and reasonable charges. There is nothing in this suggesting irregularity or a receiver's overcharge.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by L. J. Mestier & Co. against the A. Chevalier Paving Company, Limited. Marie L. Delcalzal intervenes. From the judgment, the defendant and H. B. McMurray, receiver thereof, as well as the intervenor, appeal. Modified.

Dinkelspiel & Hart, for appellants A. Chevalier Paving Co., Limited, and H. B. McMurray. Henry Chiapella, for appellant Marie Louise Delcalzal. Benjamin Rice Foreman, for appellees.

On Motion to Dismiss.

NICHOLLS, C. J. The plaintiffs move to dismiss the appeal of H. B. McMurray, receiver, on the grounds: (1) That he has no interest in the controversy between plaintiff and defendant, and was only appointed for the purpose of collecting the paving certificates pledged by defendant to plaintiff. (2) The district judge had no power to grant to H. B. McMurray a suspensive appeal from a money judgment exceeding \$2,000 on a bond of \$250, and the order for a suspensive appeal should be rescinded, and is not sufficient to give this court jurisdiction of the appeal. The application for the dismissal of this appeal is supported by no brief in behalf of the same. Counsel can scarcely expect this court to seek and ascertain for itself the facts on which such a motion is based. We are told that the receiver has no interest to appeal, but the lower court, which was fully advised of the situation, granted him one. And we are informed by appellants' brief that the appellee made an unsuccessful attempt in the lower court to have the order for the same rescinded on the ground of want of interest. In order to ascertain what interest the receiver has in the matters involved, and what issues he has raised or proposes to raise on appeal, we would have to examine a very large transcript, without any aid or assistance from counsel. The whole case is before us on appeal of other parties, and from the information to be obtained by us later

¹ Rehearing denied June 23, 1902.

we will be able to deal advisedly with the rights of all parties. If the receiver has no interest in the controversy, we can so declare at that time. Succession of Fortier, 51 La. Ann. 1567, 1568, 26 South. 554. The receiver, as appellant, furnished a bond of appeal for \$250, the amount of bond ordered by the court. The appeal cannot be dismissed on the ground that the amount is too small. The appeal is good at least as a devolutive appeal.

For the reasons assigned, the application is denied.

On the Merits.

(May 26, 1902.)

BREAUX, J. Plaintiff claims from defendant part of the proceeds of a joint venture. Plaintiff advanced funds to the defendant to enable it to execute contracts awarded to it to pave streets. Plaintiff and defendant agreed to submit their differences to an amicable compounder. After he had made return of his action into court, and the judge had homologated it, and subsequently entered judgment in favor of plaintiff for the balance found due by defendant, on application of the defendant for a new trial the court annulled the finding of the amicable compounder, and again rendered judgment in favor of plaintiff, after having deducted items not passed upon by the amicable compounder, as they had not been brought before him for arbitration. This is the judgment before us on appeal. Mrs. Delcalzal, a judgment creditor of the defendant, intervened in this suit, and asked for judgment recognizing her claims, and, further, that the claim made by the plaintiff against the defendant be rejected to the extent of her interest, and her judgment paid. In the course of the litigation, H. B. McMurray, sheriff, was appointed receiver. The district court rendered judgment in favor of the plaintiff against the defendant in the sum of \$4,938.49, with legal interest from December 22, 1897, subject to a credit of \$1,098.77. The court maintained the judicial sequestration which had been issued, and under which paving certificates issued by the city engineer of New Orleans had been sequestered, and recognized a lien in favor of plaintiff, and ordered that it be paid by preference from the proceeds of these certificates. To that end, Mr. McMurray, civil sheriff and receiver, after having deducted his costs and reasonable charges, was ordered to pay to plaintiff in liquidation the funds in his hands arising from the collection of these paving certificates, and to hand over to the plaintiff the paving certificates remaining in his possession which had not yet been collected. The right was decreed to plaintiff to recover from the succession of Molise an amount to which we will refer hereafter. With reference to the intervener, the court maintained the intervention and third opposition of Mrs. Marie Louise Delcalzal to the extent of recognizing her as a judgment cred-

itor of the defendant for the amount claimed to be paid from the paving certificates after satisfaction of plaintiff's claim, and the right was reserved to her to compel plaintiff to account to her.

We have found no difficulty in arriving at the conclusion that the report of the amicable compounder is not authoritative, and to be taken as the basis of a judgment. It was annulled for good cause. The amicable compounder had not taken the requisite oath, and all needful facts were not furnished him to enable him to make a complete return. The finding of the amicable compounder was annulled by the district court, and no sufficient complaint is made in the pleadings to bring up the lower court's ruling for review on appeal as relates to this finding. We take it that plaintiff, in whose favor it was rendered, does not seriously complain of the decree setting it aside. The compounder evidently has business training, and while, for good reason, his report was annulled for cause not in his control, yet it may be consulted to the extent that it may assist in arriving at a conclusion.

Defendant complains of the court's ruling under which evidence, over its objection, was admitted to support claims, which was inadmissible under the pleadings, because, it urges, it was evidence of one of the defendants' personal indebtedness, and not of corporation indebtedness of defendant. We have not found that this evidence was inadmissible. There must be an end to all things, even to lawsuits, and a ruling to that end admitting testimony, unless manifestly erroneous, affords no good ground to set aside a decision in so far as it appears to have done justice between the parties, and it is manifest that no one has been taken by surprise. Taking up the contested items of the account, we come first to the contested item of \$120, properly credited, as we think. We have not found that, as charged, in the acts of plaintiff and approved by the judgment, defendant was made to lose it. Taking up the different credits to which the defendant is entitled, the next item in dispute is an amount for cement. The court a qua was not impressed by defendant's denial of indebtedness. We have not found that the testimony would warrant us in striking out this item. This brings us to an item of \$141.24, with interest, being balance on account current between A. Chevalier individually and the plaintiff. It is of a date anterior to the date the corporation was formed, and was in no way due by the defendant company. Plaintiff, a few days after the judgment had been signed in the lower court, to quote from the motion, "to avoid all possible question should an appeal be taken," remitted from the amount of the judgment "the balance of statement A, viz., one hundred and forty one and $\frac{24}{100}$ dollars (\$141.24)." It follows that the interest on this account heretofore allowed, of which defendant complains, was also remitted. Leaving this

item, we find that defendant complains because the district court recognized a pledge of the paving certificates issued to the defendant under a city ordinance. Defendant charges, as relates to plaintiff's claim to a pledge, that it (plaintiff) expressly repudiated the written contract which gave them the pledge, and quotes the following from plaintiff's petition regarding the contract of pledge, "That said document was not the contract" between the parties. The plaintiff sought to repudiate the contract in part, but it alleges regarding it that its "object" and "end" were to enable plaintiff to let it be known to the abutters of property on streets on which the paving was done that the parties had an interest, and were authorized to collect from the different abutters the amounts due to the defendant. The concluding part of the contract, not repudiated, as we take it, reads, "L. J. Mestler & Co. to collect all of said bills, to the exclusion of all other persons, until they are fully reimbursed, and to receipt therefor." This was a joint venture between the plaintiff and the defendant, under the terms of which, in order to secure plaintiff for its advances, plaintiff acquired an interest in the sums earned. This was the condition of which it appears all concerned had notice. In the pleadings, in our view, the correctness was not challenged. On the contrary, it was given some recognition. The certificates, with the exception of a few which had not yet been issued, found their way, in accordance with agreement, into the hands of plaintiff, by whom they were held in pledge until they, in compliance with the court's order, were delivered to the sheriff or receiver.

We take up the next item in the order in which the issues are presented, it being the Plaswirth claim. Plaintiff, in matter of this claim, points to an asserted agreement between them whereby it was understood that plaintiff was to assume it as part of the disbursement. This was written in the articles of agreement between them submitting their differences to an amicable compounder to be settled. The article in question of the agreement to submit does not suggest any difference regarding this claim. It was, to quote from the agreement, "assumed by said firm as part of their disbursements." The firm referred to was Mestler & Co. The claim of Plaswirth was for bricks furnished to plaintiff and defendant, and for which the former paid, and which was, as we think, properly charged in the settlement, as it is supported, in addition to the written agreement in question, by the oral testimony of witnesses.

Another difference grew out of the Jackson Barracks contract with the United States government for paving. We think that justice was done between the parties in decreeing that plaintiff was entitled to half of the profits and the defendant to the other. This was the agreement, as sworn to by one of the plaintiffs. Although it was denied by one of

the defendants, the fact remains that plaintiff made the advances and assisted in executing the contract. "*Res ipsa loquitur*" is an applying maxim. The amount allowed was correct, and we therefore must decline to increase it on grounds urged by plaintiff. The court allowed \$1,162.15. This, we think, includes the whole claim. Plaintiff has claimed from the first that there was a partnership between itself and defendant quoad the venture, and that for that reason it had an interest in the profits. True, this corporation could not be a member of a partnership. It had no such power, yet it could bind itself to the extent of dividing profits as a consideration for advances made; as we understand was done in this case.

The collection fixed at \$1,098.77,—an amount of which no account had been taken until lately, for the reason that it was not known by defendant that it had been collected for its account,—must be increased to the sum of \$1,133.01, in order to correspond with the amount heretofore found due. Succession of Molse (not yet officially reported) 107 La. —, 31 South. 990. We feel warranted, in view of the argument at bar and in the brief, in decreeing that the judgment be amended as just stated.

A credit of \$52 is also claimed by defendant for paving done in front of the property of the plaintiff. This is sustained by the testimony of one of the defendants. We have not found a denial of the correctness of this item.

The intervenor's claim requires our attention. We have not found it possible to extend the court's recognition to any greater length than extended in the judgment of the court *qua*. To allow her claim would be to deny any effect to the agreement entered into between plaintiff and defendant whereby the former was to be secured for advances made.

The sheriff was authorized by the court to collect the bills which were placed in his hands, and he was given the title of receiver. We have not found error in this and in the judgment as relates to this judicial sequestrator or receiver.

In appellee's answer to the appeal it asks that the judgment be amended. We have considered the grounds, and have arrived at the conclusion that the amount of the judgment, except in minor particulars, should remain unchanged.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by decreasing the amount of the judgment from \$4,938.49, with legal interest, to \$4,886.49, with legal interest from December 22, 1897, subject to a credit of \$1,133.61, and to a further credit of \$141.24, and whatever interest has been heretofore added thereto in the judgment of the district court. As amended, the judgment is affirmed, at appellee's costs.

(107 La.)

LEGENDRE v. ASSESSOR OF PARISH OF ST. CHARLES et al. (No. 14,339).¹

In re ELFER, Assessor, et al.

(Supreme Court of Louisiana. June 21, 1902.)

TAXATION—ASSESSMENT—INCREASE—NOTICE—VALUATION.

1. Plaintiff's contention that because by judgment of court the assessment of the Ashton plantation, including movables thereon, was fixed at \$67,000 for the year 1899, the assessor was without authority to increase it the next year, 1900, is directly negatived by the ruling in *Warehouse Co. v. Marrero*, 30 South. 305, 108 La. 130.

2. Neither was it necessary for the assessor, in preparing his assessment rolls for 1900, to give previous notice to the owner that he intended to raise the assessment for that year over the amount at which it had been fixed the previous year.

3. No sufficient grounds appear for disturbing the valuation of the property, for the purpose of taxation for the year 1900, as fixed by the district judge, and his judgment is sustained.

(Syllabus by the Court.)

Certiorari to court of appeals, parish of Orleans.

Action by Emile Legendre against the assessor of the parish of St. Charles and others. Judgment for defendants was reversed by the court of appeals; and Charles Elfer, assessor, and others, apply for certiorari or writ of review. Reversed, and judgment of district court affirmed.

Robert J. Perkins, for applicants. James Legendre, for respondents.

BLANCHARD, J. This is a suit to reduce the assessment on the Ashton plantation, in St. Charles parish, for the year 1900. In April, 1900, plaintiff had returned the property for assessment as follows:—

On the land, some 2,364 acres.....	\$60,000
On the live stock.....	7,000
Total	\$67,000

The assessor did not accept these figures, submitted by the owner, as representing the assessable value of the property, and on his rolls for 1900 assessed the plantation as follows:—

Cash value of the land.....	\$85,000
Cash value of the live stock.....	5,000
Cash value of wagons, implements, etc.	2,000
Total	\$92,000

It is understood that the assessment of the land included the improvements upon it, including the sugar house and its machinery.

Due notice of the completion of his rolls having been given by the assessor as required by law, and plaintiff having failed to obtain from the assessor any reduction, he applied to the police jury, sitting as a board of review, complaining of overassessment and praying reduction to the figures he had returned as representing the value of the property. The board of reviewers did not agree

with him and left the assessment as the same had been made by the assessor. Whereupon plaintiff filed his petition, in the district court of St. Charles parish, in which he set up that the return of \$67,000 as the assessable value of the property, which he had made to the assessor, was the amount at which the court had in a previous suit fixed its value for purposes of taxation for the year 1899, and that this figure was changed by the assessor, in his assessment for 1900, without previous notice to him (petitioner) and in disobedience to the decree of the court. He claims that the assessment as made by the assessor is illegal and void as having been made without notice to him; that it is illegal as to form and excessive and beyond the cash value of the property. The prayer is that his plea of *res judicata* be maintained; that the assessment of the plantation and movables be reduced to \$67,000; and that he recover of the assessor, individually and officially, \$250 as attorney's fees because of his action in placing a greater valuation upon the property than that fixed by the court the previous year.

The district judge rendered this judgment:—"It is ordered, adjudged and decreed that the assessment of the Ashton plantation be reduced from eighty-five thousand dollars to sixty-seven thousand dollars and that the assessor be ordered to correct his rolls accordingly," etc. This judgment, however, was not predicated on the plea of *res judicata* set up by plaintiff, but on the evidence of value, actual and relative, adduced on the trial. Not satisfied with this reduction, plaintiff appealed to the court of appeals, parish of Orleans, and that tribunal amended the judgment by reducing the total assessment of the Ashton plantation from \$92,000 to \$67,000, and condemning the assessor to pay plaintiff \$50 as attorney's fees—this latter predicated upon section twenty-six of Act No. 170 of 1898. Whereupon this court, on the application of defendants, granted its writ to review this judgment.

Ruling.—While the plaintiff's petition prayed that the assessment upon the Ashton plantation and movables be reduced to \$67,000, the district judge did not go that far. His judgment confined its reduction to the landed part of the property only. Thus, the assessor had valued the lands at \$85,000. The district judge reduced this valuation to \$67,000. But he left intact the assessment of \$5,000 upon the live stock and \$2,000 upon the wagons, carts, etc. So that, according to the judgment of the district court, the assessment left upon the Ashton plantation and movables, as the result of the litigation in that court, was \$67,000 plus \$5,000, plus \$2,000—or \$74,000. And on that sum the tax collector demanded payment of taxes. If this were not the proper construction to put upon the judgment of the district court, if there were any doubt as to its purport and meaning, it would have been an easy matter,

¹ Rehearing denied June 30, 1902.

on application for new trial, to have had the judge remove the doubt by stating precisely that the whole assessment placed on the plantation, movables and immovables, \$92,000, was reduced to \$670,000, instead of that the reduction applied only to the \$85,000 which was the amount for which the lands alone were assessed. The effect of the amendment of the judgment of the district court by the court of appeals is to still further reduce the assessment from the \$74,000 as it was left by the district judge, to \$67,000, besides mulcting the assessor in penalties. Our conclusion is, from a review of the case, that the amount as fixed by the district judge should not be disturbed.

Plaintiff's contention that because by judgment of court the assessment of the Ashton plantation, including movables, was fixed at \$67,000 for the year 1899, the assessor was without authority to increase it the next year 1900, is directly negatived by the ruling of this court in *Warehouse Co. v. Marrero*, 103 La. 130, 30 South. 305. Neither was it necessary for the assessor, in preparing his assessment rolls for 1900, to give previous notice to the owner that he intended to raise the assessment for that year over the amount at which it had been fixed the previous year. The law does not so require. There is requirement of law to the effect that immediately after completing his rolls the assessor shall give notice by publication in a newspaper, if one be published in the parish, and if there be no newspaper published therein, then by posting on the court-house door, for the period of 10 days, that the listing of the property has been completed in accordance with law, and that the list will be exposed in the office of the assessor for inspection and correction for the term of 10 days, etc. Section 22, Act No. 170 of 1893. This notice was given.

It is ordered that the judgment of the court of appeals herein be set aside and that the judgment of the district court in and for the parish of St. Charles do stand as the proper adjudication of the issues presented—costs of the district court to be borne by defendants; those of the court of appeal and of this court by plaintiff.

(107 La.)

SPEYRER v. MILLER, Constable, et al.
(No. 14,309.)

(Supreme Court of Louisiana. May 26, 1902.)

COURTS—JURISDICTION—INJUNCTION—SEIZURE OF HOMESTEAD—AFFIDAVIT—BOND—DISSOLUTION—DAMAGES.

1. Where a homestead is seized, and the seizure is enjoined, the matter in dispute in the injunction suit is the homestead, and not the amount of the judgment sought to be executed; and the injunction suit must be filed in another court than that of the seizure, if the latter court has not jurisdiction *ratione materiae*.

2. Where the land and movables claimed as homestead are seized in a justice of the peace court, and an injunction is sued out in the district court, the movables may be included in the injunction, notwithstanding that the jus-

tice of the peace court would have jurisdiction as to them.

3. An affidavit for injunction in these words, "I swear that all the facts contained in the foregoing petition are true," is sufficient.

4. Where the amount in which bond should be given has not been fixed by the judge, the injunction must be dissolved, and cannot be saved by invocation of the doctrine that an injunction will not be dissolved where it appears that another writ could be sued out immediately.

5. The practice of including in one injunction several separate seizures made by creditors between whom there is no privity is not to be encouraged, and can be sanctioned only in highly exceptional cases, where evidently no inconvenience can be occasioned to the defendants in injunction, and no complication can possibly arise.

6. An order requiring a bond to be given in favor of each of the defendants is not compelled with by giving bond in favor of the defendants jointly.

7. Statutory damages on the dissolution of an injunction will not be allowed where, the merits not having been gone into, the court cannot say that the equitable remedy of injunction has been abused.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Edward T. Lewis, Judge.

Action by Joseph C. Speyrer against Felix Miller, constable, and others. Judgment for plaintiff, and defendant Miller appeals. Reversed.

William J. Sandoz, for appellant. Charles Frederick Garland, for appellee.

PROVOSTY, J. Three of the creditors of the plaintiff, Joseph Speyrer, obtained judgment against him in the justice of the peace court, and caused execution to issue against him, and his property to be seized. Between these creditors there existed no privity of interest. The judgments and the executions were separate. The property was already under seizure by virtue of an execution issued by the district court, and the seizures were made on the top of this other seizure, and there was pending in the district court an injunction suit involving the question of the liability of said property to seizure; the same being claimed to the homestead. Under these circumstances, it was thought advisable to stay proceedings on the three seizures until this question of homestead should have been determined in the district court suit, and accordingly the parties entered into an agreement to that effect, and, in pursuance of this agreement, proceedings were stayed on the three seizures. And so matters remained until the termination of the district court suit, when the constable proceeded to advertise the property for sale without renewing his notice to the seized debtor that he would so proceed unless the debt was paid. The district court suit had been settled without a trial, and therefore had not determined the question of the alleged exemption of the property from seizure. In proceeding with the three executions, the constable, for economy's sake, consolidated the three notices of sale

into one, heading it with the titles of the three suits, and announcing that the sale was being made to satisfy the three writs. The plaintiff then went into the district court and sued out the present injunction. The grounds of injunction are: First, that at the time of the advertisement the writs in the constable's hands had expired; second, that plaintiff "has never been notified of the advertisement of his said properties for sale, nor of the contemplated date of the sale thereof, nor has he been notified to appoint an appraiser on a date fixed to meet the appraiser to be selected by the plaintiffs to appraise his property before the sale thereof"; third, that the property is exempt from seizure under the homestead law, except the roan horse, the buggy, and the cow Betsy, which are exempt because not belonging to the plaintiff, but to his children. The constable and all the creditors in the seizures were made defendants. They excepted that the district court could not enjoin the process of the justice court. This exception was overruled as to the immovables, and sustained as to the movables. Defendants then further excepted on the grounds that the affidavit was insufficient, that the order granting the injunction does not fix the amount of the bond to be furnished, that there was a misjoinder of parties, and that the bond is a joint one, and does not name the amount of the obligation of the plaintiff and his surety towards each of the three defendants. They prayed the dissolution of the writ, with statutory damages. These exceptions having been overruled, the defendants answered to the merits; pleading—First, that, in view of the fact that the proceedings under the writs were stayed in pursuance of an agreement with plaintiff, the latter is estopped from taking advantage of the expiration of the writs; second, "that the stay of execution granted by the district court in plaintiff's suit against Berkson Bros. operated a stay of execution of other executions until the determination of said injunction suit; third, that plaintiff was served with all legal notices required by law; fourth, that "the only legitimate manner of legally testing the value of the homestead claimed by this plaintiff is as provided under article 244 of the constitution of Louisiana for the year 1898, to wit, that the property must be offered for sale by the executive officer under due process of law, when it shall not be sold unless the sale thereof realizes more than the sum of \$2,000, in which case the beneficiary shall be entitled to that amount. Respondents declare that a sale of said property will realize more than the sum of \$2,000." They prayed the dissolution of the writ, with \$50 damages, as attorney's fees. The court made the injunction peremptory, basing its judgment on the want of notice, and abstaining from passing on the question of homestead.

1. Under this state of the facts and the pleadings, the first question coming up for examination is the exception to the jurisdic-

tion. The rule is that one court cannot enjoin the process of another, and in this state that rule has matured into statute law. Code Prac. arts. 617, 629; *State v. Livaudais*, 39 La. Ann. 984, 3 South. 185; *Arthurs v. Sheriff*, 43 La. Ann. 414, 9 South. 126. An exception to the rule is recognized where the property of a third person is seized, and the value of the property exceeds the limits of the jurisdiction of the seizure court, as prescribed by the constitution. In such a case the only question that can be raised is that of the ownership of the property seized; and the value of the property tests the jurisdiction of the court, and the claimant must go into the court having jurisdiction according to amount. *Cross v. Parent*, 26 La. Ann. 591; *Munday v. Lyons*, 35 La. Ann. 990; *Bruneau v. Haughton*, 16 La. Ann. 47; *Gayarre v. Hays*, 21 La. Ann. 307; *Testard v. Belot*, 31 La. Ann. 795. Even as to the defendant in execution an exception is admitted in cases where the execution comes from another parish. *Lawes v. Chinn*, 4 Mart. (N. S.) 388. The defendant may in such cases apply for relief to the courts of his own parish. This exception had its origin early in our jurisprudence, at a time when the means of communication were so imperfect and slow that to confine the defendant to the court of the execution for relief would have operated a denial of justice in many cases, as he would not have had time to reach that court. Founded in necessity, or supposed necessity, the exception has persisted to these days of rapid communication, when the necessity has long ago ceased. *Police Jury v. Michel*, 4 La. Ann. 84; *Hobgood v. Brown*, 2 La. Ann. 323; *Arthurs v. Sheriff*, 43 La. Ann. 414, 9 South. 126. The rule against one court enjoining the process of another is not, then, without exceptions; and the present inquiry is whether another exception should not be recognized in the case of a homesteader seeking to rescue from the clutches of a seizure his homestead, of a value either going above or falling below the limits of the jurisdiction of the seizure court. The solution of the question depends upon the ascertainment of what is, in such a case, the matter in litigation. The matter in dispute being ascertained, the question solves itself; for no court can entertain jurisdiction of a matter whose value either falls below or goes above the limits of its jurisdiction as prescribed by the constitution. To say otherwise would be to say that a mere rule of general jurisprudence, or an article of the Code of Practice, can stay the operation of the provisions of the constitution prescribing the limits of the jurisdiction of the several courts of the state. Where, then, a person enjoins the seizure and sale of property as being his homestead, what is the matter in dispute? To put the question more pointedly, in such a case is the matter in dispute the amount of the judgment sought to be executed, or is it the value of the property claimed as homestead? In

the case of an ordinary debtor the amount in dispute and the test of the jurisdiction is the amount of the judgment. The reason is that all the property of a debtor must go to pay his debts, and therefore he cannot raise any issue in connection with the property separately and independently of the judgment; but he can litigate, if at all, only in connection with the judgment, to contest either its validity, or the regularity of the proceedings had for its execution. No issue, therefore, can possibly be raised by him that will not be merely incidental to the judgment and its execution. Hence in the case of an ordinary defendant in execution the amount of the judgment is always and inevitably the amount in dispute, and the test of the jurisdiction, no matter in what shape the litigation may frame itself. But this reason does not hold in the case of the homesteader. While he owes the debt, his homestead property is not liable for it, and every dollar of the property taken away from him by the seizure would be that much property of which he would have been deprived in violation of the rights secured to him by the constitution and laws of the state. His homestead is a right additional to and independent of his ordinary right of ownership. It is an additional tenure by which he holds the property, and, in a litigation involving the question of homestead *vel non*, it is not his ordinary tenure of ownership that he is vindicating, but this special, separate, constitution-conferred tenure. In vindicating this tenure he stands towards the seizure in precisely the same attitude as the third person whose property has been seized. The property seized is not more liable to the seizure in his case than in the case of the third person. He, as much as the third person, raises an issue not touching the validity of the judgment or the regularity of the execution, but confined strictly to the liability of the property to the seizure. In his case, then, precisely as in the case of the third person, the value of the property ought to be the test of the jurisdiction. Because more than an amount sufficient to satisfy the execution could not be taken out of the proceeds of the sale of the property is not a reason why the amount of the judgment sought to be executed should be the test of the jurisdiction. No greater amount could be taken out in the case of the third person, and yet it is recognized that in his case the amount of the judgment is not the test of the jurisdiction, but that the value of the property is. Then, again, what if the property adjudged not to be homestead be sold for less than its real value,—say for two-thirds of its appraisement at a first offering, or for whatever it will bring on 12 months' credit at a second offering; will not the homesteader actually have lost the difference between the real value of the homestead and the price of the sale? If the property is worth in the neighborhood of \$2,000, as in this case, and it is adjudged

by the justice of the peace not to be homestead, and is sent to sale, and brings only \$1,000, will not the homesteader have been deprived of \$1,000 of his property, even though not one cent is taken out of the price of the sale, towards satisfying the execution? What if the execution is for more than \$100? This is quite possible. The judgment itself might be for \$100, and, with the interest and costs, the debt might easily be increased to \$150. What if a part of the homestead sufficient in amount is seized to satisfy this debt? Will not the homesteader lose this \$150 if the judgment goes against him, and his property is sold? It would seem, then, that the amount really involved in the seizure of the homestead is not that of the judgment to satisfy which the seizure is made, but that the value of the property seized, and that the value of this property ought to be the test of the jurisdiction of the court, precisely as in a case where the property of a third person is seized. This court held differently in the case of *McGinty v. Richmond*, 27 La. Ann. 606, but the reasons on which that decision is founded do not commend themselves to us. These reasons are comprised within four lines, as follows: "The value of the property sought to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of the property not subject to the seizure." The first reason, namely, "that the value of the property seized is not to be considered," is not a reason, but a decision of the case. Whether such value is to be considered is the very question up for decision, and we have endeavored above to demonstrate the affirmative of that question. The second reason, namely, "that, if the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of property not subject to seizure," has, as an argument, the defect of proving too much. It proves that in the case of the seizure of a third person's property the seizure court has jurisdiction to enjoin the sale, regardless of the value of the property. This reason would overthrow a settled jurisprudence. Because of this decision we have gone into the matter perhaps more elaborately than was necessary. The matter is, after all, a very simple one. This justice of the peace clearly had no jurisdiction to adjudge that this \$2,000 of property was not homestead, and upon the strength of such adjudication to send the property to sale. The learned judge *a quo* was right in overruling the exception.

The movables claimed as homestead were properly included in the injunction in the district court. They and the land constituted together the homestead. Besides, they were included in the one seizure, and were therefore properly included in the one injunction.

Justices of the peace have no jurisdiction of suits involving title to real estate; and it is said by plaintiff that this homestead right is a real right, and that, the title to it being involved, the case involves title to real estate, and that for this reason the justice of the peace was without jurisdiction. We prefer not to pass on this point, as our doing so is not necessary to the decision of the case.

What we have here said, however, with regard to jurisdiction, has no application to the movables alleged to belong to the children. As to these the justice of the peace had jurisdiction, and as to them the plaintiff should have addressed himself to him.

2. The next question is as to the sufficiency of the affidavit. It was in these words: "I swear that all the facts contained in the foregoing petition are true." This was sufficient. Hen. Dig. p. 671, No. 14.

3. Next as to the bond. There was left in the order for the bond a blank space, to be filled in with the amount to be fixed by the judge. This space was never filled, so that the amount in which the bond should have been given was never determined by the judge. This omission was fatal. The Code of Practice expressly requires as a prerequisite to the issuance of an injunction that bond shall be furnished in an amount fixed by the judge. Article 307. See, also, section 1753, Rev. St. The courts cannot dispense with what the law has expressly prescribed as a prerequisite. This is a plain proposition. In the case of Lemann v. Truxillo, 32 La. Ann. 65, this court held that the fixing of the amount in which bond is to be given is a prerequisite, and that an omission in that regard could not be supplied or remedied by an order made after the issuance of the writ. True, that was a case of sequestration, but the principle is the same. See, also, Egan v. Fush, 46 La. Ann. 474, 15 South. 539. Time and again have injunctions been dissolved because issued without bond, or on a defective bond. If the bond given by the plaintiff were a legal bond, susceptible of enforcement against the surety thereon, perhaps there might be some ground for arguing that the omission of the judge had been supplied and remedied by the giving of bond in an amount sufficient to protect defendant; but the bond in question could not be enforced. Bonds given in a judicial proceeding in obedience to or in pursuance of particular provisions of law are not ordinary bonds, and are not governed by ordinary rules. The bondsman on such a bond is held not accordingly as he has bound himself, but accordingly as the law under which the bond was given requires that he should be held. This is well settled in our jurisprudence. If it is a forthcoming bond given by an intervener in a case in which such intervention and release on bond were not authorized by law, the bond is null, and the surety is not bound. Alexander v. Silbernagel, 27 La. Ann. 557. See, also, Le Blanc v. Succession of Massieu, 27 La. Ann. 824. If there was no seal on the

writ of fi. fa. under which the property was seized, the seizure is null, and the forthcoming bond given by an intervener is also null, and cannot be enforced. King v. Baker, 7 La. Ann. 570. A forthcoming bond given under an order of court authorizing the release of the property upon Boss and Andrews giving bond is null if signed by Andrews alone, and cannot be enforced against Andrews and the sureties. Benham v. Collins, 23 La. Ann. 222. An appeal bond given without a legal order of appeal is null. "It has been repeatedly held," says the court, "that the liability of sureties on judicial bonds is fixed by the law which authorizes the taking of the bonds; and, as no law authorized the taking of the bond without a previous order of appeal being obtained, it must remain inoperative." Sears v. Bearsh, 7 La. Ann. 539. These are but illustrative cases. They show, we believe, that, in the absence of an order fixing the amount in which bond shall be given, there cannot be given a valid injunction bond, such as can be enforced against the sureties. In the instant case the bond and the order under which it was given must be read together, and, so reading them, the bond becomes a bond for a blank amount; that is, no bond at all. The same article of the Code of Practice which requires bond to be given requires also that the plaintiff shall "state under oath the facts which render an injunction necessary." Enforcing the same article in the matter of the affidavit, as we are now enforcing it in the matter of the bond, both of which are prerequisites to the injunction, this court has time and again dissolved injunctions because of the insufficiency of the affidavit. The following are some of the cases in which this has been done: Herbert v. Joly, 5 La. 52; Reboul's Heirs v. Behrens, Id. 79; Richards' Heirs v. Hiriart, Id. 244; Catlett v. McDonald, 13 La. 46; Le Blanc v. Dashiell, 14 La. 274; Sauvinet v. Ponpono, Id. 87; Jewell v. Jewell, 1 Rob. 316; Rice v. Walsh, 4 La. Ann. 346; Robertson v. Travla, Id. 151; Hermanos v. Duvinneaud, 10 La. Ann. 114; Beatty v. Dufief, Id. 206; Banking Co. v. Carriel, 3 La. Ann. 225; Carroll v. Miller, Id. 535; Boatner v. Walker, 17 La. 461; Woodruff v. Payne, 9 Rob. 163; Taylor v. Clark, 11 La. Ann. 560; McRae v. Brown, 12 La. Ann. 181; Elder v. City of New Orleans, 31 La. Ann. 500,—though the court has theretofore allowed somewhat more latitude in the matter of the affidavit than in that of the bond. The following are some of the cases in which injunctions have been dissolved because of some defect in the bond or of insufficiency of the bond: Gauthier v. Gardenal, 44 La. Ann. 884, 11 South. 463; Bank v. Wilson, 19 La. Ann. 3; Lafon's Ex'r v. Gravier, 1 Mart. (N. S.) 243; Peterson v. Stewart, 6 La. Ann. 808; Dashiell v. Lasassier, 15 La. 101. The affidavit and the bond are unquestionably required by the Code to be furnished as prerequisites to the issuance of an injunction, and we fail to see

whence the court would derive authority to dispense with both or either of them in any case.

But the plaintiff contends that an injunction will not be dissolved where from the face of the record or from the evidence it appears that another writ would have to be granted immediately. In order to make sure of the scope of that doctrine, which is a familiar one, we have taken the trouble to examine every case we could find where the doctrine had been either applied or referred to. Our research in the matter has revealed the following: In *Exniclos v. Weiss*, 3 Mart. (N. S.) 480, property was seized under executory process to satisfy the unpaid purchase price, and the seizure was enjoined by the vendee on the ground that he was in danger of eviction, and could not be forced to pay the debt. On the trial it developed that the vendee had not yet been disturbed, but that he probably would be, because in another suit between other parties his vendor's title to the property had been adversely passed on. The defendant in injunction urged that this danger of eviction had developed since the bringing of the injunction, and could not, therefore, justify it. The court said: "We are of opinion that whenever a party who has an injunction shows that he ought not to pay, and that, if the injunction be dissolved, another must be granted at once, the former injunction ought not to be dissolved." In *Bushnell v. Brown's Heirs*, 4 Mart. (N. S.) 499, where the facts were practically the same as in *Exniclos v. Weiss*, the court said: "Proceedings on injunctions are not carried on in the formal manner in which ordinary ones are conducted, but summarily. The strict rules of pleadings are disregarded by the court. 'Semper ad eventum furtivat.' It will take care that neither party be surprised or entrapped, but it disregards many obstacles to the attainment of justice. It will receive, as a ground of sustaining an injunction, that which would be sufficient to demand its instant restoration. It will not demolish, to rebuild." In *Crane v. Baillio*, 7 Mart. (N. S.) 273, a writ of seizure and sale was enjoined on the ground that it had been obtained on insufficient evidence. The court dissolved the injunction because from the evidence on the trial it appeared that the plaintiff in the executory process would be entitled to take out a new writ at once. In *Insurance Co. v. Morgan*, 8 Mart. (N. S.) 680, the court dissolved an injunction sued out against "a treasury execution for arrearages of taxes," remarking as follows: "If the injunction was sustained on the technical objection, justice would require us to save the right of the state to another execution. As we do not dissolve injunctions which must necessarily be immediately issued de novo, we cannot perpetually enjoin a remedy which every circumstance in the case demands that the party should be immediately permitted to resort to." In *Hudson v. Dangerfield*, 2 La. 63, 20

Am. Dec. 297, the court held that two executions on the same judgment could not issue simultaneously, but that in such case only the second writ was illegal; and the court took occasion to remark as follows: "We have said we would not dissolve an injunction irregularly obtained if it appeared from the circumstances of the case the party, on an immediate application, must have a new one. Why should you perpetuate an injunction to the execution of the writ of *fi. fa.* when it is clear the party thus enjoined has a right to proceed to a new levy by taking out an alias or a pluries?" In *Campbell v. His Creditors*, 8 La. 75, the court refused to dissolve an injunction obtained on the affidavit of an attorney in fact whose authority to make the affidavit was not shown. Said the court: "Admitting that the facts necessary to support the application for injunction were not legally established at the judge's chambers, they were evident to the court on the motion to dissolve from the inspection of the record, and from the acts and conduct of the syndic. It was evident that if the court had been of opinion, on very technical grounds, indeed, that the injunction was not properly granted, the applicant had an undoubted right to a new one on the dissolution of the former." In *Woodward v. Dashiell*, 15 La. 184, the court said: "The injunction was dissolved although the party who had obtained it was perhaps entitled to have it sustained, because we are of opinion the remedy was worse than the evil, as a new seizure must have been immediately issued. For this purpose, and for this purpose alone, the injunction was not sustained. We have often refused to dissolve injunctions when we thought the party was immediately entitled to a new one on the dissolution of the former, and in order to avoid expense, delay, and trouble. In the present case the injunction was dissolved although it was properly obtained. In such cases the party should not be mulcted in damages, because the dissolution takes place for the sole purpose of avoiding unnecessary costs and delay in bringing the suit to a conclusion, and the party benefited thereby cannot expect us to give damages; for, if we were compelled to do so, we would sustain the injunction and require him to begin anew." In *Chambliss v. Atchison*, 2 La. Ann. 488, the injunction was against an executory process, and was maintained on grounds not set out in the petition, but which would have been available on an appeal from the order for the seizure and sale. Said the court: "The rule laid down in *L'Eglise's Case*, 3 La. 220, if understood in the broad sense that we can in no case whatever travel out of the matters set forth in the petition, would come in direct conflict with another rule of practice, which has received the uniform assent of the bench and the bar. That rule is that injunctions, although improvidently sued out, are never dissolved when the facts of the case show that on the dissolution

the party will immediately be entitled to that form of remedy on other grounds." In *Dorsey v. Hills*, 4 La. Ann. 106, the injunction was against a writ of *fi. fa.*, and the question was whether irregularities other than those set forth in the petition for injunction could be considered for the purpose of sustaining the injunction. Decided in the negative, the court saying: "It is true that courts will not dissolve injunctions when the facts show that the party would be immediately entitled to resort to the same remedy. But such facts must appear on the face of the proceedings, or from evidence legally admitted under the pleadings, or received without objection." In *Lafleur v. Mouton*, 8 La. Ann. 489, execution issued under a judgment rendered on a forfeited recognizance, and was enjoined on the ground that the recognizance did not state the cause for which it had been taken. On trial it developed that since the suing out of the injunction the accused had surrendered, and been tried and acquitted, which, under the law, vacated the forfeiture. Proof of this vacation was resisted on the ground that the pleadings did not authorize the admission of the evidence. Said the court: "This is strictly true, but as we have no reason to doubt the truth of the facts alleged, and they are sufficient to authorize the injunction of the judgment, we feel bound to adhere to the rule, not to dismiss an injunction when we believe that the plaintiff would be immediately entitled to the same remedy." In *Adams v. Lewis*, 7 Mart. (N. S.) 406,—a case of sequestration, where the objection was that the two demands of plaintiff were inconsistent,—the court applied the same doctrine, saying: "It has been more than once decided in this court that writs of this description would not be set aside if the case showed sufficient grounds for immediately reinstating them." In *Citizens' Bank v. Crooks*, 21 La. Ann. 324, and in *Porter v. Morere*, 30 La. Ann. 233, the court held that, when it is manifest that the plaintiff in injunction will be entitled to a new writ if the first is dissolved, the case will be remanded to enable him to supply evidence which he has omitted to introduce. In *Ward v. Douglass*, 22 La. Ann. 463, the court said: "On the merits, the view we have taken renders it unnecessary for us to notice either the exception based on the confused and inartificial pleadings of the plaintiff, the bills of exception, or the various points made in the argument. It is now well settled that an injunction will not be dissolved if it appears from the record that there exists good cause for an injunction." What were the faults attributed to the injunction, the report of the case does not make known. In *Lewis v. Daniels*, 23 La. Ann. 170, the court said: "On the second ground, that the bond is insufficient, we are not satisfied that the objections to it are tenable, but it is manifest that the plaintiffs would be entitled to renew their injunction if the present writs were dissolved. We deem it proper to follow in

this case the well-established usage and reject the motion." In *Dupre v. Swafford*, 25 La. Ann. 222, a natural tutrix sued out an injunction before having qualified. She qualified in time however to give the bond. Motion was made to dissolve on the ground "that the said Maria J. Dupre is not tutrix. If she is at present, she was not at the time the injunction was sued out." The court said: "It is a sufficient answer to state that an injunction will not be set aside for irregularities when it appears from the face of the papers that another will be issued." In *Savole v. Thibodeaux*, 28 La. Ann. 169, where the bond was given for a less amount than that required by law, and where the judge *a quo* had declined to dissolve the injunction, the court said: "But in conformity with the jurisprudence of the state, he ruled that, although an injunction may have been imprudently granted, it will not be dissolved when it is plain from the record that the party would be entitled to the writ immediately." In *Howard v. Simmons*, 25 La. Ann. 670, the court said: "While it is a general rule that petitions in injunction suits are not allowed to be amended, still, when events have occurred since the institution of the suit which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another. Code Prac. art. 748." In *Woolfolk v. Woolfolk*, 22 La. Ann. 207, the court said: "The judge *a quo*, believing the cause for injunction to be good and sufficient, did not err in permitting additional security to be given, as another writ could have been immediately granted." Thus it is seen that, while the court has repeatedly stated the doctrine in question in terms broad enough to justify the maintenance of an injunction without bond, yet it has thus far never applied the doctrine to a case where bond had not been given. We think that in the case of *Savole v. Thibodeaux*, 28 La. Ann. 169, where a bond insufficient in amount was sustained, the doctrine was carried to the utmost verge,—in fact, too far,—and we are not disposed to carry it any further. Whether the case of *Campbell v. His Creditors*, 8 La. 75, where an affidavit made by an attorney in fact whose authority was not shown must not be considered to have been overruled by the long list of subsequent decisions holding strictly to the necessity of the affidavit, *quære*? The case is distinguished in *Cattlett v. McDonald*, 13 La. 44, on the authority of *Reboul's Heirs v. Behrens*, 5 La. 79.

4. As to misjoinder of defendants. The injunction is against three separate seizers, under separate executions, in satisfaction of separate judgments in favor of three different creditors, between whom there was no privity. It is doubtful whether, under these circumstances, the exception of misjoinder of

parties was not good. The law abhors a multiplicity of suits, but so it does an incongruous assemblage of litigants, possibly discordant. The practice of joining in one injunction several seizures made by different creditors is not to be encouraged, and could be tolerated only in exceptional cases. But probably the present case is of that character. The three seizures were from the same court, by the same officer, at the same time, of the same property, and were consolidated for advertisement. All the defendants are represented by the same attorney, and the issues as to all the defendants were necessarily the same, so that no possible complication could arise. At all events, this defect, if such, was of those which could be cured under the doctrine invoked above in connection with the bond.

5. The objection that the bond is a joint one, and does not name the obligation of the plaintiff and his surety towards each of the three defendants, is well taken. Under the law and under the order of the judge the plaintiff had to give a bond in favor of each of the defendants, and, as a matter of course, he could not satisfy this obligation by giving one bond in favor of the defendants jointly. The proposition will not admit of discussion, though here, again, the doctrine against dissolving injunctions would probably come into play.

6. We conclude that the injunction must be dissolved for want of a bond as required by law.

Not having considered the case on the merits, and therefore not having considered whether there has been, or not, an abuse of the equitable remedy of injunction, we cannot grant the prayer for statutory damages, and can allow only the \$50 claimed as attorney's fees.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the injunction herein be dissolved, without prejudice, however, and that the plaintiff be condemned to pay to the defendants \$50 as damages, and be further condemned to pay costs in both courts.

BLANCHARD, J., concurs in the decree and so much of the opinion as relates to the injunction bond and holds the same insufficient, but dissents from that part of the opinion which holds that the seized debtor may arrest the execution, as relates to the immovable claimed as a homestead, by injunction in the district court.

(107 La.)

PIERCE v. STURDIVANT. (No. 14,942.)
(Supreme Court of Louisiana. June 21, 1902.)
SEQUESTRATION—AFFIDAVIT—IMPEACHMENT—EVIDENCE.

1. Sequestration was sued out against a crop standing ungathered in the field. The affidavit was that plaintiff feared defendant would conceal, part with, or dispose of the crop. Defendant's charge of falsity of the affidavit gave rise to inquiry into the reasonableness of the fear expressed by plaintiff.

2. On this inquiry, involving questions of fact, it is considered sufficient grounds existed to warrant the apprehension and sustain the writ.

3. Where the right to sequester is contested on the averment of no grounds existing warranting resort to the writ, the inquiry is to be directed towards ascertaining whether the debtor was doing or saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that the sequestration would prevent, rather than to ascertaining the real intentions of the debtor.

(Syllabus by the Court.)

Certiorari to court of appeals, Second circuit.

Action by Thomas A. Pierce against J. Y. Sturdivant. Judgment for plaintiff was modified by the court of appeals and he applies for certiorari or writ of review. Decree of court of appeals set aside and judgment of district court affirmed.

William Francis Millsaps, for applicant.
Andrew Augustus Gunby and Allan Sholars, for respondent.

BLANCHARD, J. The writ of review was granted and the case is before us for examination and decision. Plaintiff sued to recover \$165.42, with interest, for goods, wares, merchandise and farm supplies furnished defendant during the year 1901, annexing an itemized account to his petition. Defendant, it seems, had recently entered under the homestead act a tract of land adjoining that of plaintiff, and being without means entered into a contract with plaintiff, himself a farmer, the terms of which will hereinafter appear. Plaintiff had occupied a portion of the land constituting the homestead entry just previous to its acquisition by defendant, and had put some fencing and a cabin upon it and perhaps had done a little clearing. He explains this by the statement that he was under the impression the lines of his own land extended that far—that is to say, ran over on land which it was afterwards ascertained did not belong to him, but did pertain to the tract which defendant entered. Plaintiff claimed the improvements he had thus put upon the tract and asserted his right to remove them, though, entering into contractual relations with defendant, did not do so. The agreement between the parties was that defendant was to cultivate the cleared land on the homestead entry; plaintiff to furnish the stock and farming implements necessary for that purpose and feed the stock. All the labor required was to be furnished by defendant. The crop thus to be grown was to belong one half to plaintiff, the other half to defendant. It was further agreed between the parties that plaintiff was to furnish defendant with supplies to enable him to cultivate the crop. These supplies were, in the main, food for defendant, his wife and five or six children, and the same were to be paid for out of the proceeds of

defendant's half of the crop. Plaintiff says his agreement was limited to \$100 worth of supplies, unless the growing crop justified more. Defendant denies the limit as to amount. It is a fact that the account ran up to the amount sued for, of which \$109.11 came under the head of supplies necessary to make the crop, for which the law grants a privilege on the crop. In his petition plaintiff claimed a privilege on defendant's half of the crop to secure this \$109.11. He claimed, also, the ownership of the other undivided half of the crop, which was then standing ungathered in the field. He averred he feared defendant would conceal, part with or dispose of the crop and prayed its sequestration. It was sequestered, but released, later, on bond, with security, executed by defendant. In an exception and motion to dissolve defendant pleaded the debt was not yet due and the action premature, and that no grounds for sequestration existed. These pleas were overruled, as were the defenses set up in the answer, and the district court awarded judgment in favor of plaintiff for the amount sued for, sustained the sequestration, recognized plaintiff as owner of an undivided half of the crop seized, and recognized a privilege in his favor for \$109.11 on defendant's undivided half of the crop. On appeal by defendant to the court of appeals that tribunal sustained the district judge in all particulars except as to the sequestration. It held the grounds and proof insufficient on that branch of the case and dissolved the writ.

Ruling—We are unable to concur in this view. Plaintiff was owner of one half of the crop and had a privilege as furnisher of supplies on the other half. Here were two grounds, either of which sufficed to supply a basis for sequestration upon plaintiff complying with the requisites provided by law. This he did when he made affidavit that he feared defendant would conceal, part with or dispose of the crop, and furnished the bond in the amount fixed by the judge. Defendant's charge of the falsity of the affidavit gave rise to inquiry into the reasonableness of the fear expressed by plaintiff. *Vives v. Robertson*, 52 La. Ann. 25, 26 South. 776. Sufficient is shown, we think, to sustain the averment. While the end of September was at hand, defendant had not picked a lock of the cotton in the field. Half to two-thirds of it was open. Cotton picking in the neighborhood had begun the latter part of August. Plaintiff had already, on the adjoining place, picked over his own cotton two or three times. Defendant was ailing to some extent, but was engaged in cotton picking, when well enough, elsewhere than in his own field. The crop, ungathered, would soon go to waste, and much of it would rot in the field. The rains would beat it out and the mud and dust would injure the staple. It would deteriorate. Plaintiff was owner of the half of the crop. He could

not lawfully enter upon the premises for the purpose of safeguarding his interests by picking the cotton. Besides, it was defendant's duty to pick it. That was the agreement. The only way to save it, if defendant would not pick it, was to sequester it and have it picked through orders of the sheriff by authority of the court, with the legal right in defendant to bond the sequestration, in which event the bond would furnish protection to plaintiff. Defendant's wife had told plaintiff in the presence of her husband that the latter was unable to pick the cotton and that if it was to be picked she and her children would have to do it, and if they did it he (plaintiff) would not get it. It is testified to by Mr. Beard, a neighbor and reputable citizen, that defendant told him he would not proceed to gather the crop unless plaintiff consented to forego the benefit of the farming contract between them, which meant that Pierce would not claim ownership of half the crop. All this taken together justified the affidavit plaintiff made for the sequestration. As this court said in *Duncan v. Wise*, 39 La. Ann. 74, 6 South. 13, it is not what the party intended to do that is to be considered in determining whether the sequestration has been lawfully sued out, but whether he was doing or saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that the sequestration would prevent.

As to all the other defenses set up, it suffices to say, without going into a discussion of the same, that we agree with the conclusions reached by both the courts below.

It is ordered that the decree herein of the court of appeals, Second circuit, be set aside, and that the judgment of the district court do stand as the proper determination of the issue involved in this cause—costs of all the courts to be paid by defendant.

(107 La.)

GORDON v. STANLEY, Register of Conveyances, et al. (No. 14,055.)¹

(Supreme Court of Louisiana. May 12, 1902.)

ELECTION OF REMEDIES—REGISTER OF CONVEYANCES—NEGLIGENCE—LIABILITY ON BOND—PRESCRIPTION—CERTIFICATE OF REGISTER.

1. Whilst it is true that mere error, negligence, or imprudence, resulting in injury to another, may be a quasi offense, it is also true that one may by contract bind himself to compensate such injury; and, because the injured party has an action in damages as for a quasi offense, it does not follow that he should be denied the right to sue on his contract, if he has one, and prefers that remedy.

2. The bond given by the register of conveyances for the parish of Orleans, as required by section 3153, Rev. St., constitutes a contract between that officer and the state, for the benefit of those interested, that he will faithfully discharge the duties of his office; and, whilst an act of omission or commission with respect to such duties, considered by itself, may be a quasi offense, it is also a breach of the obliga-

¹ Rehearing denied June 23, 1902.

tion of the bond, and an action on the bond for damages resulting therefrom is an action *ex contractu*, which is not barred by the prescription of one year applicable to quasi offenses.

3. Under Civ. Code, art. 2257, it is the duty of the register of conveyances for the parish of Orleans, when called upon for a certificate showing whether certain property has been alienated, to include in the certificate issued by him any alienation which may have been registered in the books of his office, whether appearing in the indices or not; and where he certifies that, "according to the records of his office," the property has not been alienated, he will be liable for the damages sustained by the party acting upon such certificate if it appears that a conveyance was registered in the books, though not properly indexed.

4. A lender, who has advanced money on the faith of a certificate showing the nonalienation of property supposed to belong to the borrower, who mortgages the property to secure the debt, has a right of action against the register and his sureties, on the bond of the former, to recover the loss sustained, but he must prove the loss with reasonable certainty.

Breaux, J., dissenting.

(Syllabus by the Court.)

Action by Charles Gordon against John E. Stanley, register of conveyances, and others. Judgment for defendants was affirmed by the court of appeals, and plaintiff applies for certiorari or writ of review. Modified.

Solomon Wolff and Benjamin Rice Forman, for petitioner. Dinkelspiel & Hart and Conrad G. Collins, for respondents.

MONROE, J. This is an application for the review of a judgment rendered by the court of appeal for the parish of Orleans. The record, with the evidence adduced, which has been sent up in response to the writ of certiorari herein issued, presents the following case, to wit: Charles Gordon, the applicant, who resides in Shreveport, through his agent, Solomon Wolff, who resides in New Orleans, was applied to by Mrs. Martile J. Baker, acting through Levin R. De Poorter, for a loan of \$1,250, to be secured by mortgage on real estate said to belong to Mrs. Baker, and situated in New Orleans; and the loan was made by his agent and attorney, Wolff, after the latter had examined the title to the property offered as security, and after the defendant, who was at that time register of conveyances, had certified that it had not been alienated. The applicant received as evidence of the loan three notes of the borrower, two of which, for \$500 and \$300, respectively, were dated June 30, 1898, and the other, for \$400, August 3, 1898; all of them being payable one year from date, and identified with the act of mortgage by which they purport to have been secured. The first two notes were not paid at maturity, and the holder, acting through the same attorney, having obtained the written authority of the maker to have the property sold at auction, caused it to be advertised with that view, when it was made known that it belonged to Jacob Holzenthal, who had acquired it from Otto Walther, who, in turn, had acquired it from Mrs. Martile J. Baker by an authentic act dated February 10,

1894, and duly registered in the conveyance office. These facts were brought to the knowledge of the applicant's attorney about July 13, 1899, and on July 19th he communicated them to the register of conveyances, and demanded that the latter should hold the applicant harmless; and he subsequently obtained judgment against Mrs. Baker, the mortgagor, for the amount of the notes, with interest, and issued execution thereon. The original *fieri facias* was returned nulla bona November 13, 1899, but there is in the record an alias writ under which some personal property appears to have been seized in December, 1900; the sheriff's return, dated February, 1901, showing that he had retained a copy of the writ, and was still maintaining the seizure. In the meanwhile, on November 20, 1899, the applicant brought suit on the official bond of the register of conveyances against that officer and his sureties; setting forth the facts which have been hereinbefore recited, save as to the alias *f. fa.*, and also alleging that, so far as he was informed, Mrs. Baker was not financially in a condition to entitle her to the loan which she had obtained, and that he would not have made it if he had not been misled by the certificate of non-alienation of the property by which it purported to be secured; and he prayed judgment against the parties made defendant in the sum of \$1,576.27, with interest and costs. The defendants filed an exception of no cause of action, and one of the sureties filed additional pleas of discussion and prematurity of action. The exception of no cause of action was maintained, but on appeal the judgment was reversed and the case remanded. Thereupon the register of conveyances answered, denying that the plaintiff acted on the faith of the certificate, as alleged, or that he had sustained any loss, and alleging that the sale from Mrs. Baker to Walther had been made during the incumbency of the preceding register, and had not been indexed, and that he was not responsible for his failure to report the same. The sureties made no further appearance, and no further steps were taken against them; and after trial on the merits the demand as to the register was again rejected, and the case was again appealed, and in the appellate court the principal defendant pleaded the prescription of one year.

Two of the judges of the court of appeal adopted the view that the action arises *ex delicto*, and is barred by the prescription of one year from the date of the issuance of the certificate, and that view was made the judgment of the court; whilst the third member of the court, although agreeing with the reasoning in the majority opinion, yielded to what he conceived to be the more recent jurisprudence of this court, to the effect that the action, having been brought upon the bond, must be considered as *ex contractu*, and that the case should have been considered upon its merits. Dealing with the question as an original one, our learned Brethren

constituting the majority of the court of appeal, after referring to the fact that a contract is an agreement by which one person obligates himself to another to give, to do, or permit, or not to do, something expressed or implied in such agreement, whilst a quasi offense is an act by which one person, without malicious intent, but through error, negligence, or imprudence, causes damage to another, conclude that the issuance by the register of conveyances of the misleading certificate of nonalienation in the instant case was not the result of any agreement or contract between him and the plaintiff, but that it was a quasi offense, and that hence the action to recover damages resulting therefrom is barred by the prescription of one year, under Civ. Code, art. 3536. This would be true if only the act itself were to be taken into account, but such is not the case. The applicant sues to enforce the obligation of a written instrument executed by the defendant whereby the latter agreed and bound himself, under a penalty of \$15,000, "well and faithfully to discharge and perform all the duties incumbent on him as register of conveyances," etc. And he was joined in the execution of that instrument by three other persons, who bound themselves, under a penalty of \$5,000 each, that he would do as he agreed, and who have no connection with, and are in no wise liable for, his acts of commission or omission, save as they have thus agreed and bound themselves. Whilst it is true, therefore, that mere error, negligence, or imprudence, resulting in injury to another, may be a quasi offense, it is also true that one may by contract bind oneself to compensate such injury; and, because the sufferer may have an action in damages as for a quasi offense, it does not follow that he should be denied the right to sue on his contract, if he has one, and prefers that remedy. The distinction thus indicated was recognized by this court more than half a century ago. Thus *Brown v. Gunning's Curatrix*, 19 La. 462, was a suit on the bond of the curatrix of William Gunning by a creditor of the succession, whose claim had been acknowledged upon an account which had been homologated. It was urged, among other grounds of defense, that "all actions in damages for maladministration, neglect to perform the duties of a curatrix, and all other damages resulting from quasi offenses, are [were] prescribed against in one year." The court said: "We have attentively examined the plea of prescription filed in this court. This is an action arising *ex contractu*, on the bonds given by the parties, not one, sounding in damages, for an offense or quasi offense. The cases of *Semple v. Buhler*, 6 Mart. (N. S.) 665, and *Fish v. Browder*, Id. 691, were both actions against the sheriffs personally for damages, and not actions on their official bonds, alleging breach thereof. Had such been their character, we imagine that the decision of

this court would have been different from what it was." In *Brigham v. Bussey*, 28 La. Ann. 676, the plaintiff brought suit on the official bond of the recorder of the parish of Morehouse for damages resulting from the failure of the recorder to reinscribe a judgment within the proper time, and the recorder and his sureties pleaded the same prescription, and supported it with the same arguments which are now urged. This court said: "In our opinion, the action is *ex contractu*. The recorder was required by law to enter into a bond, with two good sureties, for the faithful performance of his official duties, and the law made it his duty to reinscribe the judgment when duly called upon to do so. It was then a special duty embraced within the obligation of his bond, and his failure, or that of his deputy duly appointed, to perform the duty, is a breach of his bond, on which he and his sureties may be sued therefor. It is only through or by the bond that the sureties have any connection whatever with the acts or omissions of the recorder or his deputy. * * * We concur in the opinion that 'M. Marcade has, in his commentary on the Napoleon Code, developed the distinction between damages *ex delicto* and damages *ex contractu* with his usual brevity and felicity. The former flow from a violation of a general duty; the latter, from a breach of a special obligation.' * * * He and his sureties entered into a specific contract with the state, for the benefit of those interested, that he and his deputy would faithfully perform each duty of his office, and his failure in such respect is a breach of that contract. If this is not a case in which the bond may be enforced, it is difficult to imagine one in which official bonds may be made available. We therefore conclude that this action is not prescribed by one year." In *Fox v. Thibault*, 33 La. Ann. 32 (being an action on the bond of the recorder of the parish of Plaquemines for damages for his failure to include certain mortgages in a certificate issued by him), Mr. Justice Fenner, as the organ of the court, said: "The defenses urged by the defendant [defendants] are the following, viz.: (1) The prescription of one year, based on the hypothesis that the action is one for damages resulting from a quasi offense. We are not concerned here with the question as to whether defendant's breach of duty was or was not technically a quasi offense. The action is on the bond, and therefore *ex contractu*, to which the prescription invoked is not applicable." And to the same effect is the decision in *Weintz v. Kramer* (La.) 10 South. 416, where the action was brought on the bond of a notary for damages resulting from his failure to embody the necessary recitals in his process of a nuncupative will by public act.

The meaning of these decisions is admitted by the respondent judges, but in the majority opinion it is said that they are entirely

at variance with the previous jurisprudence, and in support of this view a number of adjudged cases are cited. The first are those of *Semple v. Buhler*, 6 Mart. (N. S.) 665, and *Fish v. Browder*, Id. 691. But the opinion overlooks the fact that in deciding the case of *Brown v. Gunning's Curatrix*, 19 La. 462, the court especially refers to the cases of *Semple v. Buhler* and *Fish v. Browder*, and says that they were suits against sheriffs individually, and that, if they had been actions on the official bonds of those officers, the decisions would probably have been different. And what was said of those cases may with equal, and in some instances with perhaps greater, propriety be said of the cases of *Balfour v. Browder*, 6 Mart. (N. S.) 708; *Emmerling v. Graham*, 14 La. Ann. 389; *Taylor v. Graham*, 15 La. Ann. 418; *City of New Orleans v. Southern Bank*, 31 La. Ann. 566; *Caillouet v. Franklin*, 32 La. Ann. 220; and *Knoop v. Blaffer*, 39 La. Ann. 23, 6 South. 9,—none of which were actions on bonds, and in one or two of which there were no bonds upon which actions could have been brought. In fact, the only case to which our attention is called which appears to be at variance with the doctrine announced in *Brown v. Gunning's Curatrix*, and affirmed in *Brigham v. Bussey*, and in the cases since decided, is that of *Harvey v. Walden*, 23 La. Ann. 162, which had been, in effect, disposed of when the question of prescription was mentioned, without reference to the issues now under consideration; and it was said that even if the other defenses, which had already been held sufficient, had not been so, the plea of prescription (it being an action on a sheriff's bond) would have been good. If, therefore, the issuance of the certificate containing the erroneous recital that Mrs. Baker had not alienated the property in question was a breach of the obligation of the bond which the recorder had given, the suit predicated upon such breach arises *ex contractu*, and is not barred by the prescription applicable to quasi offenses, even though the act constituting the breach, considered by itself, may have been a quasi offense.

It is said that the law does not impose upon the register of conveyances the duty of issuing certificates of nonalienation, and hence that the issuance of an erroneous certificate of that description is not a breach of the obligation of the bond given for the faithful discharge of his duties. The law directly applicable to the subject is to be found in Civ. Code, art. 2257, which reads as follows, to wit: "It shall be the duty of the register of conveyances of the parish of Orleans to keep his office in as central a situation as possible, in a brick house, and to keep his record book open to the inspection of all persons, and to deliver to them certificates of the inscriptions that may have been made, if they require the same." Under this law, it was plainly the duty of the register, when

called on for the certificate, to have included in it the inscription of the act of sale of February 10, 1894, from Mrs. Baker to Otto Walther. Instead of doing so, he certified that there was no such inscription, which was a breach of his duty, and of the obligation of the bond which he had given, agreeably to Rev. St. § 3153, for the faithful performance of the duties imposed upon him by law. The proposition that the applicant must designate the particular inscription of which he wishes a certificate issued is not sustained by the law which has been quoted, as generally understood and as construed with other provisions. Rev. St. § 2528, requires notaries and sheriffs in the parish of Orleans, before passing any act of sale, to demand a certificate from the register of conveyances showing that the vendor has not alienated the property,—said certificate to give a clear description of said property,—and fixes the fee of the register; and the following section imposes a penalty upon any notary or sheriff who neglects to obtain such a certificate before making a sale. It is true that these sections apply in terms only to the making of sales by the officers mentioned, and do not refer to the issuance of certificates for the purposes of acts of mortgage; but they show the common understanding that nonalienation certificates may be demanded of the register of conveyances. And the article of the Code gives to any citizen the right to demand such a certificate for any purpose.

It is further said that the indices are component parts of the records of the conveyance office,—as much so as the books in which the conveyances are registered,—and that, if a particular incumbent of the office fails to enter in the proper index a conveyance duly registered in one of the books, his successor, who is guided by the indices in any research made by him with a view to the issuance of a certificate of nonalienation, should not be held liable when, failing to find such conveyance in any index, he fails to certify its existence. It must be admitted that the situation is not free from difficulty, since, if the register is unable to rely upon the indices which he finds in his office, the only method by which he can assure himself, and those relying on him for the information, that property acquired 50 years ago has not been alienated, is by turning over the leaves of all the conveyance books from the date of the acquisition of the property. The system, such as it is, has, however, been in operation for a great many years, and whilst recorders have in some instances been held liable for failure to report mortgages inscribed against property, because of their nonappearance in the indices, our attention has not been called to any similar case concerning conveyances. And whatever may be the difficulty, the fact remains that the indices form only part of the records of the office, whilst the books themselves form the

other part; and if the register certifies that no conveyance of particular property appears in the records of his office, when in point of fact a conveyance is inscribed in the books, though not entered in the index, he certifies to something that is not true, and he must bear the consequences. In the instant case the certificate issued by the register reads as follows:

"Office of the Register of Conveyances.

State of Louisiana, Parish of Orleans.

"Note. The register of conveyances will not be responsible for the record of any acts of sale inscribed in Book No. 17 of this office; the same having been lost or stolen previous to his taking possession of the office of register of conveyances.

"New Orleans, July 1, 1898.

"The undersigned register of conveyances for the parish of Orleans hereby certifies that, according to the records of his office, it does not appear that the following described property has been alienated by Martine Jones, widow of Jeffrey Baker."

And then follows a description of the property, and a statement of the date of its acquisition, with the book and folio in which the same is registered. If the register had confined himself to saying that, according to the indices of his office, no alienation appeared, the parties to whom the certificate was issued would have governed themselves accordingly. But the certificate, as issued, embraced the books as well as the indices, and, though true as to the latter, was untrue as to the former.

Another point suggested on behalf of the defendant is that there were two acts of mortgage,—the one of July 1st, and the other of August 3d,—and that, as the only certificate obtained was that issued at the date of the first act, the register is not responsible with regard to the second. The evidence shows that the applicant, through his attorney, acted in both transactions on the faith of the same certificate. Of course, in so doing he took the risk of the mortgagor's having alienated the property between July 1st and August 3d; but the register is responsible for the certificate issued, as of its date, whether it was used on that day or later.

The law of the case is therefore with the applicant. Upon the facts a somewhat different condition is presented. But one witness was examined as to the value of the property supposed to have been mortgaged, and it is by no means clear from his testimony that, if sold under the hammer, it would bring the amount which the applicant claims. Further than this, there is included in the record of the suit against Mrs. Baker the alias *fi. fa.* already referred to, from which it appears that the applicant has seized some property which will presumably be appropriated to the

reduction of his claim. Under these circumstances, we find it impossible even to approximate the loss which he has sustained through the fault of the defendant, and, dealing with the case as we are authorized to do by the constitution (that is to say, as if it had been brought here directly by appeal), we feel constrained to dismiss it as in case of nonsuit.

It is therefore ordered, adjudged, and decreed that the judgments herein rendered by the court of appeal and the district court be amended in so far as that the demand of the plaintiff, Charles Gordon, is dismissed as in case of nonsuit, instead of being finally rejected; said plaintiff to pay the costs of the district court, and the defendant John H. Stanley to pay the costs of the appeal and of this application.

BREAUX, J., dissents.

(107 La.)

BUDGE v. MORGAN'S L. & T. R. & S. S. CO. (No. 14,105.)

(Supreme Court of Louisiana. Feb. 17, 1902.)

**INJURY TO SERVANT—LIABILITY OF MASTER—
DEFECTIVE APPLIANCES—CARE REQUIRED—
RAILROADS—INSPECTION OF FOREIGN CARS—
EXPERT EVIDENCE—PERSONAL INJURIES—
DAMAGES.**

1. Masters are not insurers. They are liable to their servants for the consequences, not of danger, but of negligence; and negligence, in cases where the servant is injured by reason of defective appliances, consists of the failure of the master to exercise due care that the appliances furnished for the use of his servants shall be safe when furnished, and shall be maintained in a safe condition.

2. Whatever may be the duty of the master as to the methods to be adopted for ascertaining originally whether the appliances so furnished are suitable and safe, due care requires him, especially in the use of dangerous appliances, or where the service in which they are used is dangerous, either by himself, or by some other, selected for the purpose,—in either case one competent and qualified,—to inspect and look after the condition of such appliances, and see that they are kept in repair.

3. This duty is personal to the master, and must be continuously performed by him, or by those whom he selects to represent him; and he is liable for its neglect, whether by his representatives or by himself, the danger resulting therefrom not being assumed by his servants as incidental to their employment.

4. A railroad company drawing the cars of another company over its road owes a duty to its employes in reference thereto. It is bound to inspect such cars, the same as its own, and is responsible for the consequences of such defects as would have been disclosed by ordinary inspection, as it is its duty either to remedy them or to refuse to take the cars. The employe no more assumes the risks of such defects than of those in the cars belonging to his employer.

5. Men without scientific knowledge and without practical experience in the handling of moving cars and trains, who may be employed as car inspectors, and charged with the duty of seeing that the parts and appliances of the cars are safe and sound and in their proper positions, do not thereby become qualified as experts in the matter of the causes which may

operate to derail a car or to prevent its trucks from working properly.

6. It is a fair presumption that railroad companies have no desire to subject their employes to unnecessary risks, or, upon the other hand, to waste money by incumbering their cars with useless contrivances, but that they endeavor to obtain cars which, being the safest and most serviceable, cost the least money. When, therefore, an inspector, such as those above referred to, undertakes to decide that an apurtenance for which scientific knowledge has provided a particular place will discharge its function as well somewhere else, or that it may be dispensed with, he places himself in antagonism to the position to which his employer, with greater knowledge and greater interest, is already committed.

7. The opinions of car inspectors, not experts in the running of cars, do not prove that it is as safe to operate a freight car with a hanger pin out of its sockets and a nut missing from a bolt which holds a friction plate in position as if those parts were properly adjusted; and, as a matter of fact, it is not as safe, and it is negligence to tolerate a system of inspection which proceeds upon the contrary theory.

8. Verdict and judgment for \$12,500 for the loss of a leg amended by reducing the amount to \$6,000.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

Action by George Budge against the Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for plaintiff, and defendant appeals. Modified.

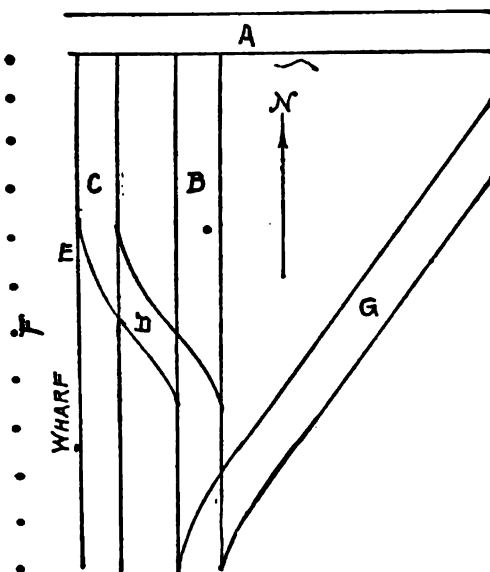
D. Caffery & Son, for appellant. Foster, Milling, Godchaux & Sanders, for appellee.

MONROE, J. Plaintiff sues for damages for personal injuries sustained whilst in the discharge of his duties as brakeman in defendant's employ at Morgan City. The petition alleges that, after he had coupled certain cars to an engine, the train moved, and petitioner, as was his duty, climbed upon the ladder of the first box car that approached him for the purpose of riding to the next switch, "and when his hand had almost reached the topmost round of the ladder the said car jumped off the track, came near turning over on your petitioner, threw him from the ladder to the plank flooring on the track, and caught his right leg in such a way as to crush the ankle and leg below the knee; that the injury was occasioned by a defect in that part of the machinery which allows the body of the car to work upon the axles of the trucks so as to allow the trucks to turn in order that they will take a curve in the track; and, as this part of the machinery was worn, defective, or had become loose, the trucks and wheels were thereby locked, and could not take the curve, thereby causing them to jump the track, which almost overturned the car upon [which] your petitioner was riding, and caused great personal injury to your petitioner, as aforesaid. He shows that this accident was caused without any negligence or contributory negligence on his part, but was due entirely to the negligence of the company in placing upon the track a car which

was not safe for its employes to handle, but, to the contrary thereof, being so defective as to be dangerous for said employes; that said injury would not have happened to petitioner but for the defect in the mechanism of the car, as aforesaid." There are further allegations setting forth the sufferings of the petitioner, the amputation of his leg, the expenses incurred by him, and his impaired earning capacity, and a prayer for judgment in the sum of \$25,313. The defendant denies the existence of the alleged defect in the car, denies that the injury of which petitioner complains was the result of any fault or negligence on its part, and alleges that plaintiff contributed to, if he did not wholly cause, the accident by the negligent and unskillful manner in which he performed his duties as switchman. It further alleges that, if the negligence of any other of its employes contributed to said accident, the defendant is not responsible therefor, either under the general law or under the provisions of its legislative charter, being act No. 37 of 1877; and finally, and in the alternative, that, if the accident was not contributed to by the negligence of the plaintiff, and was not due to the negligence of a fellow servant, it was a risk assumed by the plaintiff as incidental to his employment, for which the defendant is not liable. There was a verdict and judgment for the plaintiff in the sum of \$12,500, from which defendant has appealed.

There are certain facts which are either admitted or established beyond controversy, to wit: The plaintiff was an active man, who, for about four years, had been employed by the defendant as brakeman at Morgan City. The defendant's main track from New Orleans approaches that station from the east. On the south side of this track there are quite a number of other tracks, switches, and sidings that are used for the accommodation of the traffic carried on between the railroad and the steamship lines, and among them there are two parallel tracks, running along the front of the wharf, the one about seven feet in the rear of the other. These tracks are reached by what, in order to distinguish it, may be called the "main switch," which leaves the main track some distance farther back, and they are connected together by means of a switch which extends from one to the other in a short, reverse curve. Using the accompanying rough sketch, for convenience of illustration, A may be supposed to represent the main track, B and C the two parallel tracks, D the connecting switch, E the point at which the accident occurred, F the wharf, and G the main switch.

Upon the morning of May 27, 1900, the plaintiff had coupled to the switch engine several cars standing on the track C, that were to be pulled out, through the switch, D, onto the track B; and when the engine and forward car had passed, at the rate of three or four miles an hour, he ascended the ladder on the second car, which was an empty box



car, in order to go on to the next switch, and had about reached the top of the car, when the rear truck, instead of taking the turn into the switch, mounted the rail, or split the switch, and went off the track, causing the car to jolt and list toward the front of the wharf in such a way that the plaintiff was either thrown off, or, being apprehensive that the car was about to turn over, jumped off, with the result that one of his legs was caught between the derailed truck and the outside rail of the track C, and was so badly crushed that it subsequently became necessary to amputate it below the knee. The track is laid upon the level plank wharf, and is shown to have been in perfect condition; and the engine, the forward car, and the forward truck of the car upon which the plaintiff was riding had passed in safety over the point at which the rear truck was derailed. There were present at the moment of the accident, besides the plaintiff, Joret, the yard master, and Blancon, a switchman; and Joret shortly afterwards replaced the car on the track. Being asked who assisted him, he answered: "Blancon was the only one. There might have been others around there, but I did not notice them." Blancon, on the other hand, testifies that the car was put back by "Mr. Joret, young Shinn, and some of the other boys"; and young Shinn testifies that the car had already been put back on the track when he first saw it. No one who admits having participated in replacing the car on the track, except the yard master, has testified in the case. It is not disputed that it was the duty of the yard master to see that the property belonging to the defendant and the rolling stock in the yard at Morgan City were in good order. Being called to the stand on behalf of the defendant, this witness, early in his direct examination, was asked what means he used in replacing the derailed car on

the track, to which he replied, "I just jacked it up a little and used the frog." Later on his attention was called to the question of the alleged immobility of the rear truck, resulting from the locking of the friction plates, which the plaintiff asserts was the cause of the accident, and he was asked whether he could have replaced the car on the track with the friction plates locked in such a manner as to immobilize the trucks, to which he replied, "No, sir; it would be a matter of impossibility to replace the car back on the track with the plates locked, unless you would put a jackscrew under it, and jack it up first." He was then asked, "Did you use a jackscrew in putting that car back on the track?" to which he answered: "No, sir; I never thought of a jack screw at the time. Q. What did you use to put it back on the track? A. I just used an iron bar, like the company furnishes for that purpose." Still later he was again asked, "How did you get this car back on the track?" and he replied, "I just run the frog there and pulled it back with the engine." He was asked, "Did you examine the trucks of the car before you put it back on the track?" He replied, "No, sir; the only thing that I done was to put it back on the track." Being asked at another time, "Mr. Joret, after Budge was hurt, did you look at the car from which he fell or jumped?" he replied: "No, sir; I looked at it after it was put back on the track. Q. State whether or not the hanger pin was out of the socket before it was put back on the track. A. That I don't know." Being asked as to any subsequent examination, he testifies that he made no thorough examination of the car. Referring to a statement made by him that the hanger pin was out of its socket, he was asked, "Now, Mr. Joret, did you find any other cause for the jumping of the track, other than the defect you saw in this car?" to which he answered, "No, sir." In his report to the company, of even date with the accident, the witness says, "Accident was caused by rear truck of car splitting switch and taking wrong track, thus twisting car, and causing it to lean over badly." Blancon assisted in taking the injured plaintiff home, and then returned to the scene of the accident before the car was replaced on the track. He was asked by counsel for defendant, "Well, sir, did you, at the time that the car was off the track, look around at the trucks?" and he answered, "No, sir." He was recalled, late in the trial, and asked by the same counsel, "Now, can you state whether or not the hanger pin was out of that car before it was jerked back on the track?" and he answered, "I don't know." And yet at other times he says that he looked around the car "right after the accident," and that the hanger pin was then out of its socket, and that there was a nut missing from a bolt in the upper friction plate, but that the plates were in position, and that there was nothing otherwise the matter with the truck; that the truck was replaced on the

track by Joret, Shinn, and some of the other boys "with a rope," and that they had very little trouble, and had to use but little force. This witness appears subsequently, and after the car had been replaced on the track, to have made an examination in company with Chotin and Fields, though he testifies that he does not remember that Fields was present. Callan, the road master, was at breakfast when the accident occurred, but went down a few minutes later, and looked at the car before it was replaced on the track. He testifies that he did not go under the car, as it was not necessary, but that he inspected it, and found nothing wrong, no defects whatever. Being asked, "Did you examine the hanger pin thoroughly?" he replied: "Yes, sir; I saw the car and looked at it. I saw nothing wrong with it at all." Being asked, "Then, if a car was to jump the track, and you go there and examine the car and find a defect, you would conclude that the jumping of the track was what caused the defect?" he replied: "Yes, sir. Q. Come to that conclusion at once? A. Yes, sir. Q. You would not attribute the jumping of the track to any defect in the car? A. No, sir; that would be very hard to say." Paul Chotin, who has been about 30 years in the defendant's employ as switchman and brakeman, testifies that about two hours after the accident he, Blanton, and Fields,—the latter being a conductor in the defendant's service,—in the presence of the yard crew, examined the car, in order to find the cause of the derailment, and that he found that the hanger pin was displaced; that one bolt, or possibly a nut from one bolt (the witnesses sometimes speaking of the one and sometimes of the other), was gone from the upper friction plate; that the nut on the other bolt was loose, and that the plate "was hanging by one bolt"; that the upper and lower plates were locked, so that the truck could not steer in taking the curve into the switch; and hence the accident. There is no doubt that Fields, as well as Chotin, at that time reached the conclusion, and so expressed himself, that the defects which they observed had so immobilized the truck as to prevent it from taking the curve into the switch, and that the derailment was the result. And Fields, being examined as a witness, admits that he made a statement to that effect long afterwards, and testifies that, the hanger pin being out, the truck would not steer so as to take the curve, and that he had stated that he would not take a car in that condition out from a "terminal." Upon the other hand, he also testifies that the displacement of the hanger pin was the only defect that he noticed; and, being asked, "Would or would you not consider a car with the hanger pin out in a fit condition to run and for the employés to work on?" he answers, "I could not say that I would consider it unsafe." It may be remarked, in this connection, that just before or pending the trial the witness, together with some of the officers of the road

and some of the car inspectors, who had been summoned on behalf of the defendant as experts, had re-examined the car in question (10 months after the accident), and the witness appears to have been convinced, in the course of a discussion on the subject, that the displacement of the hanger pin could not have caused the derailment. Maitland is a bridge foreman and track repairer, who, the morning after the accident, replaced the hanger pin, under instructions from the yard master. It does not appear that he examined the car until after the yard master and his assistants had put it back on the track, and he then found no other defect than the displacement of the hanger pin. Upon that subject he was asked, "Does the railroad company generally run cars with the hanger pins out of place?" to which he replied: "Most decidedly not. When we see them out of place, we put them in on the first occasion."

A number of witnesses, so-called experts, were examined on behalf of the defendant for the purpose of showing that the displacement of the hanger pin is a matter of no consequence; that it is impossible for the friction plates to become locked so long as the truck remains on the track; and that the defects in the truck in this particular case were probably the results, rather than the cause, of the derailment. In order to appreciate these theories, and the testimony adduced in their support, it is necessary that one should know something of the construction of the truck and its relation to the car,—a species of information which is not readily imparted in words. We shall endeavor, however, to be as intelligible as the conditions will permit. There are different kinds of trucks, but the truck in question consists of two pairs of wheels, each pair being connected by an iron axle, to which the wheels are immovably attached. The ends of the axles project through the wheels into an iron frame which extends upon the outside from a wheel of the one pair to a wheel upon the same side of the other pair, and is connected between the two pairs from one side of the track to the other, the whole forming a figure something like the letter "H," with a pair of wheels, upon an axle, between each of the open ends. That part of the frame which extends across and holds the sides together consists of two pieces of iron called "transoms" (or sometimes called "channel bars"), probably 10 or 12 inches broad, set up edgewise at a distance of, perhaps, a foot apart, which, being parallel to each other, form what may be called a bottomless channel or trough, extending from one track to the other between the front pair of wheels and the pair in the rear, the upper edges of the transoms being higher than the axles; so that, in the absence of other device, the body of the car would rest upon the transoms, but, as the entire frame is practically in one piece, and rigid, it is obvious that such an arrangement would produce the same effect as though the

body of the car rested upon the axles themselves. To obviate this, and to provide ease of motion for both the body of the car and the trucks, there is in this trough a "bolster," consisting of a plank, upon either end of which rests a spiral spring with a piece of timber on top of them, the whole being suspended in the trough by means of two slings, each of which consists of two iron straps and two iron pins, called "hanger pins," the top pin running through the upper ends of the straps, and ordinarily resting in raised sockets on the edges of the transoms, and the bottom pins running through the lower ends of the straps and affording the necessary support for the bolster. There may be some other supports for the bolster across the bottom of the channel or trough, but the main supports are the upper hanger pins. The bolster, as thus suspended, rises above the upper edges of the transoms, is perforated through the middle by the kingbolt of the car, and has upon the upper surface, towards either end, a "friction plate," which corresponds with a similar, but longer, plate attached to the under surface of the bottom of the car, the two together constituting the "side bearings," and serving practically as segments of a fifth wheel, whereby the body of the car is allowed a certain play, and yet is prevented from listing in such a way as to jam the "center bearing," or throw too much lateral strain on the kingbolt. The lower plate is a piece of iron about 4 inches square and 2 or 3 inches thick, whilst the upper plate is from 15 to 17 inches long, about 3 inches thick, and, probably (though there is no direct testimony on that subject) about as wide as the lower plate. This upper plate, as originally put on, is fastened to the car by two bolts, one at each end, coming through the bottom of the car and through the plate, with nuts on their lower ends, and "lips" or "lugs" on each side, to keep the plate from being twisted around. It is undisputed that one of the upper hanger pins on the truck in question was found, immediately after the accident, resting upon the transoms, two inches or more outside of its sockets, and that the car had thereby acquired a list of, perhaps, a couple of inches. It is also undisputed that the nut was missing from one of the bolts intended to hold the upper friction plate in position, and we are inclined to think from the testimony that the bolt itself may have been missing, whilst Chotn, as we have seen, testifies that the nut on the other bolt was loose, and that the plate was "hanging by one bolt."

Returning, now, to the experts, it appears from their testimony that, as a rule, they have had no experience whatever in running trains, or in handling moving cars. One has been a carpenter, another has played baseball, others have been car repairers, etc. And from these different avocations they have been assigned to duty as car inspectors, and as car inspectors have undertaken to testify

as experts concerning the possible danger of derailment and otherwise to moving cars, resulting from different conditions, hypothetically stated. It would be unprofitable to recapitulate the testimony of these witnesses at length, or to spend much time in criticising it. They testified, generally, that the truck, whilst on a straight track, cannot turn far enough to allow the friction plates to become locked by getting the one behind the other, and that the listing of the car, resulting from the displacement of the hanger pin, cannot effect such a result, and does not endanger the safety of the car. As to the first of these propositions, it may be said that the car in question was not on a straight track, but that the rear truck was derailed when the forward truck had been carried into the switch around a sharp curve, and because it (the rear truck), failing to follow, split the switch, and kept on the main track, so that, as the yard master reported, the car was twisted, and was made to lean over badly. The truck might, therefore, very well have reached the angle, as compared with the body of the car, which the witnesses think was necessary to the locking of the plates. Aside from this, as the hanger pin is two inches in diameter, and was two inches or more upon the outside of its sockets, the bolster must have been carried four inches or more out of its proper position, and, as the lower friction plate is bolted to the bolster, it may have happened, if the kingbolt had been bent or broken by reason of the undue weight thrown upon it by the listing of the car, that the lower plate was taken more than its width from under the upper plate, and that the two plates locked sidewise.

As to the other proposition, the witnesses seem to us to have gone very far in their effort to establish it. Taking them together, they testify that it is perfectly safe to run a car "as long as the truck transoms are all right,"—that is to say, with the bolster out; which is equivalent to saying that a car can be run safely upon trucks which are as rigidly attached to its body as 10 or 15 tons of dead weight can attach them,—and yet we do not understand it to be seriously denied that if a truck becomes locked, and rigid, it is thereby rendered incapable of accommodating itself to curves, and will go off the track, either by splitting a switch or by mounting a rail. They testify that a car is no more liable to be derailed by being listed than if evenly balanced. The evidence shows that the car in question was taken to Morgan City the day before the accident, weighing 52,000 pounds, of which one-half, or about 12 tons, was freight. If it was listed to one side, a greater proportion of this weight than was contemplated in the building of the car was thrown laterally on the kingbolt, which is about two feet long and about two inches in diameter; and to that weight was added the force resulting from the movement of the car where the track was uneven or where it curv-

ed. It seems to us that, starting in such a condition, the bending or breaking of the kingbolt would only be a matter of time. One witness says that it might be safe to run such a car at the rate of 20 miles an hour, but possibly not safe at the rate of 25 miles; another that it would be safe to go a short distance, say 100 or 200 miles; another, that he would be willing to risk it for thousands of miles; another tells us that a car will not be derailed with all the hanger pins and the kingbolt out; another, who states that he never heard of the "fifth wheel" of a buggy, testifies that if a car came in "without any nuts or bolts," or with the hanger pin out of its sockets, he would have it repaired "if they had time," otherwise he would let it go on; that in inspecting cars he pays particular attention "to the wheels, the top axle, and the arch bars," and, in answer to a question as to the hanger pins, answers, "Yes, sir, to the top hanger pin," and yet the bolster will drop out as certainly in the absence of the bottom pin as of the top one. Another inspector says that if a car came in with the hanger pin out he would have it repaired if it contained "perishable freight." We do not, however, understand him to refer to human beings. Without going any farther, it is sufficient to say that, whilst these witnesses have, perhaps, testified according to their lights, there seems to us to be no reason why they should be heard as experts with respect to the matters concerning which they were interrogated, and we are not otherwise impressed with their views. A man may spend his life in hammering rivets in iron bridges, or in inspecting them, without becoming an expert in the matter of the strain imposed upon a bridge by the marching of a body of troops, or by a hurricane blowing at the rate of 80 miles an hour; and so a man may spend his life doing the work of a cabinet maker, in a car shop, or in inspecting cars to see whether the different parts are sound and in their proper positions, without finding out how much lateral pressure is thrown on the kingbolt of a freight car carrying 12 tons of freight, when the car, listed two inches, and in running at the rate of 25 miles an hour, strikes a block of wood or a stone on the track, or runs into a curve, or, the track being uneven, rocks from side to side. These remarks do not apply to the engineer of the road, nor, perhaps, to one or two others, whose practical experience may, in some degree, have qualified them to testify as they did; but the hypothetical testimony of these witnesses cannot control the facts of the case. No witness except Callan, the road master, and Blancon, the switchman, pretends to have examined the car in question whilst it was off the track, and Callan swears that the derailed truck was then all right, including the hanger pin; which we know was not all right. Blancon, though at one time stating that he made an examination right after the accident, at other times specifically and cate-

gorically swears that he did not examine the car until after it had been put back on the track. No one who assisted in replacing the car on the track, except the yard master, has testified in the case; and the yard master, whose duty it is to see that the cars in the yard at Morgan City are in good order, and who was by the side of the car in question when it was derailed, tells us that he replaced it on the track without looking at the derailed truck (though he saw, in some way, that the hanger pin was out of its sockets), and that he never thereafter made a thorough examination of the car. He also tells us, in the beginning of his testimony, that he used a jackscrew in the replacement of the derailed car; but later on, in connection with the statement that, if the truck had been locked he would not have been able to replace it without the use of a jackscrew, he denies that he used a jackscrew, and says that he used only an iron bar; and later still he says that he used some other appliance. He also tells us that Blancon alone assisted him in replacing the car, though there were some others around, whom he did not particularly notice; but Blancon testifies that Shinn and the train crew rendered the assistance, whilst Shinn swears that he did not see the car until after it was replaced, and the train crew have not been heard from. We are therefore absolutely without reliable information from any one who is willing to admit that he examined it as to the condition of the car between the time that it was derailed and the time that it was found replaced on the track. And this seems to us to require explanation. Here was a little train, consisting of an engine and four cars, in charge of Joret, the yard master, two brakemen, Budge and Blancon, and, presumably, an engineer and a fireman. A truck was derailed, and Budge was crippled for life. Joret, the yard master, knew that it was his duty to replace the derailed car on the track, and to find out, and to report to the company, the cause of the derailment. The witnesses all say that there was nothing the matter with the track. It seems to us, under these circumstances, that in the discharge of his duty Joret would naturally have examined the car before replacing it on the track, for the double purpose of ascertaining the cause of the accident and of finding out whether there was any defect in the car which would prevent its being replaced. It seems to us also that Blancon, and the yard crew, and the engineer and the fireman would naturally, as a matter of interest or curiosity, have examined the car before putting it again on the track, from which it had just apparently derailed itself without cause, in order to solve the mystery, and protect themselves and the company from another, and perhaps even more disastrous, derailment. But Blancon specifically denies that he examined it until after it had been replaced, although he was on the spot; and neither the engineer, the fireman, nor the yard crew were ex-

amined. Taking it all together, it looks somewhat as though Joret and Blancon were afraid that, if they examined the car at once, they might acquire some information that they did not care to possess, and we are left to conjecture as to whether such information was not acquired by the engineer, the fireman, and the yard crew. Joret was, however, obliged to make his report, and he therein states that the rear truck split the switch; and, as he testifies that the track was in good order, and it appears that the several trucks which had immediately preceded that which was derailed had not split the switch, it would seem to follow that the derailed truck must have differed in some way from the others, and it seems to us not unlikely that the difference which caused one truck to split the switch when the others did not was that the one was for some reason immobile, and held on to the straight track, whilst the others took the curve, and it may be that this immobility was so far cured in replacing the truck on the track as to make it comparatively safe for those who were afraid of acquiring too much information thereafter to inspect it, though not thoroughly, as we understand the yard master to say that he never did inspect it thoroughly. Chotin, Fields, and Blancon, however, gave the car a pretty careful inspection soon after it was replaced on the track. Chotin had been engaged in handling moving cars, as a brakeman and switchman, for about 30 years; Fields had been a brakeman and conductor for about 11 years, and Blancon is a switchman. These witnesses, we think, might fairly lay claim to expert knowledge in the matter of the causes that would be likely to derail a car, and they were about as well qualified to judge, upon looking at the particular car in question, which had just been derailed and rerailed, of the cause of the derailment, as any one else would be likely to be. Chotin and Fields were of the opinion that the cause was the immobility of the truck, and, though Blancon is not shown to have committed himself, it does not appear that he at that time put in any protest against the conclusion reached by the others. When Fields was examined as a witness for the plaintiff, he was asked, "State whether or not, the hanger pin being out of place, the trucks would slew so as to take the curve," and he answered, "No, sir; not in my judgment." He was asked, "If the saddle bolster that you call the 'ink,' marked 'B,' if that is lowered down, or drops down, is it not a fact that the trucks become rigid, so that they would not take the curve?" and he answered, "Yes, sir; if they drop down that far, the trucks would become rigid, and the car would not take a curve." He was asked, "Well, the track being in order, and the truck leaving the track, the natural conclusion is that the accident was caused by some defect in the truck?" and he replied, "Well, if the track was in order, the cause must have been in

the truck." Later in the trial he was examined as a witness for the defendant, after having discussed the question at issue with the car inspectors, who were examined as experts, and with some of the officers of the road, and he seems, to some extent, to have gone over to their way of thinking. In our opinion, the testimony given by him on his first examination was the more intelligent, and, after considering the circumstances and probabilities of the case, in connection with all the testimony, our conclusion is that the derailment of the car was caused by the displacement of the hanger pin and the loosening of the upper friction plate, resulting in the locking of the truck to such an extent as to prevent its taking the curve into the switch; and this is what the plaintiff has alleged.

It is not enough, however, for the employé to show that he has been injured by reason of a defect in the appliance with which he has been furnished by the master, since the liability of the master in such a case arises, not from the fact of the injury, nor from the defect in the appliance, but from some omission of duty on his part in the matter of the selection of the appliance or of its maintenance. From the general jurisprudence on this subject, we are of opinion that the rules applicable to the facts in this case that are best sustained by reason and authority may be stated as follows:

Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but, of negligence; and negligence, in such cases as the one now under consideration, consists of the failure of the employer to exercise due care that appliances furnished for the use of its employes shall be safe when furnished, and shall be maintained in a safe condition. Whatever may be the duty of the master as to the methods to be adopted for ascertaining whether the appliances so furnished are suitable and safe, due care requires him, especially in the use of dangerous appliances, or where the service in which they are used is dangerous, either by himself or by some other selected for that purpose,—in either case, one competent and qualified,—to inspect and look after the condition of such appliances, and see that they are kept in repair. This duty is personal to the master, and must be continuously performed by him, or by those whom he selects to represent him; and he is liable for its neglect, whether by his representatives or by himself, the danger resulting therefrom not being assumed by his employes as incidental to their employment. In the matter of foreign cars, we approve the rule as thus stated by the court of appeals of New York, to wit: "A railroad company drawing the cars of another company over its road owes a duty to its employes in reference thereto. It is bound to inspect such cars, the same as its own, and is responsible for the consequences of such defects as would

have been disclosed by ordinary inspection, as it is its duty either to remedy them or to refuse to take the cars. The employé no more assumes the risks of such defects than of those in cars belonging to his employer." *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344. See, also, as sustaining, generally, the propositions above stated: *Bailey, Mast*, Liab. 14, 24, 95, 101, 106; *Thomas, Negl. Rules, Decisions, Opinions*, 743-749, 752-754, 756; *Black, Law & Prac. Acc. Cas.* 73, 74; *Whart. Negl.* 210, 212; *Railroad Co. v. Herbert*, 116 U. S. 652, 6 Sup. Ct. 590, 29 L. Ed. 755; *Dewey v. Railroad Co.*, 97 Mich. 329, 52 N. W. 942, 56 N. W. 756, 16 L. R. A. 342, 22 L. R. A. 292, 37 Am. St. Rep. 348; *Cowan v. Railroad Co.*, 80 Wis. 284, 50 N. W. 180; *Morton v. Railroad Co.*, 81 Mich. 423, 46 N. W. 111; *Railroad Co. v. Phillips*, 49 Ill. 237; *Bomar v. Railroad Co.*, 42 La. Ann. 983, 8 South. 478; *Ferris v. Hershshelm*, 51 La. Ann. 178, 24 South. 771; *Faren v. Sellers*, 39 La. Ann. 1011, 3 South. 363, 4 Am. St. Rep. 256; *Meyers v. Railroad Co.*, 49 La. Ann. 21, 21 South. 120; *Towns v. Railroad Co.*, 37 La. Ann. 630, 55 Am. Rep. 508; *Van Amburg v. Railroad Co.*, 37 La. Ann. 650, 55 Am. Rep. 517; *Anderson v. Elder*, 105 La. 672, 30 South. 120.

The charge that the plaintiff was guilty of contributory negligence is disproved, and we dismiss it from further consideration.

The question which remains to be determined is, has the negligence of the defendant, upon the basis of which the plaintiff must recover if he is entitled to recover at all, been established? And, as a preliminary to the decision of this question, it ought to be determined whether the circumstances of the accident itself make out a prima facie case of negligence, such as to require an explanation from the defendant; or whether, in the absence of explanation, further affirmative proof should be required from the plaintiff. "The fact of the happening of the accident has no tendency to prove negligence, for the very good reason, if no other, that the negligence, or the facts from which it is to be inferred, must be affirmatively proved." *Bailey, Mast*, Liab. 508. There are, however, many cases from the facts or circumstances of which negligence may be inferred. Thus, without going into unnecessary detail for the purposes of illustration, it has been held by the supreme court of the United States that: "When a steamboat, on a calm day, in smooth water, is thrown with such violence against a wharf, properly built, as to tear up some of the planks of the flooring, this, if unexplained, is prima facie evidence of negligence on the part of her agents in making the landing." *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. And so, if it appeared that a trestle on a railroad had given way under a train, and that the timbers of which it was built were obviously rotten, a presumption of negligence in the matter of inspection and maintenance

would arise. In the instant case we are not disposed to hold that any presumption of negligence arises from the mere fact that the car in question reached Morgan City with the hanger pin out of its sockets and one nut gone and the other loose on the bolts of the upper friction plate, since that condition might have resulted from the movement of the car during the trip, of a few hours, from New Orleans. A somewhat more doubtful question presents itself in the matter of the failure of the yard master to inspect the car upon its arrival, it appearing from the evidence that it reached Morgan City at about midday on May 26th, and that it had not been inspected up to the time of the accident, say 7 o'clock on the following morning; and it further appearing from the evidence that the regulations of the defendant require that cars shall be inspected upon arrival and departure. We are inclined to think that a regulation of this kind presupposes a necessity for it. And if the company considers it necessary and proper that a car should be inspected upon its arrival in, as well as upon its departure from, a yard, we find no reason for adopting a different view, the more especially as, in this case, we believe that a compliance with the regulation would have saved the plaintiff his leg. Our investigation and study of the case has, however, led us to doubt whether the car was inspected before leaving New Orleans, and has convinced us that, if inspected, the inspection was insufficient. The evidence shows that it was inspected by the defendant's chief car inspector, at New Orleans, upon May 17th, and that he found that it then needed a "brake head, shoe, bolt, and key," which, he says, were supplied, after which the car was sent out west. The witness also, and among other things, says, in substance, that if a nut is off of one of the bolts that hold the upper friction plate, and the hanger pin is out of its sockets, resting on the transoms, it can have no effect whatever on the running of the car or the locking of the wheels; that, if the hanger pin is entirely gone, the bolster will not drop far enough to cause the truck to lock, so long as it remains on the track; that, as a matter of fact, at the time of his inspection, May 17th, the hanger pin was in its place, but that there was a nut missing from one of the friction plate bolts, and, as we understand him, he paid no attention to the missing nut, and would, in all probability, have paid no attention to the hanger pin had it been out of its sockets. It may be remarked, in connection with this testimony, that although upon the occasion of the inspection to which he refers he had received the car from the Louisville & Nashville road, and although he found that it then needed a "brake head, shoe, bolt, and key," the inspector of the Louisville & Nashville road, who delivered it to him upon May 15th, testifying as a witness for defendant, says that when he delivered the car it "was in good

order, the best kind of order," which would seem to indicate that even the inspectors have different standards of excellence in such matters. It may not be amiss also to say that the witness last mentioned testifies that he inspected 150 other cars upon the same day that he inspected the car in question, and that he is able to state positively that no bolts or nuts were missing on that particular car, and that nothing was wrong about it, because he kept a record of the defects, and the defects only, in the cars inspected by him, and that he had no such record of C. P. car No. 25,021. This witness also testifies that, if the hanger pin is gone, the bolster will drop down to the track. Another car inspector, in the employ of the defendant at New Orleans, testifies that he inspected C. P. car No. 25,021 a number of times, both before and after the accident, and is particularly specific as to his inspection upon May 26, 1900,—the day before the accident,—when the car left New Orleans for Morgan City. It turned out, however, that he had no recollection whatever of the car or of the inspection of which he testified, and that he gave his testimony from a type-written paper, which purported to have been prepared by some one else, as showing the contents of records kept by him or his subordinates in New Orleans; and, being asked finally, "On the 26th of May, who examined this car, you or your men?" he replied, "I could not say." If, therefore, the car was inspected before it left New Orleans, on May 26th, it is not so stated by any witness who had personal knowledge of the fact. Upon the other hand, it is not shown that it was not inspected, and as the negligence for which the defendant is liable, if liable at all, must have consisted either of a failure to inspect, an inefficient inspection, or a failure to make repairs called for by the inspection as made, it is contended that the failure of the defendant to discharge its duty in one or the other of these respects must be shown by the plaintiff by affirmative evidence, as a condition precedent to his recovery. We find it unnecessary to decide the question thus presented, and will only remark here that, whilst it is no doubt true that the negligence of the master in employing or retaining an incompetent servant, through whose fault a fellow servant is injured, must be brought home to the master by affirmative testimony, it is not improbable that a distinction might be drawn where the negligence relates to inanimate and unintelligent agencies, and that in the latter case, where it is shown that the agencies are defective, it might not be unreasonable to hold that the master should show that he used due care in their selection and in their subsequent inspection and maintenance. In this case, however, the defendant undertook of its own accord to show that the car in question had been inspected, and in the effort to do so, which, as we have seen, was unsuccessful

developed, as we think, the information that the inspection, if made at all, was made by persons who do not properly appreciate the responsibility resting upon them, and do not properly discharge the work for which they are employed. The defendant's inspectors, as well as the others who have been called as experts, agree substantially in testifying that the fact that a hanger pin upon a car, loaded or unloaded, is two inches or more out of its sockets and is resting on the transoms, that the car is listed to one side from one to three inches, and that a nut is missing from an upper friction plate on the same side, is a matter of little or no consequence; and that, unless they had plenty of time, and the car was starting out from a "terminal," or, as one of them states, unless it was loaded with "perishable freight," they would not have the hanger pin replaced in its sockets; and, if we are to judge from the admitted fact in this case, they would not have the missing nut supplied under any circumstances. We take it, however, that the railroad companies have no desire to subject their employes to unnecessary risks, or, upon the other hand, to waste money by incumbering their cars with useless contrivances, which would add nothing either to their safety or their carrying capacity. We assume, not only because thousands of human lives are at stake, but also because of the enormous material interests which are involved, that the best talent is employed to design and construct cars, which, being the safest and most serviceable, shall cost the least money. If, therefore, a freight car would run as safely and as well with the hanger pins, by which the bolsters are suspended, resting upon the transoms, instead of in their sockets, there would be no money spent on sockets; and, if it would be useless and unnecessary to secure by means of nuts the bolts by which the friction plates are held in position, the money expended for nuts and the labor expended in cutting threads for the bolts and screwing the nuts on would be used in the payment of dividends, or for some other purposes. And hence, when an unscientific man,—a laborer,—employed to inspect a car, and to see that everything belonging to it is in its proper position, and is sound and safe, undertakes to decide that an appurtenance for which scientific knowledge has provided a particular place will discharge its function as well somewhere else, or that it may be dispensed with altogether, he places himself in antagonism to the position to which his employer, with greater knowledge and greater interest, is already committed. Applying these general principles to the facts of the instant case, whilst we can understand that a freight car with a hanger pin out of its sockets, and listed on one side, and with a nut missing from a friction plate bolt, may be hauled from one place to another without immediate disaster, we are satisfied that such a car would be in a safer condition with the

hanger pin in its sockets and the nut on the bolt. And we are equally satisfied that the inspectors themselves are aware of that fact, and that their theory is, not that there is no additional risk, but that the additional risk, resulting from a misplaced hanger pin or a missing nut or bolt, is one to which a train crew may be subjected. Nevertheless, one of them has testified that if a car in such a condition were loaded with "perishable freight" he would have it repaired, because another company might not receive it; from which we deduce that, however small the additional risk may be, it is not one to which fruit and vegetables should be subjected, though, in the opinion of the inspectors, the human beings composing the train crew are not entitled to the same consideration.

Our conclusion, then, upon the whole case, is that it was the duty of the defendant to have had the car in question inspected in New Orleans; that that duty, if discharged at all, was not efficiently discharged; that the condition of the car when it reached Morgan City was defective; that the defects were attributable to the defendant's failure to make proper inspection and repairs in New Orleans; and that those defects caused the accident which resulted in the injuries of which the plaintiff complains.

The amount allowed by the jury is in excess of what has been allowed by this court in similar cases. *Stucke v. Railroad Co.*, 50 La. Ann. 172, 23 South. 342; *Conway v. Railroad Co.*, 51 La. Ann. 146, 24 South. 780; *Bell v. Lumber Co. (La.)* 31 South. 994. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount thereof to \$6,000, and, as amended, affirmed; the plaintiff to pay the costs of the appeal and the defendant those of the district court.

On Application for Rehearing.

(June 28, 1902.)

In their application for rehearing counsel for defendant attempt to place the court in the attitude of having accepted as proven by the testimony of Chotin that the side bearings were locked when he examined the car after it had been replaced on the tracks, and they say: "Apart from direct contradiction by Joret, Blancon, Maitland, Fields, and Callan, Chotin's statement is branded as absurd and false by the admitted impossibility of the car's standing on the rails on a straight track, where he pretends he saw it, with the side bearings locked by the top plate swinging down against the lower one. * * * How the court could have failed to realize that, beyond the question of the condition of the car when derailed, there was still the question of its condition after being put on the track, is surprising enough, but that the court should have paid no attention to this physical rebuttal of Chotin is astounding." There is nothing in the opinion to sustain this attempt,

or to occasion the astonishment thus expressed. It is true that, referring in general terms to the testimony given by the different witnesses, the opinion mentions the fact that Chotin testified that the plates were locked when he examined the car; but that particular statement was not made the basis of the judgment, nor is it so intimated. And possibly an injustice was done to the witness in not giving his testimony more fully, since it appears doubtful whether he intended to convey the idea that the plates were locked when he examined the car, or merely that, from the condition as he then found it, he concluded that they had become locked when the car entered the curve. Thus the following was elicited on his cross-examination: "Q. And you found these plates locked? A. Yes, sir. Q. And one of the bolts missing out of that top plate? A. One of the nuts was off and the other was loose. Q. Did you examine the lower plate? A. Yes, sir. That was resting on the side bearings. Q. Now, how would that interfere? A. Well, the top plate was bearing on the side rests. Q. Well, how would that affect it? A. It would allow it to steer one way, but not the other. Q. Now, I will place these two books one on top of the other. We will call the top book the top plate, and the lower book the lower plate. Now, this top plate had a bolt, as you say, of only one inch. Can you explain how that would effect the curving of the car? In what way would it cause those two plates to lock? A. (Witness here explains to the jury): The bolt was loose on one side of the top friction plate, and on the other side it was gone; and, the hanger pin being out, the car was lower, and listed to one side. That would cause one of the plates to work to one side, and be higher than the other, and in going into a curve it would be locked, and could not come back to its place, and that would keep the trucks from steering, and they would go straight on." The facts to which he testified, therefore, were, that one of the bolts in the upper plate was missing, and the other loose; that the hanger pin was out of position; that the car was listed to one side; and that the "top plate was bearing on the side rests,"—from which he appears to have deduced, rather as an opinion than a fact, that the plates had become locked when the car entered the curve. And Fields, who examined the car at the same time, and corroborates Chotin as to the misplacement of the hanger pin, reached the same conclusion as to the effect of that condition, as may be seen from the following questions and answers in his examination as a witness for the plaintiff: "Q. State whether or not, the hanger pin being out of place, the trucks would slew so as to take a curve? A. No, sir; not in my judgment. * * * Q. When the hanger pin works out of its socket, and the car drops down, is it not a fact that that would cause the trucks to become rigid? A. Yes, sir." This being the case, and the wit-

ness Chotin being a plain working man, with a limited vocabulary, it is hardly justifiable, upon a doubtful interpretation of his meaning, to make the charge that his statement "is branded as absurd and false," and it is not a legitimate method of arguing for the counsel to profess to be astonished that this court should have accepted that statement, so interpreted, as full proof, when in point of fact it was not, and the opinion handed down affords no reason for supposing that it had been, so accepted.

The counsel say in their brief: "It is a misstatement of the facts to say that the car reached Morgan City in a defective condition. With absolutely no basis for such a statement, why depend on the record at all, if essential facts are to be bodily supplied ex cathedra? We say that the court has supplied this fact without any intention of suggesting that the court would knowingly make a misstatement, for we know that the court would do nothing of the kind," etc. The expression in the opinion to which this charge is directed reads as follows: "Our conclusion, then, upon the whole case, is that it was the duty of the defendant to have had the car in question inspected in New Orleans; that that duty, if discharged at all, was not efficiently discharged; that the condition of the car when it reached Morgan City was defective; that the defect was attributable to the defendant's neglect to make proper inspection and repairs in New Orleans." This conclusion was reached and expressed after as careful a consideration and review as we were able to give and to make of all the undisputed facts and of all the testimony in the case. It was a conclusion of fact predicated upon the facts, which we believed to have been established, that the car, if inspected at all, was not efficiently inspected, in New Orleans; that, nothing having happened to it which could account for its defects, so far as shown or suggested, during the interval which elapsed between its arrival at Morgan City and the moment of the accident the rear truck ran off a track, which was in perfect order and free from obstructions, and over which other cars in the same, slowly-moving train and the forward truck of the particular car in question had passed in safety; and that immediately thereafter defects were discovered in the truck, which, in our opinion, were sufficient, in the absence of suggestion of any other known cause, to account for the derailment. And this, we take it, was the opinion of the jury, which gave a verdict for the plaintiff in the sum of \$12,500, and of the judge before whom the case was tried, and who made that verdict the judgment of the court.

The counsel say: "To eke out Chotin's story that after the accident the side bearings were locked, the court presumes that they were locked before the accident, and it reaches this conclusion by supposing that the king pin was bent on the trip to Morgan City in

consequence of the hanger pin being out; and that the hanger pin was out before the accident is likewise presumed." The charge that the court indulged in any presumptions in order to "eke out Chotin's story" has no foundation in fact, and the assertion that the court reached the conclusion that the plates were locked before the accident by supposing that the king pin was bent on the trip to Morgan City is equally unwarranted. As may be seen by reference to the opinion, it was said, referring to the testimony of certain witnesses for the defendant who undertook to testify as experts: "They testified generally that the truck, while on a straight track, cannot turn far enough to allow the friction plates to become locked by getting the one behind the other, and that the listing of the car, resulting from the displacement of the hanger pin, cannot effect such a result, and does not endanger the safety of the car. As to the first of these propositions, it may be said that the car was not on a straight track, but that the rear truck was derailed when the forward truck had been carried into the switch, around a sharp curve, and because the rear truck, failing to follow, split the switch and kept on the main track, so that, as the yard master reported, the car was twisted, and made to lean over badly. The truck might, therefore, very well have reached the angle, as compared with the body of the car, which the witnesses think was necessary to the locking of the plates." And the theory is then propounded that the plates might have become locked sidewise by reason of the listing of the car and the bending of the kingbolt. It may be conceded that this latter theory is improbable, and perhaps wholly unsound, and that in all probability the plates could not have become locked in the manner suggested; but that has nothing to do with the present question. There were two ways suggested by which the plates might have become locked,—the one (as we believe) a practicable and probable way; the other (as we now think) an improbable one, suggested and considered as a possibility; and the counsel have seen fit to ignore the former and to say that the court reached its conclusion or presumption upon the basis of the latter alone; and in doing so they make use of the following language: "It is remarkable how little this case depends on fact. The issues have been settled by pure mental effort, with an occasional reference to the record. We trust this criticism of the opinion is proper. It may serve to direct the attention of the court to the general defect in the opinion without which the case would certainly have been decided differently. The objectionable presumption to which we refer is that the court, finding that there could be no locking of the side bearings without discovering somewhere a play of at least four inches out of the normal between the upper and lower plates, carves the four inches out of the impossible." There was, however, one fact, commented on with some

emphasis in the opinion, of which this application for rehearing offers no explanation. It is referred to in the following language: "We are, therefore, absolutely without reliable information from any one who is willing to admit that he examined it as to the condition of the car between the time that it was derailed and the time that it was replaced on the track. And this seems to us to require some explanation. Here was a little train, consisting of an engine and four cars, in charge of Joret, the yard master, two brakemen, Budge and Blancon, and presumably an engineer and a fireman. A truck was derailed, and Budge crippled for life. Joret, the yard master, knew that it was his duty to replace the derailed car on the track, and to find out and report to the company the cause of the derailment. The witnesses all say that there was nothing the matter with the track. It seems to us, under the circumstances, that in the discharge of his duty Joret would naturally have examined the car before replacing it on the track, for the double purpose of ascertaining the cause of the accident and of finding out whether there was any defect in the car which would prevent its being replaced. It seems to us also that Blancon, and the yard crew, and the engineer, and the fireman would naturally, as a matter of interest or curiosity, have examined the car before putting it again on the track, from which it had just apparently derailed itself without cause, in order to solve the mystery, and protect themselves and the company from another, and perhaps even more disastrous, derailment. Taking it altogether, it looks somewhat as though Joret and Blancon were afraid that, if they examined the car they might acquire some information that they did not care to possess. And we are left to conjecture as to whether such information was not acquired by the engineer, the fireman, and the yard crew. Joret, was, however, obliged to make his report, and he therein states that the rear truck split the switch; and as he testifies that the track was in good order, and that the several trucks which had immediately preceded that which was derailed had not split the switch, it would seem to follow that the derailed truck must have differed in some way from the others, and it appears to us not unlikely that the difference which caused one truck to split the switch when the others did not was that the one was, for some reason, immobile, and held on to the main track, whilst the others took the curve; and it may be that the immobility was so far cured in replacing the truck on the track as to make it comparatively safe for those who were afraid of acquiring too much information thereafter to inspect it, though not thoroughly, as we understand the yard master to say that he never did inspect it thoroughly." Referring to some of the language used in the foregoing excerpt, the counsel for the defendant say: "We are appalled at such a declaration as this from the court. We can-

not refrain from saying that this seems to evidence quite a strong feeling on the part of the court against these particular witnesses or against this particular defense." The only explanation which they offer, however, is that, in their opinion, the witnesses intended to testify that they examined the car immediately after the accident. And this explanation would seem to require another, which is not offered; i. e., if the witnesses intended to testify "that they examined the car," etc., why, in point of fact, did they testify that they did not examine it, and that they could, therefore, give no information as to its condition immediately after the accident? Referring to that part of the opinion in which it is said: "A somewhat more doubtful question presents itself in the matter of the failure of the yard master to inspect the car upon its arrival. It appeared from the evidence that it arrived at Morgan City at about midday on May 26th, and that it had not been inspected up to the time of the accident, say 7 o'clock on the following morning; and it further appeared from the evidence that the regulations of the defendant require that cars shall be inspected upon arrival and departure. We are inclined to think that a regulation of this kind presupposes a necessity for it,"—the counsel for the defendant say: "Such a regulation has never been promulgated; it was never spoken of at the trial; it has never been heard of at Morgan City; and simply has no existence. We are entitled, upon so vital a point, to a correction." C. Hantle, a witness sworn for the defendant, testified that he was the defendant's inspector at New Orleans, and had been so employed for several years. His cross-examination reads in part as follows: "Q. Do you inspect cars that just go from Algiers to New Orleans, across the river, on the ferry? A. We inspect them every opportunity we get. * * * Q. Is that the rule of the company? A. That is my rule. Q. Is that the rule of your company? Answer the question. A. Yes, sir; to inspect them every time they go out or come in." It is possible that the witness was referring to a rule which obtains at New Orleans, and not elsewhere, but he does not so state, and we can conceive of no reason why such a rule should not be equally necessary at Morgan City, a point at which the railroad and steamship lines of the defendant meet in the transaction of a business which extends across the continent and far into the interior. The counsel say: "The only inspectors for whose competency the defendant was responsible were Hayes and Hantle; and, after quoting certain of the testimony given by those witnesses and by one Garrett, they further say: "We would respectfully suggest that in its general hostility against the hypothetical testimony of the numerous inspectors the court allowed itself to believe that the inspectors at Algiers would have let the car pass if defective, without examining their testimony upon that point. We venture the assertion that this

testimony of Hayes, Hantle, and Garrett will be quite surprising to the court." The counsel have ventured an assertion which is totally erroneous. The testimony referred to was carefully considered before the opinion was prepared. It is true that the witnesses mentioned give such testimony as the following by Hayes: "Q. Would you consider a car perfectly safe with the hanger pin out? A. Well, if it was at a terminal, I would have put it back in place; if not, I would have it go on." But they also testify that there is no danger whatever in running a car with the hanger pin out of its sockets; from which, and from the testimony of other inspectors examined on behalf of the defendant, we concluded that they attached no importance to a defect of that kind, and would have had it remedied at a terminal, though not elsewhere, only if it happened to be entirely convenient. In this same connection the brief of the defendant's counsel contains the following: "There was certainly no lack of frankness in the opinion dealing with the opinions of the inspectors. They were dismissed as of no weight or bearing. But the court did not refrain from parrying their testimony, saying they referred solely to the locking of the trucks on a straight track, while the accident happened on a curve. It is only natural that, having announced that such testimony would not influence the court, there should be inaccuracy in stating what it was when the court did undertake to deal with it. Hence, error in the statement that this testimony did not take in the case of locking at the curve is not surprising. It will be found that locking at a curve is pronounced utterly impossible, by Pollock, Fravor, Gillan, Ernst, Cash, McDonald, Hayes." The opinions of the witnesses named were disregarded either because, as appeared from their own statements, the witnesses were utterly without the experience or qualifications necessary to entitle their opinions to consideration, or because of the intrinsic weakness of the testimony, or for both causes.

In conclusion, it may be said that this court is restrained by the obligations, which are inseparable from the advantages, of its position, from attacking the motives and conduct of counsel engaged in the discharge of the duties which they owe to their respective clients, and it is, no doubt, partly for this reason, as well as because of other and obvious considerations of justice and propriety, that such attacks are rarely leveled at the court, though, in the discharge of its duties the court is necessarily brought into close relations with the entire bar, and at one time or another must inflict disappointment upon each individual member. The brief under consideration is exceptional in this respect, and contains charges which are equally unfounded and unprovoked, and which cannot be reconciled with the professions of respect by which they are accompanied.

The application for rehearing is denied.

(107 La.)

HOPE et al. v. BOARD OF LIQUIDATION OF STATE DEBT et al. (No. 11,097.)¹

(Supreme Court of Louisiana. Feb. 17, 1902.)

CITIZENS' BANK — REORGANIZATION — "BANKING DEPARTMENT" — LIABILITIES — BONDED INDEBTEDNESS OF STATE — PURCHASE — EXTINGUISHMENT.

1. The banking department of the Citizens' Bank of Louisiana was a new creation under the act of 1853 and the compact or articles of association of that year, adopted in pursuance of the act.

2. The legislation of 1853 and the compact formed a new constitution of the bank, in virtue of which the banking department never became liable for the bonded indebtedness of the state incurred in 1836 in aid of the bank.

3. Being a new creation for the purpose of conducting a general banking business, and not being liable for the bonds of the state, it follows that the banking department had the capacity to purchase as an investment of separate funds, or in current business, the bonds in question, just as any other bank or third person could do.

4. This being so, the purchase did not extinguish the bonds by confusion and the banking department is entitled to the benefits of the funding scheme in reference to the bonds it holds, in like manner as any other person would.

Breaux, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Hope & Co. against the board of liquidation of the state debt and another. Judgment for defendant board, and plaintiffs and defendant Citizens' Bank of Louisiana appeal. Reversed.

Farrar, Jonas, Kruttschnitt & Gurley, Henry Denis, and Thomas J. Semmes, for appellants Hope & Co. Fenner, Henderson & Fenner and Eugene D. Saunders, for appellant bank. Milton J. Cunningham, Atty. Gen., and Walter Gulon, Atty. Gen. (Charles M. Cunningham, of counsel), for appellee.

Statement of the Case.

BLANCHARD, J. Under the act of 1836 the state of Louisiana issued its bonds to the extent of \$7,000,000 in aid of the Citizens' Bank of Louisiana. Of this amount of bonds, there were, on the 1st of January, 1874, outstanding \$4,018,626.48, represented by 9,042 bonds, each for the sum of \$444.44. By act approved January 24, 1874, the state enacted the funding law and created the board of liquidation of the state debt. This act authorized the issue of bonds to be known as "Consolidated Bonds of the State of Louisiana," and directed the board of liquidation to exchange such bonds for valid, outstanding bonds of the state and valid warrants of the state at the rate of 60 cents in consolidated bonds for \$1 in outstanding bonds and warrants. It seems that for some years following the enactment of the funding act it was

¹ Rehearing denied June 23, 1902.

thought doubtful that bonds such as those issued in aid of the Citizens' Bank were fundable under the terms of the act, and those of the supplemental law of May 17, 1875. Finally, certain decisions were rendered by this court holding that bonds of a similar character were entitled to the benefits of the funding scheme. Whereupon, Hope & Co., of Amsterdam, representing themselves to be the holders and owners of the 9,042 bonds still outstanding of the bonds issued to the Citizens' Bank, applied to the board of liquidation to fund the same under the act of 1874. The board rejected this application. Thereupon, Hope & Co. brought suit in the civil district court of the parish of Orleans to compel the board to fund the bonds they held, and included in their demand to fund the coupons of the bonds remaining unpaid. They prayed that the board be condemned to receive the bonds and the coupons thereof, and to issue and deliver to them in exchange therefor consolidated bonds to the amount of \$2,411,175.88. The district court held that the state's obligation upon the bonds was that of surety, not that of principal, or codebtor, with the Citizens' Bank to the holders thereof; that the bonds were contingent liabilities of the state and, for that reason, excluded from the provisions of the funding act; that the holders of the bonds, Hope & Co., had discharged the principal obligor, the Citizens' Bank, and this act operated, likewise, the discharge of the state. From this judgment Hope & Co. prosecuted an appeal to this court, and in May, 1891 (43 La. Ann. 733, 9 South. 754) the court handed down its decision, reversing the judgment appealed from and decreeing the bonds valid obligations of the state entitled to the benefits of the funding scheme, but that the state was entitled to large credits (itemizing and detailing the same), to be applied in reduction of the aggregate sum of the bonds held by Hope & Co., and that only the balance left due should be funded. The board of liquidation was ordered to settle and liquidate the claim of the plaintiffs upon the principles and in accordance with the direction of the opinion of the court, and, on surrender of the bonds held by the plaintiffs, to issue to them consolidated bonds for the resulting balance, without the coupons attached thereto prior to the date of funding, which coupons were ordered to be cut off and canceled. In a second opinion, denying the rehearing that had been applied for, the court, stating that since the rendition of the original decree a suggestion had been made by the attorney general that some of the bonds declared on by Hope & Co. were the property of the Citizens' Bank, reserved whatever right the state had, if any, to refuse to fund such bonds so held. Following this judgment and in obedience to its mandate, the board of liquidation met in October 1891 and proceeded to recast the account with Hope & Co. upon the basis of the opinion of the court, as follows:

Amount in capital (of bonds)	\$4,013,626 43
Less 40% under Act 3 of 1874	1,607,450 00
Leaving	\$2,411,175 88
7% interest for 54 years	228,302 71
2% " " 5 " "	241,117 58
4% " " 5 " " and	
5 months	618,868 45
1 month's interest at 4%	8,037 25
	<u>\$4,207,501 87</u>
Less payments-credits allowed by the court	\$2,060,466 35
Less payments-credits allowed by the court	722,451 03
Less payments-credits allowed by the court	300,000 00
Less payments-credits allowed by the court	885,000 00
	<u>\$3,967,917 38</u>
1 month's interest at 5% on \$2,060,466.35	8,535 27
	<u>\$3,976,502 65</u>
Thus showing a balance of	\$ 230,999 22
as the amount of consolidated bonds due.	

The board then declared it appeared that of the bonds held by Hope & Co. and presented by them for funding, 665 belonged to the Citizens' Bank, the principal obligor, and for which the state is only surety, and that the fundable amount due on these 665 bonds exceeded the balance of \$230,999.22 due as aforesaid.

So holding, and considering the bonds belonging to the bank not entitled to be funded because extinguished by confusion, the board refused to fund the 665 bonds, or any part of them, or the \$230,999.22 found to be the fundable balance due on all the bonds as aforesaid. Whereupon the present suit was instituted to compel the board to issue consolidated bonds for the balance of \$230,999.22 found to be due under the judgment of the court in the former suit.

After reciting the history of the issue of bonds by the state in aid of the Citizens' Bank, the petitioner represents in substance:—That Hope & Co. were and still are the holders of the 9,042 bonds under an agreement between them and various persons, owners of the bonds, by the terms of which the bonds were delivered to them (Hope & Co.) in trust for the purpose of securing unity of action on the part of all the holders of the bonds through them, and with full power in them (the petitioners) to institute any and all such actions at law and to take any and all such proceedings as they might deem proper and expedient for the purpose of securing the payment or funding of the bonds, or otherwise realizing upon the same. That whenever the owners of the bonds deposited the same with petitioners, the latter (Hope & Co.) gave receipts negotiable in form to the depositors of the bonds, acknowledging the deposit of the same, but that they (petitioners) never gave any such receipts to the Citizens' Bank of Louisiana, and were ignorant at the time of the institution of the first suit that the Citizens' Bank was the owner of any of the negotiable certificates or receipts which had been issued by petitioners to the owners of bonds who had placed the same on

deposit with them as aforesaid; were ignorant that the bank had thus acquired a beneficial interest in and to any of the bonds so deposited, except that petitioners were informed that the banking department of the Citizens' Bank of Louisiana had some right or title in and to the certificates representing 45 of the said bonds. That petitioners have since the institution of the suit for funding the bonds learned that the banking department of the Citizens' Bank is or was the owner of certificates or receipts representing 665 of said bonds, but that petitioners are unable to state the numbers or series of the bonds in which the said banking department had a beneficial interest, nor are they able to state whether or not the bank is still the owner of such certificates. It is then averred that the fact that any of said bonds belong to the banking department of the bank is wholly unimportant and in no manner affects the obligations of the state in the premises. As showing this, the familiar history of the rise and career of the bank is recited.

The main contentions of the petition are:— That the effect of the legislation of the years 1852 and 1853, together with the articles of agreement of 1853, was to constitute the Citizens' Bank of Louisiana either a dual corporation, or as one corporation with two entirely distinct and independent departments, neither of which participated in the profits, nor was bound for the liabilities of the other. That the legislative acts and the compact formed a contract between the cash stockholders and the state, with agreement upon part of the latter that she would never look to the cash stockholders for payment of the state bonds, and that said cash stock department should conduct a purely banking concern without apprehension arising from the antecedent liabilities of the bank. That the state, by its legislative acts aforesaid, did induce many persons, in no manner interested in, nor bound for the obligations of the Citizens' Bank, to subscribe for and pay in full at par shares of the capital stock of the banking department of the bank; that said shares had for 40 years been dealt in and passed from hand to hand in the markets as shares in a corporation in no manner bound for the antecedent liabilities of the bank or its mortgage stock department; and that said legislation, as construed by subsequent legislatures and by this court, constitutes a contract between the state and the banking department of the Citizens' Bank, which is protected from impairment by the provisions of both the federal constitution and the state constitutions. That the 665 bonds, or the certificates representing the same, pertaining to the Citizens' Bank, were purchased by the banking department of the bank since the year 1880 with funds belonging to the said banking department, wherein the mortgage stock department had no interest whatsoever, and which said funds were in no manner liable to or pledged for the

payment of the bonds issued by the state to the Citizens' Bank; that the banking department, being a legal entity entirely distinct from the mortgage stock department and not responsible for the debts of the latter or of the bank as antecedently existing, the purchase by it of said bonds or certificates did not extinguish the obligation of the state of Louisiana upon said bonds to said banking department by confusion or otherwise, and that the banking department is entitled to recover on said bonds in like manner as any other person. That though the Citizens' Bank was at the inception of the original litigation the owner of the certificates representing 665 bonds, and though said bank may still own said certificates, yet the same are negotiable in form, and if it should be held that by reason of the ownership of the certificates by the banking department they or the bonds they represent have in any manner been affected or extinguished, then the court should compel the production of the said certificates and their cancellation, or otherwise not in any manner impair or affect the rights of petitioners to recover upon the bonds represented by said certificates still outstanding and representing an obligation of petitioners which may not be extinguished save and except contradictorily with the owner of said certificates and upon their cancellation, and that, therefore, the Citizens' Bank should be made a party to the suit.

The prayer of the petition is for citation to the Citizens' Bank as well as to defendants, and for judgment ordering the board of liquidation to settle and liquidate the claim of petitioners in accordance with the principles established by this court in its decision handed down in 1891 (43 La. Ann. 738, 9 South. 754), without omitting from said settlement and liquidation any of the bonds presented by petitioners for funding by reason of the fact that any of the said bonds are held by the banking department of the Citizens' Bank. And, further, that it be adjudged the mortgage stock department of the bank has no beneficial claim or interest whatsoever in and to any of the 9,042 bonds tendered by petitioners for funding under the terms of the decree in the former suit; that it be decreed that none of said bonds have been paid or extinguished by confusion, or otherwise; and that, however, should the court render any decree affecting the validity of the certificates representing the bonds pertaining to the banking department of the Citizens' Bank, then that the decree do further compel the production and cancellation of the said certificates.

The Citizens' Bank, made party defendant, appeared as such, and also as intervener, and answered that the state of Louisiana, liable upon the bonds issued under the act of 1836 and extant in 1852 and 1853 to an amount approximating \$10,000,000, payment whereof was secured by mortgage upon the property of the shareholders of the bank, had

an obvious interest in restoring the bank's charter that had been forfeited in 1842, so that by the application of the capital and assets of the bank as they then existed (in 1852) and under the administration of an active bank, the said bonded indebtedness might be discharged and the state freed from its liability therefore; but that it was thought entirely impracticable to effect this result without procuring fresh capital, and this, it was deemed, could not be obtained without the pledge of the complete immunity of the fresh capital from all liability for said bonded indebtedness. That with this object in view of ultimately freeing itself from the bonded indebtedness, to be attained by restoring the bank's charter and thereby better assuring the administration and application of its assets and property to the discharge of said indebtedness, the state, by the legislation of 1852 and 1853 (the first ratified, and the second specially authorized, by article 121 of the constitution of 1852), restored said charter on certain terms and conditions, which the bank complied with, and authorized the procuring of fresh capital for conducting the future banking business of the bank, and sensible that said capital could not be obtained without the fullest guaranty it should never be implicated in, or in any manner bound, for said bonded indebtedness, the state, through its legislature, authorized and directed the board of directors of the bank to prescribe the terms and conditions on which the fresh capital should be obtained, and to determine the division of the profits thereof, and that these terms and conditions being thus fixed became then and thereafter known as "the compact" or "articles of agreement" under which the future business of the bank was conducted. That in accordance with this legislation and the compact the banking department of the bank was formed, and its stock in trade consisted of \$1,000,000 of fresh capital and \$500,000 in valuation of the available banking assets of the bank as the same existed in 1853—those furnishing the fresh capital being known as the cash stockholders to distinguish them from the original stockholders, and the latter remaining members of what was thereafter known as the mortgage stock department. That, thus, the legislation and authorized agreements of that period resulted in the two separate and distinct departments of the bank, one of which only, the mortgage stock department (the original debtor) should be and remain bound for the antecedent bonded indebtedness, but was to be aided by advances and loans of money, when necessary, by the other department, which loans and advances were to be reimbursed. That the banking department thus formed acquired the capacity to conduct and carry on for its own benefit a banking business and to acquire assets and property of its own. That, again, in the year 1880, a further agreement was entered into between the banking de-

partment and the mortgage stockholders by which the nonliability of the former for the antecedent bonded indebtedness was reaffirmed, and the state, by Act No. 79 of 1890, authorized this agreement to be made and itself, in the act, recognized as the only debtor of the bonds the mortgage stock department of the bank. That the distinction between the two departments and the consequent nonliability of the cash or banking department for the indebtedness incurred prior to 1853 has been generally accepted by all parties in interest and concerned; that the cash department, for its advances to the mortgage department, has been at all times, since the legislation and compact of 1853, deemed and treated as a creditor of the mortgage department for the loans so made to it; that, still further as illustrating said distinctiveness, the mortgage stock department has received in the past its proportionate share of the profits of the cash department, as owner of one-third of the capital supplied to the latter, which share of the profits has been applied to the payment of its (the mortgage stock department's) debts as required by the compact of 1853, and the large payments made since 1853 on the bonded indebtedness have all been made exclusively from and out of the assets of the mortgage stock department aided by advances of the cash department, for which it (the latter) became the creditor of the other department, and all this has been done with no pretense of claim on the part of the state, or any one, of the liability of the cash department, or its capital or assets, for said bonded indebtedness. That at all times since the compact the state has had in the directory of the bank directors appointed by it, charged with the interest of the state in respect to the payment of the state bonds; that every legislature for many years following 1853 appointed legislative committees charged with the duty of examining, and who did examine into and take full cognizance of the transactions and business of the cash department and of its separate rights and obligations, and with full knowledge on part of the state thus derived the state has fully acquiesced in, ratified and confirmed by its conduct the separation of the two departments of the bank and the nonliability for the bonded indebtedness of one of these departments. That on the faith of these things and of the status of affairs described, large amounts of money have been invested in the shares of stock of the banking department; that \$350,000 of additional capital was subscribed for this stock in 1883 and went into the banking department, and this department, for its shareholders, on the same faith, has made investments and acquired property and rights of great value. That the state is now estopped, by reason of the facts stated, from asserting the liability of the banking department for the bonded indebtedness, or from disputing the aforesaid separation of the two depart-

ments. That in the exercise of its rights and privileges as a free and independent banking concern the cash department of the bank did, in 1884, with its own funds and as an investment thereof, acquire certificates, negotiable in form, issued by Hope & Co. to depositors of bonds left with them, said certificates representing 665 bonds of the state in the hands of Hope & Co. as custodians thereof—said agency of Hope & Co. being required by reason of the great number of holders of said bonds, as set forth in their petition herein filed. Then follow averments that the legislation of 1853, the compact made in pursuance thereof, and the other acts and things going to make up the status of the bank towards the state and the state towards the bank, and the faith given to the same upon which rights were acquired, investments made, etc., constitute a contract between the state and the cash department of the bank and its shareholders, and that said department and its shareholders are entitled to the full enforcement of said contract, and any attempt on part of the state to deny to said cash department and its shareholders the right to fund the bonds so acquired as aforesaid on the faith of said contract would be a breach of the same and an impairment of the contract, as against which protection is afforded by the guaranties of the federal constitution and the several state constitutions from and inclusive of the constitution of the year 1852 to and inclusive of that of the year 1879, which provisions of the said constitutions (naming the articles) are specially invoked and pleaded. The respondent then affirms all the allegations contained in the petition of Hope & Co. and joins in their demand for the funding of the bonds in accordance with the funding act and the decision of this court in the former suit.

The board of liquidation first excepted to the demand of Hope & Co. on the ground that the matters therein set up are things adjudged in the former suit, and pleads the judgment therein in bar of the present action. Further, that Hope & Co. by their own averments are without interest in the matters set up; that they are not the owners of the 665 bonds in question; that the same are the property of the Citizens' Bank; and that the agreements made by Hope & Co. with the holders of the bonds deposited with them do not authorize this suit. For answer to the merits, the board denies all and singular the allegations of Hope & Co. in so far as the same assert the right to any relief in the premises as set forth. To the demand of the Citizens' Bank the board pleads the same exceptions as in the Hope & Co. Case, and further that the petition in intervention discloses no cause of action. For answer to the merits, the board enters a general denial to the allegations which seek to make the state liable in the premises and avers the state is not now and never was a debtor of the bank.

Further, that the bonds in question are the property of the bank, were issued by the bank, together with other similar bonds, for its sole interest, and for their payment the bank is liable; that the purchase by the bank of the 665 bonds was for a sum much less than their face value, say for about \$67,314.20; and that in making said purchase the bank acted in its own behalf and interest in thus retiring the 665 bonds amounting to \$295,552.60, with interest, and before the maturity of the bonds.

On these issues, trial was had, resulting in a judgment of the court a qua rejecting the demand of Hope & Co. and the Citizens' Bank for the funding of the bonds. In other words, the court held that the board of liquidation was justified in refusing to issue consolidated bonds for the \$230,999.22, the balance found to be due on the basis of the former decision of this court. In doing so, the court a qua reached the conclusion that the banking department of the Citizens' Bank, acting independently, was without capacity to purchase the bonds of the state and hold the state liable thereon; that the state had conferred no such power or authority on the banking department; and that when the bonds were bought with the funds of one of the departments of the bank, the purchase was made by the Citizens' Bank, the bonds became its property and were thereby extinguished and retired. From this judgment, Hope & Co. and the bank prosecute this appeal.

Opinion.

The exceptions filed by the board of liquidation to the petition of Hope & Co. and to the intervention of the Citizens' Bank appear not to have been acted on by the judge a quo. Nor is it considered necessary to enter upon their discussion here. They are not found to have merit and are simply passed by.

The real questions which the case presents are: (1) Was the banking department of the Citizens' Bank a new creation under the act of 28th of April, 1853, and the compact or articles of association of 28th of July, 1853; (2) did the legislation of 1853 and the compact aforesaid form a new or modified constitution of the bank, in virtue of which the banking department was not liable for the antecedent debts of the bank; (3) if the banking department was a new creation and not liable for the antecedent debts, was it a department possessed of the privileges of conducting a general banking business, and, in this connection, had it the capacity to purchase as an investment of separate funds, or in current business, the bonds of the state issued in aid of the bank, as any other bank or third person?

The lower court, in arriving at its conclusions, seems to have proceeded upon the idea that this court, in its former decision (43 La. Ann. 738, 9 La. 754), held that the obligation of the state on the bonds was only that of

surety. That interpretation of the decision is erroneous. The opinion prepared by the organ of the court (Mr. Justice Breaux), concurred in by the then chief justice, does not so state. While Mr. Justice Watkins, who filed a separate opinion, expressed the view that the obligation of the state was that of surety, he, nevertheless, held the bonds were embraced within the funding scheme and concurred in the decree which became the judgment of the court. Mr. Justice Fenner, while mildly dissenting, expressed the view that the obligation of the state towards the holders of the bonds was that of principal. So that it does not appear a majority of the court held the view the state's obligation was merely that of surety, so far as the holders of the bonds are concerned. But, however that may be, the matter is of small consequence if it be found that a new department of the bank was created in 1853 and that the same never was or became liable for the antecedent bonded indebtedness. In such case, if it be considered that the state was surety, merely, on the bonds in so far as the bank was concerned, this suretyship, in its operation and effect, would have to be confined to that department of the bank which alone owed the bonds.

The scheme of the Citizens' Bank of Louisiana as originated and created by the acts of 1833 and 1836 was purely that of a property bank. The subscribers to its stock gave mortgages on lands and slaves to secure their subscriptions, and on the faith of these mortgages capital was to be borrowed with which to conduct the business of the bank. While the bank was given in the first act, that of 1833, the character of a quasi public corporation, in that it undertook to aid certain works of public improvement and certain benefits to the state were stipulated for, there was no loan of the credit of the state to assist in raising its capital. But it was not found possible to raise the desired capital on the basis as provided by the act of 1833, and there followed the act of 1836, which greatly enlarged the public character of the institution, and extended to it the credit of the state through its bonds as a means of raising the capital needed. As a guaranty of the bonds to be thus emitted by the state, all the securities granted by the act of 1833 were transferred to the state and to those who should become holders of the bonds. The object and purpose of the state in thus aiding the bank was, mainly, to encourage and promote the agricultural interests of the state. This was to be accomplished through loans made on lands and slaves. The scheme was impracticable. The bank failed to meet the expectations of its promoters and of the public and the state. Disaster upon disaster followed. Wreck and ruin brooded over the institution, and the involvement of the state for the \$7,000,000 of bonds it had emitted seemed inevitable. In 1842, by judicial decree, the forfeiture of its charter was declared, and there-

upon the state took physical possession of the assets of the bank, and proceeded to administer the same pursuant to an act of the legislature approved April 5, 1843. This possession of the bank and its assets, and the administration thereof by the state, continued until 1853, when the bank and its assets were restored to the control and administration of its directors and stockholders and the forfeiture of the charter released. This was accomplished through Act No. 141 of 1852 and Act No. 246 of 1853. The first begins with a preamble which recites the state's responsibility for bonds issued in favor of the bank for a sum exceeding \$8,000,000, together with accruing interest thereon, and that the then condition of the bank was such as to expose the state to loss from the inability of the bank to meet the payment of the bonds and interest should the liquidation of the bank be continued on the system then prevailing. This system was the state's administration of the bank, and the declaration above was made after eleven years of such administration. As consideration for the release of the forfeiture of the charter of the bank and its restoration to the stockholders, the act provides that the bank was to restore to the governor of the state bonds of the state to the amount of \$800,000 and should raise by contribution from stockholders, independently of its then means, additional assets for at least \$800,000. The evidence shows that the \$800,000 of bonds was restored to the governor. This may have been accomplished through the operation of the fifth section of the act, which authorized holders of the bonds to exchange bonds for shares of stock. But the \$800,000 of additional assets were not contributed. There appears to have been no sufficient inducement offered by the act for this. Men of money did not see their way safely to make the investment in an institution confessedly insolvent. The failure, in part at least, of the act of 1852 induced the legislature to enact the act of 1853 referred to. Something had to be done to extricate the state, if possible, from its financially perilous position in respect to the bonds which, in an evil hour, it had issued in aid of the bank. Something had to be done to advance the successful liquidation of the bank. If things went on as they had been going, the state would inevitably incur the great loss of having to pay the bonds with accrued and accruing interest. The alarm of the state over the prospect is attested by numerous acts to be found on the statute books from 1842 to 1853—all in the direction of extricating the state with as little loss as possible from the dilemma in which it was placed. If the bank and its assets were turned back into the hands of its stockholders under terms and conditions that would result in the infusion of new blood into the moribund corporation, if it could be revitalized by the elixir of new capital put into it, if it were made again a going concern as a banking institution, some hope, at least,

appeared that the state might realize some relief and its loss on the bonds reduced, minimized, perhaps altogether averted. The experiment, at least, was worth a trial. Anything were better than the continuance of the then existing status. The administration of the state for a decade had proven bootless of good results, and meanwhile interest on the bonds was falling due and extensions had, and the bonds themselves were hastening to maturity. But how to induce new capital to enlist in the service of the bank? Aye! that was the question—there the rub! It would not enlist under the old conditions which had led to failure, bankruptcy, forfeiture.

The act of 1852 prescribed no new conditions, and, hence, the failure to induce capital to come in under its terms. Then came the act of 1853. It was a new departure. It recognized the situation and accepted it. It prescribed new conditions. It authorized the board of directors chosen under the act of 1852, seven in number (two of whom were appointed by the governor on behalf of the state), into whose hands the bank had passed pursuant to the seventh section of the act of 1852, to raise \$1,000,000 of fresh capital, the contributors whereof were to be designated as the "cash stockholders" of the bank, and to enable the directors to raise this money the act empowered them to arrange "terms and conditions" with the contributors. The act was virtually a power of attorney to the board of directors. It is not to be regarded merely as an act passed by the state in the exercise of its sovereign lawmaking power. It is also to be viewed as a proposition made by the state as a contracting party having direct pecuniary interests in the affairs of the bank. Under its authority the directors took action. After three months—months, doubtless, of thought and reflection, of seeing what could be done, of consultation with those in interest, including the mortgage stockholders and representatives of the state, of negotiation with men of money, of advising with counsel, of preparation of papers—the compact of July 26, 1853, was adopted by the board of directors. This compact constituted the articles of association between the mortgage stockholders and the subscribers of the cash stock. It was the execution of the mandate conferred by the act of 1853 upon the board of directors. It prescribed the terms and conditions upon which the million of fresh capital was brought into the bank. It is not seen wherein the directors, in adopting the same, transcended their authority. The terms and conditions established in the compact were to be, and were, by the very terms of the second section of the act of 1853, "binding on and between the holders of the cash stock and mortgage stock respectively." The latter, at the time, were the debtors of the state on the bonds—the former were not; they had not yet come into the bank. Here then was an act of the leg-

islature which authorized its debtors, the holders of the mortgage stock, represented by the board of directors, to make terms and conditions upon which cash stockholders, with fresh capital, might come in. If these terms and conditions were binding on its debtors, so must they be held binding on the state. There is no escaping this conclusion. The holders of the mortgage stock did make the terms and conditions—one of which was that the subscribers to cash stock should be exempt from liability on the antecedent debt of the Citizens' Bank, practically all of which was represented by the bonds the state had loaned the bank in 1836. The third section of the act of 1853 directed that subscriptions to the cash stock should be received after 30 days' previous notice of the terms and conditions agreed upon. This meant public notice, and extensive advertisement in the public press of the time was made of the articles of association. This informed every one, including the state, just how, in what way, the board of directors had construed and carried into effect the powers granted them in the act of 1853. Yet no succeeding legislature—no act of the state—gainsaid that those powers had been exceeded, or asserted that what was done and said in the compact was not binding on the state. On the contrary, in legislation thereafter enacted the validity and binding force of the compact was recognized, as it was, too, by this court following its execution. The compact divided the capital of the bank into two distinct and separate funds, one denominated the "Banking Department," which was to constitute what was called "the movement of the bank"; the other the "Mortgage Stock Department," which should "represent its dead weight"; and it was prescribed that all loans, discounts, or other banking operations should be carried on with the capital composing the banking department, and for its exclusive benefit and at its risk. Of what the mortgage stock department should consist was prescribed, and this, it was directed, should remain exclusively appropriated to the redemption of the then existing liabilities of the bank. Separate books and accounts of the two departments were to be kept. No funds arising from collections of the mortgage stock department were ever to be used for the benefit of the banking department. Should advances of cash be required at any time by the mortgage stock department to meet the foreign debt (meaning the bonds and interest on same held abroad), the banking department should make the same, either by discounting such securities as the mortgage stock department had to offer, or by debiting such advances to the mortgage department at the usual rate of discount, the same to be reimbursed out of the first moneys collected by the mortgage department; and no portion of the capital of the banking department was ever to be diverted from its legitimate operations except for that purpose—"it being the true

intent and meaning of this compact or agreement," declared its sixth article, "that the cash stockholders shall only be held responsible for the liabilities of the banking department." The dividends accruing to the holders of the cash stock were to be paid them in cash, and the dividends accruing to the mortgage stock department, from that part of the capital of the banking department which the former had supplied, were to be carried to the credit of that department and applied to the payment of its liabilities, or reinvested for its account. The cash subscribers never consented to put their money into the stock of the banking department except upon the terms and conditions proposed to them by the board, acting under authority of the state.

These are some of the salient features of the compact of July, 1853, showing the complete separation of the banking department from the other department. The latter was the old bank continued; the former was its new feature, constituting a separate legal entity. It was either another department added to the pre-existing corporation, but complete and distinct in itself and not weighted down with the antecedent burdens of the corporation; or else the act of 1853 and the compact carrying the same into execution are to be read into the original charter of the bank, adopted in 1833, the three forming, virtually, a new constitution and a dual corporation, one branch of which was the obligor of the state for the credit that the state had extended by the emission of its bonds in 1836, the other not the debtor of the state on account of the bonds, and given a free hand to conduct banking operations proper. This dual corporation may be likened to twins—separate personalities, but aids and allies one of the other, and the relations of these two departments, which thus sprung into existence, to each other are precisely the same as if they were distinct and separate corporations. And that the banking department has been of the greatest benefit to the mortgage stock department and its creditor, the state, is abundantly shown. The evidence establishes that during the period from 1853 to 1880 the banking department paid to the mortgage stock department, in dividends alone, on the half million of stock held by the latter department in the former, \$1,065,000, which was applied in payment of the interest on the bonds of the state. This amount would, doubtless, have been much larger but for the Civil War and its resulting demoralization of business and destruction of values, both in landed property and slaves. In addition to the \$1,065,000 so paid as profits to the mortgage stock department, the banking department advanced its sister department the further sum of \$682,000, which was applied to the bonded indebtedness, and which was, under the terms of the compact of 1853, to be reimbursed. With reference to this \$682,000, while an adjust-

ment was made of this indebtedness in 1880 in an agreement between the bondholders and the banking department, by which the latter was to take in discharge of the debt due it the \$500,000 of the stock held in the banking department by the mortgage stock department (upon which it, the banking department, had a pledge for all advances made), this court, in its former opinion, virtually canceled this transfer by crediting on the bonds outstanding the estimated value (three hundred thousand dollars) of the \$500,000 of banking assets which in 1853 the mortgage stock department had transferred to the banking department, and for which it held stock in the latter upon which dividends of \$1,065,000 had been paid. And as showing further benefits resulting to the mortgage stock department and the state by the reorganization of the bank which took place under the act of 1853 and the compact of that year, it only need be observed that whereas in 1853 there was outstanding of the bonds of the state, issued in aid of the bank, something over \$6,000,000 principal of the indebtedness, when the former suit against the defendant board of liquidation was filed in 1890 there was outstanding of the principal of these same bonds but a little over \$4,000,000. There had, therefore, been paid or retired \$2,000,000 of the principal of the debt, and the interest had been paid down to the year 1868. All this had been done by the mortgage stock department of the bank—the state not supplying a dollar for the purpose. More than this. This court, in the former case (43 La. Ann. 738, 9 South. 754), found that since 1880 funds available from the mortgage stock department of the bank had accrued applicable to the bonded indebtedness, which had not been credited upon same at the time that suit was filed, and that the state, in further diminution of the debt, was entitled to various other credits resulting from assets of the mortgage stock department held to be available for the purpose, all enumerated in the opinion of the court, the aggregate of which, when applied to the extinguishment pro tanto of the bonded indebtedness sought to be funded, left due to be funded after deducting the discount provided for by the funding act, the comparatively small sum of \$230,999.22. It thus appears that as the outcome of the reorganization of the bank under the act of 1853 and the compact of that year, resulting in the creation of the banking department and the management of the affairs of the bank by that department, the indebtedness of the state on her bonds issued in aid of the bank had been reduced from \$6,000,000 in 1853 to a fundable balance of only \$230,999.22, in 1891. which amount, it was stated in argument at the bar and as appears in the briefs filed on behalf of the plaintiffs and intervener, if funded, would be all that was left of liability on part of the state growing out of her issuance in 1836 of the \$7,000,000 of bonds in

aid of the bank. It appears from the evidence that persons not previously shareholders contributed the \$1,000,000 of fresh capital in 1853, and \$350,000 more in 1853, and that this capital has at all times been represented by shares of \$100 each extant in the hands of holders. It further appears that since 1853 these cash shares have been leading securities upon the stock market, traded in and bought and sold promiscuously as stock of the banking department, and treated and understood by the public as exempt from liability for the bonds of the state issued under the act of 1836.

The position of counsel for the state that the act of 1853 intended that only the then mortgage stockholders should subscribe the fresh capital of \$1,000,000 needed to enable the bank to resume business, is not sustainable. We find nothing in the act prohibiting others from subscribing. The then existing stockholders were only intended to be given preference, and if they failed to subscribe, others were not barred. What was wanted was the fresh capital, and this was to be had by setting apart so many of the existing outstanding shares and selling same to those who would buy. It was never the intention that the scheme was to fall through should the then shareholders fail or refuse to subscribe the amount needed in cash. And that seems to have been the interpretation put upon the act at the time, both by those interested in the bank and by this court. See *Pollock's Heirs v. Bank*, 12 La. Ann. 230. But, in this scheme, the rights of the state, as creditors of the mortgage stock department in respect to the bonds issued, were safeguarded, for it was provided in the act that the mortgages then existing to secure the stock set apart for sale, in order to raise the \$1,000,000, should not be considered raised. This precaution was taken because of the fact that all the then existing mortgages were pledged to the state to secure the payment of its bonds. Here was a double advantage to the state. Its debtors, the mortgage stockholders, were to contribute shares of stock held by them to be sold, or subscribed to, to raise the \$1,000,000 needed to put the bank on its legs again, so that it could go ahead in the work of paying off the bonded debt owed by the mortgage department; yet the mortgages which had been previously given to secure these very shares so set apart or contributed were not to be considered raised, but were to still exist and eventually to be paid by the mortgagors, and when paid the proceeds to go in extinguishment of the indebtedness for which the state was liable. If a stockholder owned 15 shares, 1 share was to be set apart to be sold to raise the fresh capital. For this 1 share so taken from him and set apart, he was not only to get nothing (unless he put up the cash for it himself), but the mortgage he had given to secure the 15 shares was to still exist and be exigible for the full amount represented by the 15 shares. It is difficult to see where ad-

vantage to the mortgage stockholders in this agreement appeared, other than that, perhaps, the foreclosure of the mortgages given to secure payment of their stock was averted, and the bank in which they were interested was made again a going concern; but the advantage resulting to the state is quite apparent.

In the early part of 1837 the case of *Pollock's Heirs v. Bank*, supra, came before the court. It involved the construction of the acts of 1852 and of 1853 relating to the Citizens' Bank. It was a time when this legislation was fresh in the minds of every one. The decision was by judges sitting just following the enactments. Their view of the acts was, practically, the contemporaneous construction, and being such is entitled to the greatest weight. "*Contemporanea expositio est optima et fortissima in lege.*" A statute is best explained by following the construction put upon it by judges who lived at the time it was made. In that case the court declared it was notorious the state was largely interested in the success of the bank, being bound for the payment of upwards of \$6,000,000 of bonds negotiated for the benefit of the bank, and that the avowed object of the legislation was the assurance of the state against loss. But, further and more important to this discussion, are the declarations of the court that the corporation (the bank) "as we now find it," says the court, is the offspring of the legislation of 1853 (Act No. 246), and that the act made a radical change in the constitution of the bank. Then, after referring to the several sections of the act and giving a synopsis of their contents, and after showing that the act had been formally accepted by a majority in number and amount of the stockholders, as was required, the court go on to say:—"After the acceptance of the act, which was then by its terms in force, the board of directors, as they were authorized and required to do by the second section, fixed, on the 26th of July, 1853, before opening books of subscription, the terms and conditions of a compact and agreement as to the manner of administering the affairs of the bank and dividing its profits between the cash stockholders and the mortgage stockholders; which compact and agreement * * * was advertised during the term of thirty days, in six different newspapers, as the basis of subscription to the cash stock. The whole of the ten thousand shares of cash stock was thereafter subscribed, and the bank went into operation under the amended charter of the 28th of April, 1853, and in the mode and upon the terms and conditions fixed by the articles of compact and agreement of the 26th of July, 1853, adopted in conformity and obedience to that statute and which are to be considered as the constitution of the corporation at the present time." (Italics ours.) There is here not only a judicial recognition and declaration that the compact of July, 1853, was fully authorized by the act of April 28, 1853, but that it was adopted in obedience to that legislation. In short, that it was, as it

were, a supplement to the act and necessary to carry the purpose of the act into execution. But more than that, it was a judicial declaration that the compact furnished the basis of subscription to the cash stock, and that the bank thereupon went into operation under practically a new charter and upon the terms and conditions fixed by the compact, and that this compact was, therefore, to be considered "as the constitution of the corporation." These are the very words of the opinion. Everything, then, found in the compact had the sanction of law. It and the act of the legislature upon which it was based formed the new constitution of the bank. This constitution expressly exempted from liability on the antecedent debt represented by the bonds of the state the new banking department created by the compact.

After the court, in the Pollock Case, refused to compel the bank to make loans to the mortgage stockholders on their mortgage stock according to the terms of the original charter, the legislature passed the act of the 17th of March, 1853, authorizing the Citizens' Bank to extend the time for payment of \$500,000 of the state bonds, and to use that sum in loans on stock to such stockholders as had not obtained the loan to which they were entitled under the bank's original charter; and, as additional guaranty to the holders of such bonds so extended, the act provides:—"That any sum or sums which the board of directors may have already carried or shall hereafter carry to the credit of the 'reserve fund' of the banking department of said Citizens' Bank *under the compact of 26th July, 1853*, between the cash and mortgage stockholders shall not be distributed until the \$500,000 of bonds extended as aforesaid shall have been paid. (Italics ours.) Here, then, was direct legislative recognition of the new banking department of the bank and of the compact. Not only that, but in the act the state stipulated for herself a distinct benefit—that the sums carried to the credit of the "reserve fund" of the banking department shall not be distributed until the \$500,000 of bonds, to be extended under the provisions of the act, shall be paid. In this the state demanded and accepted, and the cash stockholders made, the sacrifice for the benefit of the mortgage stockholders and the state. The latter will not be heard now to allege that this demand was wholly unnecessary; that not only the assets of the reserve fund, but all other assets of the banking department, were already pledged to her. If all were pledged already, why stipulate for a special pledge of a part only?

The duality of the bank is further recognized by the state in Act No. 45 of 1873. That act directed the board of directors to call on the mortgage stockholders for such contributions on their stock as was necessary to assure the prompt payment of the interest on the bonds of the state. There was no claiming, or hinting at, any liability

of the cash stock for such contribution. The inference is irresistible that the state, at that period, did not consider the banking department was responsible for this debt, and, further, it shows that there was then no question of the separate, independent character of the banking department apart from the mortgage stock department. Act No. 79 of 1880 equally recognized the separations of the "mortgage stock department" and the "banking department," and equally indicates the accepted general understanding that the debts of the old mortgage bank were a liability alone of the mortgage stock department. And this court, in its former opinion in 1891, in the case of these plaintiffs against the board of liquidation, in effect held that it was only the mortgage stock department of the bank that was responsible to the state on this bonded indebtedness. This is indubitably and conclusively shown by the fact that the decree of the court in that case, in enumerating and adjudging the credits to be applied in diminution of the indebtedness, delivered over to plaintiffs the whole of the mortgage stock department as assets available for that purpose, compelling them to take the same and apply the aggregate value thereof to the indebtedness, but did not advert to as applicable to the debt, or touch or adjudge as in any way responsible for the same or any part thereof, the banking department or any of its assets. As that was a suit to test the liability of the state on the bonds as fundable assets in the hands of the holders thereof, and as the state, in resisting the funding of the bonds, sought, along with its other defenses, to minimize the fundable amount thereof in case it should be held the bonds were of that class of public liabilities included in the funding scheme, every effort was made on behalf of the state to marshal every possible asset legally available as credits to which she was, or should be, entitled, so as to set off entirely the whole indebtedness, if possible, or, at least, to let the state out with as small a balance due as possible. And yet the court, marshaling all possible assets of the bank legally available as credits, did not touch an asset of the banking department. This is emphasized in the concurring opinion of Mr. Justice Watkins—that one of the justices whose concurrence in the decree was requisite to form the judgment of the court—as a few references will show. On pages 766, 767, 43 La. Ann., and page 764, 9 South., he said:—"It appears that by an act of the legislature, there was a change made in the charter of the Citizens' Bank in 1853, whereby a banking department was added to the theretofore property bank, and fresh capital in money was subscribed—it being the legislative intention and purpose that these two departments should act separately and independently of each other. Hence, since the banking department was established under the law of 1853, it has done a legitimate bank-

ing business, while the property bank, or as it is familiarly termed, the mortgage stock department, has pursued its particular branch of business—though virtually engaged in a liquidation of its affairs and endeavoring to realize on its assets. While this division of the bank into two departments is doubted and denied by the defendant * * * yet the compromise of 1880 (pursuant to the legislation of that year—Act No. 79) proceeded on that theory and the state apparently acquiesced in that condition of things. In fact, I fail to see the impropriety or impracticability of such an arrangement. It is an established fact that, on the faith of the legislative authority (meaning the act of 1853) \$1,000,000.00 of fresh money capital was subscribed and actually paid into the new banking department; and it could not be supposed that this would have been done if the subscribers had believed that their assets would, in any event, have become liable for the large claims of the plaintiffs." He goes on to say that while by this arrangement the legislature did not charter a new bank, it did permit the organization and equipment of a banking department per se, as an addition to the existing property bank, by the subscription of a specified amount of fresh capital—the stockholders in the property bank being accorded a preference in taking stock in the new department, to a limited extent. "In my opinion," he continues, "the obligations of the property, or mortgage department of the bank were unaltered or unaffected thereby—neither were they diminished or increased—and the banking department never incurred any liability to the plaintiff and never acquired any interest in, or right to, the assets of the mortgage department." (Italics his.)

If the banking department never incurred any liability to the plaintiffs, neither did it to the state, for it was only as holders of the state's bonds that plaintiffs could have asserted any liability against that department. The compact of 1853 expressly provided for the existence of the relation of debtor and creditor between the banking department and the mortgage stock department, and that relation could not exist if confusion was to take place simultaneously with the birth of the obligation from one department to the other. The bonds which the banking department bought and paid for as an investment of its separate funds were not evidences of any debt due by it. While the price paid for the bonds was much less than their face value, it is not pretended it was not their full market value at the time. The purchase was made in 1883, after the funding law was passed and when the fundability of the bonds was in dispute. Besides, if the banking department had the right to buy and own the bonds, it had the right to buy them at the lowest price at which it could get them. The purchase was made for its own account; not for that of the mortgage department, nor

was the price paid as an "advance" to the mortgage department. No such "advance" was required, or could have been required under any construction, because the bonds were not due. If the bonds had been decreed to be not fundable, they would have been "nothing worth" and the loss would have fallen entirely on the banking department. The state has not been injured. If the purchase had not been made the bonds would have remained outstanding in the hands of others and been asserted by such others as fundable obligations of the state.

It all comes back to the same question—was the banking department a debtor of the bonds? If not, it was entitled to buy and own them with the same rights as any other holder. Suppose the holders of the state's bonds, upon their own initiation, or at the instigation of the state, had, after the creation of the banking department, foreclosed the mortgages given by the mortgage stockholders to secure payment of the shares they had subscribed to, which mortgages were held in pledge for payment of the bonds, and by these proceedings the mortgage stock department had been wiped out (for the foreclosure of all the mortgages would have had that effect), would the termination, thus, of the existence of the mortgage stock department have had the effect of destroying, too, the banking department of the bank? This question must be answered in the negative. The banking department would have continued on. If this be so, and after the disappearance of the mortgage stock department, the banking department had purchased the bonds in question, would it be seriously urged that such purchase had extinguished the bonds by confusion? We think not.

The conclusion is unavoidable (1) that the banking department of the Citizens' Bank was a new creation under the act of 1853 and the compact or articles of association of that year, adopted in pursuance of the act; and (2) that the legislation of 1853 and the compact formed a new constitution of the bank, in virtue of which the banking department never became liable for the bonded indebtedness of the state incurred in 1836 in aid of the bank. Being a new creation for the purpose of conducting a general banking business, and not being liable for the bonds of the state, it follows that the banking department had the capacity to purchase as an investment of separate funds, or in current business, the bonds in question, just as any other bank or third person could do. This being so, the purchase did not extinguish the bonds by confusion, and the banking department is entitled to recover upon the bonds or the certificates representing the same, and entitled to the benefits of the funding scheme in reference thereto, in like manner as any other person could or would. We do not find there was any privity between the banking department and the state—any relation of agency on part of the former towards the latter—which pre-

cludes the banking department from recovering from the state anything more than the sum, with interest, which it paid for the bonds. The compact makes it perfectly clear that, in its administration of the banking department, the board of directors of the bank acted as exclusive agents and for the exclusive benefit of the cash stockholders, subject only to the agreement to make advances to the mortgage department when required, and on proper security, to aid it in meeting its debts, which agreement had no reference to, or connection with the purchase of the bonds. Besides, it is by no means clear that if the course were adopted of holding the state only for the purchase price of the bonds, with interest from date of purchase, the state would be the gainer. There is much basis for a calculation which would show a different result, while if the whole case were reopened for a recasting of the accounts it appears certain the final outcome would be still more burthensome—largely so—to the state.

It is time to put an end to this nightmare of financial folly which for two generations has disturbed the repose of the state. The courts have been wrestling with the complicated issues and difficult calculations involved in this controversy for many years. They have been so complicated and difficult that judges have been hopelessly divided as to their solution. The final decree rendered by this court in the former case, from every point of view, did full justice to the state, and we do not see our way to sustaining the present claim of the state to have its execution modified or disturbed in any respect. Fortunately, indeed, is the state to emerge from this entanglement, this labyrinthine involvement, with only the loss of the comparatively paltry sum which the former judgment of this court shows it is responsible for. In the beginning, seven millions of indebtedness, principal, and other millions of interest to accrue; in the end less than a quarter of a million, principal!

For the reasons assigned, it is ordered that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that the board of liquidation do settle and liquidate the claim of petitioners in accordance with the principles established and the directions given by the court in its decision in cause No. 10,830 on its docket, and as of the date when the bonds should have been funded, viz.:—October 27, 1891, and without omitting from said settlement and liquidation any of the bonds presented by petitioners for funding by reason of the fact that certain of the bonds are held by the banking department of the Citizens' Bank of Louisiana. It is further ordered, etc., that on the delivery by the board of liquidation to petitioners of consolidated bonds of the state of Louisiana for the balance shown to be due under the former decision of this court, to wit:—\$230,990.22, with interest coupons attached from the 27th day of October, 1891, petitioners (Hope & Co.) are to deliver to the board of liquidation for cancellation all the

outstanding bonds tendered by them for funding, viz.:—9,042 bonds, amounting, in the aggregate, to the sum of \$4,018,628.48. It is further ordered, etc., that all the costs of both courts be paid by defendants.

NICHOLLS, C. J., recused.

BREAUX, J. I cannot concur in the decree as made, and for that reason I am constrained to dissent. The banking department of the Citizens' Bank is, to the extent that it has an interest, in my view, entitled to the amount it has paid, and, to that end, has an equitable claim. Its financial relation to the state should preclude it from recovering more than it has paid.

(107 La.)

STATE ex rel. McMAIN v. TOWN OF POLLOCK. (No. 14,883.)

(Supreme Court of Louisiana, June 16, 1902.)

SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTION—PLEADING.

1. Where the decision of a cause in one of the inferior courts turns upon the fact whether a statute be constitutional or not, it is only when the lower court holds the statute to be unconstitutional that the cause can be appealed to the supreme court on that issue, where the matter in dispute is below the appellate jurisdiction of that court.

2. The supreme court will not take jurisdiction of a cause upon implied allegations. Allegations should be direct and specific.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; W. F. Blackman, Judge.

Application by the state, on the relation of A. F. McMain, for writ of mandamus to the town of Pollock. From a judgment dismissing the suit, relator appeals. Dismissed.

Ryan & Blackman, for appellant. W. P. Gwynes and F. Hamilton, for appellee.

Statement of Facts.

NICHOLLS, C. J. Relator demanded before the district court for Rapides parish that the mayor and treasurer of the town of Pollock be mandamus to issue to him a license for the year 1902 to retail spirituous liquors and intoxicating liquors within the boundaries of said town, and to pay him \$2,500 damages, which he alleged he had sustained by reason of their having refused illegally to issue the same. This demand having been rejected, and his suit dismissed, he has appealed.

The defendants set up in defense the prohibitory provisions of Act No. 130 of the general assembly of 1900, enacting that it should thereafter be unlawful for any person to engage in the selling, giving away, bartering, or exchanging of intoxicating liquors, except for individual, scientific, or sacramental purposes, within three miles of the high school of the town of Pollock, and subjecting any persons violating the provisions of that act, on conviction, to pay a fine of not less than \$25, nor more than \$250, or be imprisoned not less

than 10 days, nor more than 3 months. Defendants averred that said Act No. 130 was constitutional, legal, and valid in its entirety, and that it in no way conflicted with any of the statutes of Louisiana, nor with article 49 of the constitution of 1898.

The case was tried on the following agreed statement of facts: "It is admitted that the mayor and treasurer are the proper ones to issue a retail liquor license for the town of Pollock, Grant parish, La.; that a legal tender for said license was made by this plaintiff on January 24, 1902. It is shown that on the 8th day of February, 1898, an election was held in the town of Pollock under Act No. 76 of the Acts of the General Assembly of the State of Louisiana of 1884, and due promulgation thereof, and a large majority of the voters of said town decided at said election in favor of selling liquor therein. It is further admitted that the town council of the said town fixed for the year 1902 the retail liquor license at the sum of five hundred dollars. It is further admitted that the public school in the town of Pollock, or the authorities have, in no way complied with section 10 of Act No. 81 of the Acts of the General Assembly of the State of Louisiana of 1888, and it is not, in contemplation of said act, a high school under said act. Thus done and signed on this — day of February, 1902. A. F. McMinn, Plaintiff, per Ryan and Blackman, Attys. W. P. Guynes, Mayor. F. Hamilton; Treasurer."

The district court refused the mandamus and dismissed plaintiff's suit, and he appealed.

In his petition for a mandamus he had alleged and maintained that Act No. 130 of 1900 conflicted with article 49 of the constitution of 1898; that by Act No. 76 of the Acts of 1884 the legislature had conferred upon the people of the towns of the state plenary power over the question of retailing spirituous liquors, and a subsequent legislature had no power to pass Act No. 130 of 1900, to indirectly repeal a general law by the enactment of a special local law; that section 10 of Act No. 81 of the Acts of 1888 provided how high schools throughout the state should be established. It provided, in substance, that the local school boards should pass ordinances to that effect, and submit same to the state board of education, and that no high school should be opened without its sanction. It provided that suitable buildings, etc., had to be donated to the school as a prerequisite to its establishment by the state board, and none of these things had been done.

Opinion.

The mere fact that the decision of a case in one of the inferior courts depended upon whether a certain law of the state be constitutional or not does not vest in the supreme court appellate jurisdiction over it. If the matter in dispute fall within our general appellate jurisdiction, that particular issue would be taken up and disposed of, as would any other involved in the suit; but, if not, we could only

take cognizance of an appeal in the cause should the lower court have pronounced against the constitutionality of the act. In the case at bar the district court sustained the constitutionality of the statute. We have therefore to inquire whether the subject-matter of the suit was such as to give this court jurisdiction independently of this particular question. If not, we could not reverse the judgment. Allegations as to the amount of the matter in dispute avail nothing if they be made solely for the purpose of obtaining jurisdiction. The claims advanced must be serious, not fictitious. In the case before us the relator claimed \$2,500 damages against the mayor and treasurer of the town of Pollock for refusing to disobey a law of the state, and to determine for themselves that the law was unconstitutional. We do not think this demand was seriously advanced, particularly in a mandamus proceeding. We do not think relator for a moment had an idea of recovering damages to the amount demanded, even if any at all. Relator does not allege that, had he been granted the license he sought, the profits of his business for the year would have been \$2,500. It is true that article 1834 of the Civil Code declares that the general rule is that "damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived," and that this same rule, with some modification, applies to damages in other cases, and that therefore when a person claims \$2,500 damages the demand carries with it an implied assertion that that sum was the amount of gain which the party had been or would be deprived of; but we are of the opinion that, in a matter of this kind, we should deal with something more than implied allegations. The allegations should be specific and direct. Besides this, the damages which the relator sets up are not damages actually accrued, but for assumed, prospective, and contingent profits.

We are of the opinion that we have no jurisdiction of this cause *ratione materiae*, and the appeal is hereby dismissed.

(107 La.)

RICHARD v. LAZARD et al. (No. 14,315.)
(Supreme Court of Louisiana. May 26, 1902.)

STATUTES—CONSTRUCTION—HUSBAND'S SUCCESSION—RIGHTS OF WIDOW.

1. To discover the true meaning of a law, we must consider its reason and spirit, the cause which induced the lawmakers to enact it, and the mischief which it seeks to prevent or remedy. However general may be the terms in which it may be expressed, it only extends to those things or persons it appears the law-making power intended it to reach.

2. The general assembly, in enacting the statute of 1852 (article 3252, Civil Code), whereby the widow left in necessitous circumstances is entitled to recover \$1,000 from her husband's succession, to be paid by preference out of the estate, never contemplated or intended that this assistance should be extended, adversely to his creditors or to his heirs at law, to an unfaithful wife who abandoned her husband.

(Syllabus by the Court.)

Certiorari to court of appeals, Fifth circuit.

Action by Laure Richard against Joseph Lazard and others. Judgment for plaintiff was reversed by the court of appeals, and plaintiff applies for certiorari, or writ of review. Judgment of court of appeals reversed, and of district court affirmed.

Edward N. Pugh and Walter Lemann, for applicant. R. McCulloh, for respondent Mary Lazard.

NICHOLLS, C. J. The plaintiff, Laure Richard, as holder and owner of a promissory note executed by Joseph Lazard and Mary Lazard, his wife, payable to their own order, and by them indorsed and secured by special mortgage on certain property in the town of Donaldsonville, caused executory process to issue upon the note, praying that the property mortgaged be seized and sold after legal notice to the parties. Joseph Lazard, the maker of the note, was at that time dead. There were no children, issue of his marriage with Mary Lazard. The parties with whom the proceedings were contradictorily carried on by the plaintiff were the heirs of Joseph Lazard and Mary Lazard, the widow. The latter filed a petition of third opposition, in which, as widow of Joseph Lazard, she averred that her husband had recently died, leaving her in necessitous circumstances and not possessed in her own right of property to the amount of \$1,000; that in fact she had no property whatever; that she was entitled, therefore, to demand and receive from his succession the sum of \$1,000; that, as surviving widow, she had a lien and privilege, on all the property of the deceased, which outranked all and every other privilege except the vendor's privilege, if any, and expenses incurred in settling the property; that the privilege held by her primed the mortgage enforced by the plaintiff; that the property mortgaged was acquired during her marriage with the deceased, and was his only property. She prayed that her privilege with its rank be recognized, and she be paid by preference. The seizing creditor answered the opposition, pleading first the general issue; further answering, she especially denied that third opponent was such a widow as was contemplated by law, or that she was left by Joseph Lazard, deceased, in necessitous circumstances; she having been separated from him several years prior to his death. Plaintiff, in executory proceedings, caused interrogatories to be propounded to Mrs. Fred Becker, under commission, which disclosed upon their face that the claim set up in the third opposition would be opposed upon the ground that third opponent had left her husband and lived in open concubinage and adultery with another man. The interrogatories were crossed under reservation of objections that they were inadmissible, and irrelevant, vague, and leading. The testimony taken under

them was admitted, on the trial of the case, over defendant's objection, and she reserved a bill of exceptions. The district court rejected the third opposition, and opponent appealed to the court of appeals. That court reversed the judgment appealed from, and sustained the third opposition. After an unsuccessful attempt to obtain a rehearing, the cause has been brought up for review to this court, under a writ of certiorari and writ of review.

The testimony adduced established the fact that third opponent refused to return to her husband after leaving him, and lived in open concubinage with another man. We think the testimony was relevant and admissible. The pleadings did not expressly charge adultery, but the interrogatories propounded, which were crossed by defendant, disclosed fully the nature of the defense which would be set up against the third opponent's pretensions. She was not taken by surprise. The claim to a privilege is based upon the last clause of article 3252 of the Civil Code, which declares that whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, and do not possess in their own right property to the amount of \$1,000, the widow or the legal representatives of the children shall be entitled to demand and receive from the succession of the deceased husband or father a sum which, added to that owned by them or either of them in their own right, will make up the sum of \$1,000, and which amount shall be paid in preference to all other debts except those for the vendor's privilege and expenses incurred in settling the property. The fact that the opponent is without means is conceded. It is contended before us that the abandonment by a wife of her husband, and her living in concubinage and adultery with another man, are not grounds upon which courts are authorized to deny to her the benefits of the law as embodied in article 3252 of the Code; that the law is clear and free from ambiguity, and the letter is not to be disregarded under the pretext of following the spirit; that opponent is unquestionably the "widow" of the deceased, as its signification is "a woman who has lost her husband by death"; that the terms of the law are general and absolute, and the courts are not warranted in placing a limitation upon them, or affixing conditions, when the lawmakers have not affixed them; that the law is plain, and does not admit of construction. As supporting his position, counsel refers us to Succession of Liddell, 22 La. Ann. 9; Gee v. Thompson, 11 La. Ann. 657; Succession of Marc, 29 La. Ann. 413; and Sabalot v. Populus, 31 La. Ann. 855. Plaintiff, on the other hand, calls our attention to article 2382 of the Civil Code, and the decisions of this court under the same. The article reads: "When the wife has not brought any dowry or when what she has brought as a dowry is inconsiderable with respect to the

condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has the right to take out of the succession of the deceased what is called the marital fourth, that is the fourth of the succession in full property, if there be no children, and the same portion in usufruct only when there are but three or a greater number of children, and if there be more than three children the survivor whether husband or wife shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first."

In *Armstrong v. Steeber*, 3 La. Ann. 713, a wife who had abandoned her husband for several years before his death, to live in concubinage with another, claimed the marital fourth. This court said the marital fourth was first allowed by the Twenty-third and One hundred and seventeenth novels of Justinian, and forms the subject of law 7, title 13, of the sixth partida. It was established, says *Gregorie Lopez*, in *honorem preterite matrimonii*, and in order that the widow might bene et honeste vivere. That the case before it did not come within the reason and spirit of the law, nor did it think the letter of it more favorable to plaintiff's pretensions. She had left her husband, several years before his death, to abandon herself to the life of profligacy congenial to her. She did not go near him in his last illness, and suffered him to die uncared for and alone. Her situation was no more affected by his death than that of other abandoned women in the city. He did not, therefore, leave her in necessitous circumstances within the meaning of the article of the Code on which she relies, and she has no claim upon his succession. In *Pickens v. Gillam*, 43 La. Ann. 350, 8 South. 928, this court would not permit a husband to claim the marital fourth who, in less than two years after his marriage, had separated from his wife, and lived apart from her; who had not been shown to have made the least attempt at reconciliation, nor had made any inquiries about her during 17 years; who was not with her in her last illness nor at her funeral. The court said they were strangers to each other, and it was as if they had not been married; that, after those many years of unfriendly separation, the deceased did not leave him in necessitous circumstances; that the marital fourth under the Roman law was not allowed when the spouse claiming it had been wanting in interest, feeling, or attachment. That that principle in the jurisprudence of Louisiana prevailed. The court held there was a broad distinction between a spouse who was at fault and one who was not. In *Succession of Justus*, 44 La. Ann. 724, 11 South. 95, this court, referring to the marital fourth, declared that it was provided "in order that the surviving spouse might not, after a life of ease and comfort, be suddenly thrown into abject poverty;" that the

text read, "*Quatur datur in honorem preterite matrimonii*;" the fourth was given, in honor of the past marriage, that the survivor be retained in the previous accustomed rank and condition; it was a gift; it was not a donation by the deceased, but one by the sovereign, acting in the place of the unwilling, forgetful, or ignorant defunct spouse, that it might be assimilated to the charity or bounty extended or conferred on the necessitous widow or minor heirs by the act of 1852, now article 3252 of the Civil Code, with this difference: that the marital fourth is taken from a solvent succession or the heirs, while the \$1,000 are allowed in insolvent successions in preference to creditors; both are laws in derogation of common right. Referring to the case before it, the court, in rejecting the claim for the marital fourth, said that to admit it "would not be in furtherance of the humane objects of the lawgiver, but doing violence to the spirit and letter of the provision;" adding, "*Scire legis non est verba earum tenere, sed vim ac protestatem capere*." We have examined the authorities upon which appellees rely. In *Gee v. Thompson*, 11 La. Ann. 657, *Hannah Gee*, a necessitous widow separated from bed and board by a judgment in her favor from her husband, was permitted to take the marital fourth on the ground that the decree of separation had not dissolved the bonds of matrimony. The judgment of separation established that the husband had forcibly expelled and driven her from the common dwelling without any just cause or provocation whatever; that she remained separated from him by reason of his unlawful acts notwithstanding her desire to return; that he defamed her; that his conduct was cruel, excessive, and of such a nature and character as to render the living with her husband absolutely insupportable; that the wife was therefore driven by him to place herself under the protection of the law, and she had not placed herself in a worse position by so doing. This court said, "The law would be a strange one which should hold out rewards to violence and injustice even by its consequences." In *Succession of Liddell*, 22 La. Ann. 9, the deceased died leaving no children; the widow claimed the right to take \$1,000 from his succession as a widow in necessitous circumstances. Differently from the facts in the *Gee Case*, the husband had obtained a separation of bed and board from the wife, and not the wife from the husband. The evidence showed that the effect of this judgment was done away with by a reconciliation between the parties, and judgment was rendered in her favor from that condition of affairs. In *Succession of Marc*, 29 La. Ann. 412, and in *Sabalot v. Populus*, 31 La. Ann. 855, the widow was permitted to take \$1,000 from the succession of the husband as a necessitous widow, although the evidence disclosed that husband and wife had held illicit relations together prior to their marriage; the marriage in the former case hav-

ing taken place about 12 days before the husband's death and in the latter case about 18 months. The court, for the purposes of the demands of the widows, would not go back of the marriage and the fact that at the time of the death the parties were living together as husband and wife. In the 29 La. Ann. Case, it was said *arguendo*, "The act of 1852 gives to the widow who is in necessitous circumstances the sum mentioned, without qualifying her right to receive it by the condition that her previous life should have been blameless, or by limiting its operation to those whose married life should have lasted a specified time. It is argued by one of the opponents that an interpretation of the statute which permits the widow of Marc to partake the beneficence provided by it would be offensive to our moral sense, and that it could not have been in contemplation of the legislature to place a woman who had thus disregarded religious and social duty upon the same plane with the respectable and bereaved widow, whose condition attracted the regard and provoked the compassion of the lawmaker. It is very certain, however, that the law has not attached qualifications, nor imposed conditions, upon the recipients of this legislative bounty, such as we are asked to supply and enforce in the present proceeding. Should we attempt to do so, omitting any mention of our want of authority, we must arrange this description of persons into classes separated from each other by the purity or impurity of their antenuptial lives, or by the longer or shorter duration of the marriage which preceded the widowhood." It is obvious that, in using the words here quoted, the organ of the court was dealing with the phase of the question as precisely presented in the particular case then before it, with the knowledge of the disposition, which the lawmaker had in several instances manifested, of giving a condoning effect to subsequent marriage, for acts antecedent thereto. The court was of the opinion that, under the circumstances of that particular class of cases, both the letter and the spirit of the statute were satisfied.

Counsel of appellees in their brief recognize the propriety of the courts of Louisiana taking particular cases outside of the scope and operation of the provisions of article 2382 of the Civil Code, relative to the marital fourth, by reason of special circumstances, but they deny that they have authority to do so in the matter of the provisions of article 3252, which confer a privilege upon a necessitous widow, though the language of one of these articles no more calls for limitations upon the right conveyed than does that of the other. They say, "The marital fourth comes to us from the Spanish and Roman laws in existence in Louisiana in 1808, when our Code was adopted, with the construction placed upon it through many years by decisions of courts and the opinions of law writers. It contained its conditions

and exceptions. It required the wife to have lived with her husband and to have conducted herself in a virtuous manner, while the wife's privilege under the act of 1852 was without parentage in our law, without custom or prior decisions. It was plain, and needed no construction. It made no exceptions." They quote extracts from Merlin, cited in the opinion of this court in the Succession of Justus, where that author, dwelling on the necessity of some relations existing between the spouses to enable the survivor to recover the marital fourth, says, "In that respect, in addition to the poverty of the spouse, the *Novelles* 58 and 117 require two conditions that she may recover the fourth of the succession of the husband: The first, an honest marriage; the second, that she has always abided with him; from which it is not difficult to judge that the object of the legislator is to conserve the dignity of marriage;" and where that author referred approvingly to the result of a particular case where the inquiry was made, "After the marriage did she dwell with her husband? Did she remain near him to the end?" and the answer was, "Not a moment of concord or union." Counsel of appellant, referring to the act of 1852, say the enactment of this statute was in line, and had in view the same beneficent purpose, and was prompted by the same motive and duty, that led to the passage of article 2382. They are both laws on the same subject-matter and in *pari materia*; both brought about by a desire to relieve the widow in necessitous circumstances. The only difference between the two laws is that one comes into operation when the husband dies rich, leaving the widow in necessitous circumstances, and the other when the husband dies poor, the widow being left in necessitous circumstances. The amount of the bounty varies in the two cases, and justly so. Where the estate is large, the bounty is large; where small, the bounty is small. But in both cases the law aims and directs to aid and assist the same helpless party, namely, the faithful wife truly and really "left," in every sense of the word. Our courts, in construing the word "left" in respect to "the marital fourth," repeatedly held it to mean that, at the time of the death of the husband, the wife must in point of fact and in truth be deprived by that death of the means of livelihood; that his death must have caused some sudden change in her condition and means of living. That, this being the judicial meaning attached to that word in that connection prior to the statute of 1852, when the legislature used the same word and language in the subsequent statute, it was almost a presumption *juris et de jure* that they intended it to carry the same meaning and be received in the same sense. The legislature, in passing the act of 1852, must have had before it the Code provision touching the marital fourth. The wording used was strikingly similar.

In the one case the active tense is used, in the other the passive. True, the conditions which must exist in order to call into operation the one law differ from those which must exist when the other is called into play. But quoad the parties to be benefited, and the position which they must hold in relation to the deceased, the language used is identical, and the party to be benefited is the same. We are entirely at a loss to see wherein "the two laws are so entirely different as to be distinct." The one law is as plain and as clear in its provisions as the other. If the law in regard to the marital fourth has its conditions and exceptions, so has the law granting the widow's thousand. The one has no more or fewer conditions than the other. If, to construe the one, the court felt justified in referring to the old civil jurisprudence in order to determine the spirit of the Code provisions embodied in article 2382, is it not equally open to this court for this court, in order to arrive at the true spirit and meaning of article 3252, to look into the jurisprudence existing at the date of the passage of the act of 1852, and which jurisprudence must have been known by the legislators when they adopted the statute? Counsel refer us to the reasoning of the supreme court of Tennessee in the case of *Prater v. Prater*, 8 S. W. 364, 10 Am. St. Rep. 623, on a statute involving the same class of legislation, where the court said: "So the widow to whom the right of homestead inures at the death of her husband must have been a member of the family in a legal sense when he died; otherwise, she cannot successfully assert a claim to the homestead in the estate after death. This does not imply that she must in fact and in all instances have been residing with her husband at the time of his death, but if she willfully, and without excuse, deserted the family, and eloped and lived with an adulterer, or otherwise so demeaned herself, that she may neither in law nor in morals require her husband to receive her back again, she is in such case not a member of the family while he lives, and does not become his 'widow' in contemplation of the homestead when he dies." We are of the opinion that the general assembly, in enacting the act of 1852, had the same beneficent purpose, and was prompted by the same motive, that led to the adoption of article 2382 of the Civil Code; that the two laws cover substantially the same subject-matter, though from somewhat different standpoints; that they are in pari materia, brought about by a desire to relieve a wife suddenly deprived, by the death of her husband, of the means upon which she had relied up to that time to support her, and to retain her for a time at least in her accustomed condition; and that the bounty accorded by the lawmaker was in honor of the past marriage; that therefore, when the law refers to a "wife," it contemplates a

wife in fact, and not one merely in name. It is to enable a faithful wife to continue "bene et honeste vivere." It certainly does not intend to reward a woman who has disgraced herself and the family into which she was taken. For this court to hold otherwise would, as we said in the *Justus Case*, "not be in furtherance of the humane object of the law, but to do violence to the spirit and letter of its provisions. Scire legis non est earum tenere sed vim ac potestatem capere." To discover the true meaning of a law, we must consider its reason and spirit, the causes which induced the lawmakers to enact it, and the mischief which it seeks to prevent or remedy. However general may be the terms in which it may be expressed, it only extends to those things or persons it appears the lawmaking power intended it to reach. In *Succession of Bothick*, 52 La. Ann. 1879, 28 South. 464, we said: "Exceptional cases have frequently to be read out of, and excluded from, broadly written law, because it was so enacted by the legislators; as *Marcadé* says, 'Evidement parce qu'ils se sont préoccupés des cas les plus ordinaires.'" See, on this subject, *State v. Soulier* (recently decided) 32 South. 175; *City of New Orleans v. Chappuis*, 105 La. 182, 29 South. 721; *State v. Keasley*, 50 La. Ann. 761, 23 South. 900.

Applying the rule of construction herein announced, we are very certain that the general assembly, in enacting the statute of 1852, never contemplated or intended that any assistance should be extended to an unfaithful wife adversely to the creditors of her husband or to his heirs at law.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the court of appeals herein brought up for review be, and the same is hereby, annulled and reversed, and that the judgment of the district court which was reversed and annulled by the court of appeals be, and the same is, reinstated, and the same is hereby affirmed.

(107 La.)

BRENNAN et al. v. SEWERAGE AND WATER BOARD et al.

CITY OF NEW ORLEANS v. NEW ORLEANS SEWERAGE CO. (No. 14,512.)

(Supreme Court of Louisiana. June 21, 1902.)
CONSTITUTIONAL AMENDMENT—SEWERAGE AND WATER BOARD—POWERS—JUDICIAL CONTROL.

1. The validity of an amendment to the constitution, proposed as the general assembly has a right to propose it, and adopted as the electors throughout the state have the right to adopt it, is in no manner affected by any petition which may, previously, have been presented to a municipal council or to the general assembly.

2. By the terms of the amendment, proposed as Act No. 6 of the Extra Session of 1899, the sewerage and water board is authorized to acquire, for the city of New Orleans, "the plant and franchises of any water or sewerage companies" in that city. There having been, when the amendment was proposed and adopted, but

one water and one sewerage company in New Orleans, the word "plant" is held to apply to the physical means provided by those particular companies for the accomplishment of the ends for which they were established, though, in the case of the sewerage company, they do not constitute a completed plant.

3. The sewerage and water board, established by constitutional amendment, and authorized, subject to the ratification of the city council, to acquire the plant of the sewerage company, made a contract to that effect, which was ratified, as required. Its consummation is enjoined by citizens, claiming as taxpayers, on the grounds that it is ultra vires of the board, and that the price agreed on is excessive. *Held*, that the board and the city are acting within the power conferred on them, and, there being no fraud imputed or shown, no invasion of private rights, no manifest oppression, and no gross abuse, their action is not subject to judicial control.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Actions by James A. Brennan and others against the sewerage and water board and board of liquidation, and by the city of New Orleans against the New Orleans Sewerage Company. The cases were consolidated, and from the judgment, defendants appeal. Reversed.

Charles J. Théard, for appellant sewerage and water board. Branch K. Miller, for appellant board of liquidation. Fenner, Henderson & Fenner, for appellant New Orleans Sewer Company. Samuel L. Gilmore, City Atty., for appellee the city of New Orleans. Charles Louque, Louis P. Bryant, J. J. O'Connor, and A. P. Phillips, for appellees Brennan et al.

MONROE, J. In the first of the above-entitled cases, James A. Brennan and James H. Douglas seek, by injunction, to prohibit the consummation of a contract entered into between the sewerage and water board and the New Orleans Sewer Company, and ratified by the city of New Orleans, whereby the board has undertaken to acquire, for the city, certain tangible property and franchises, of which the company claims to be the owner; the grounds relied on being that the board is without authority in the premises, and that the price agreed on is excessive. When these plaintiffs appeared in court there was already pending a suit which had been brought by the city in July, 1896, to annul the ordinance and contract under which, as transferee, the New Orleans Sewer Company now claims to be the owner of the franchises in question, and to recover certain damages alleged to have been sustained by reason of the nonexecution of that contract, and the suit last mentioned was transferred to the division to which the other had been allotted, pursuant to an agreement, containing, among others, the following stipulations: "(1) These cases shall be and are consolidated, and they shall be heard and determined in division A, before Judge Ellis, at one and the same time. (2) At the trial the evidence on the issues in said suit No. 67,254,

entitled 'Brennan v. Sewerage and Water Board,' shall be first taken. (3) The evidence on the issues in suit No. 50,365, entitled 'City of New Orleans v. New Orleans Sewerage Co.' shall then be taken. (4) The matters at issue shall be argued at one time, at the earliest practicable moment. (5) The court shall then render one judgment and decree disposing of all the issues in each of the consolidated suits; and there shall be but one record on an appeal by either or all parties, and all issues shall be considered as before the supreme court when the cause is taken on appeal of any or all parties. * * * And this agreement appears to have been carried into effect in all respects, save that separate judgments were rendered in the two cases, of which, however, no complaint is here made. There was judgment in favor of Brennan and Douglas "forever restraining * * * the defendants * * * from carrying into execution the proposed purchase of the property, rights, and supposed franchise of the sewer company, and from paying them * * * any sum of money towards said purchase under the proposition" attacked by the plaintiffs. And there was judgment in favor of the city, and of certain interveners who had joined the city in the case last mentioned in the above caption, "annulling Ordinance 6142, C. S., adopted March 22, 1892, and the contract thereunder by act before J. D. Taylor, notary public, April 13, 1892, as being illegal, null, and void, and of no effect; * * * dismissing and rejecting the intervention of N. W. Jordan and of his assignee, the New Orleans Sewer Co.;" and dismissing, as in case of nonsuit, the claim of the city for damages. And from these judgments the parties cast have appealed. The facts, as we find them from the transcript and from the admissions of counsel, and which, in the main, are undisputed, are as follows: Act No. 125 of 1890, amending certain sections of the Revised Statutes, authorizes the establishment of corporations for sewerage, among other purposes, and provides that such corporations shall not construct their works through the streets of any city or town without the consent of the council thereof. It further provides that the council giving the necessary consent "may, in the interest of the public health and cleanliness, pass all needful ordinances and police regulations to make effective the system of sewerage * * * adopted with reference to all houses and lands within the municipal limits." It further provides that such corporations may borrow the money "required for the construction, repairs, or acquisition of property, or franchises, and, for this purpose, may issue bonds, or other obligations, secured by mortgage upon the franchises and all the property * * * of said companies, * * * with power to sell, pledge, or otherwise dispose of, said bonds." On March 24, 1892, the city council of New Orleans, by Ordinance 6142, C. S., authorized the mayor to enter into a contract granting to A. A. Woods and his associates the privilege

of constructing and maintaining for fifty years a system of sewers through the streets of New Orleans; and the contract was entered into accordingly, by act before Taylor, notary, April 13, 1892. It was provided that, within six months from the passage of the ordinance, Woods should transfer said contract to a corporation organized under Act No. 125 of 1880; and he made the transfer, within the time specified, to the New Orleans Sewerage Company, which was organized September 19, 1892. It was also provided that the company should begin its surveys within six months from the date of its organization, and should complete one-fifth of the entire work contemplated by the contract within each year thereafter for five years. In January, 1894, however, an extension of "two additional years" was granted to the company "within which to begin and to complete the sewerage system." The company first undertook to accomplish the work called for by its contract through the New Orleans Construction Company, but subsequently employed the contracting firm of Stewart & McDermott, who abandoned the job in October, or November, 1895. In the meanwhile, and in order to raise the necessary funds, the company had caused to be executed bonds, secured by mortgage on its property and franchises, to the amount of \$2,000,000, of which some \$386,500 had been issued, \$375,000 of that amount having been negotiated in the city of Boston, and, possibly, the larger proportion of the proceeds having been put into the work. Upon the withdrawal of Stewart & McDermott, active operations were suspended; and on May 22, 1896, the president of the company appeared before a committee of the city council and made a statement of its affairs, from which it appeared that it was not in a condition to go on with the work, and in the course of which he said "that, unless the company was controlled by gentlemen of higher standing, he would be glad to have the franchise returned to the city." It does not appear, however, that he was authorized by the company to make such a statement, or that it was made with the approval of the bondholders. On May 26th, a motion, offered by the committee just mentioned, was adopted by the council, directing the city attorney to take "necessary steps to have the New Orleans Sewerage Company put in default, and institute the necessary legal proceedings to have their charter declared forfeited, and to annul the ordinance granting all privileges to A. A. Woods, his successors, transferees, and assigns." In June following certain creditors of the company filed a petition alleging that it was insolvent, that its operations had been suspended, and that it had grants and franchises which would be lost to it and to its creditors, unless the court would appoint a receiver. And, the petition having been accompanied by a resolution of the board of directors of the company virtually admitting the truth of its allegations, and

service thereof having been accepted by its president, a receiver was appointed. Thereafter, in July, the city attorney instituted suit, according to his instructions, praying that Ordinance 6142, C. S., be annulled, and the city relieved from further obligation thereunder, and for damages; the grounds of action, as stated, being: (1) That the company had not completed one-fifth of its work in each year, etc.; (2) that it had abandoned the work and was insolvent, and that a receiver had been appointed; (3) that it had failed to put the streets in order after laying its pipes; (4) that the bond furnished was not such as the contract called for. To this, and to the supplemental petition, filed not long afterwards, the company set up various grounds of exception and defense. The case was not, however, brought to trial, and during the early part of 1897 all the assets of the company, including the rights, privileges, and franchises covered by the mortgage, were sold, by order of court, at the instance of the holder of five of the bonds, and were adjudicated to N. W. Jordan, as the holder of 375 outstanding bonds, of the par value of \$1,000 each; and the adducatee then intervened in the suit and asserted title to the property so adjudicated. In September, 1897, another supplemental petition was filed on behalf of the city, in which it was alleged that the contract with Woods was ultra vires of the city, because in contravention of section 1, Act No. 135 of 1888, and because it undertook to compel householders to cease using vaults and to pay cash for sewer connections, or else subject their property to a lien; that it was unconstitutional, in that it undertook to require the payment of monthly rates, and thereby imposed an unauthorized tax; and that neither said contract nor the franchises thereby conferred were assignable. In December, 1897, a number of taxpayers intervened and joined the plaintiff in its demands. In September, 1898, Jordan sold the property which had been adjudicated to him to the New Orleans Sewer Company (a new corporation) for \$2,324,300, represented by 19,993 shares of its stock, and \$325,000 of its bonds, secured by mortgage on the property sold. In the meanwhile the case of the city against the sewerage company remained undisposed of, and no effort appears to have been made to fix it for trial until April of the present year, when one of the counsel for the plaintiffs in the Brennan case, having intervened in his capacity as a taxpayer, made a motion to that effect, and it was then transferred and consolidated, as has been already stated. The explanation of this inaction on the part of the litigants is that negotiations looking to a compromise between the city and the New Orleans Sewer Company, claiming to be the transferee of the New Orleans Sewerage Company, were begun and broken off from time to time, but were never finally abandoned.

It is necessary now to a correct understanding of the questions at issue that we should

inquire into the origin, powers, and situation of the sewerage and water board, and into the action taken by that body which is here made the subject of complaint. In April, 1899, there was presented to the city council of New Orleans a petition, signed by more than one-third of the property taxpayers, asking for the levy of a two-mill tax, for 43 years, the proceeds of which should be applied, in such ratio as might be required, to the following purposes of public improvement, to wit: "(1) To acquiring title by the city, by construction or purchase, or both, to a system of waterworks; to the extension thereof throughout the city; and to the purification of the water supply therefrom. (2) To the construction, throughout the city, including the Fifth district, of a free sewerage system, with free water therefor, the title whereof shall be in the city." The petition further prayed the council to obtain legislative and constitutional authority for the capitalization of the tax to be levied, and with respect to other matters. An election was accordingly held, in order to take the sense of the property taxpayers, and the tax was voted. The general assembly was, then, in August, 1899, convened in extra session, and an amendment to the constitution, in the form of an elaborate piece of legislation for the carrying into effect of the proposition of the taxpayers, was submitted to the electors of the entire state, and adopted, including a certain reservation to the general assembly of the right to amend the same. This legislation, now embodied in the constitution, establishes the sewerage and water board, and, among other things, provides: "Sec. 15. That said board shall have power, by a vote of twelve of its members, to acquire, in the name and for the benefit of the city of New Orleans, the plant and franchises of any water or sewerage companies in the city of New Orleans, but no contract for that purpose shall be valid until ratified by ordinance of the common council of the city of New Orleans. In case no agreement can be reached between said board and the city council, on the one side, and the representatives of the said company on the other, as to the price to be paid said companies for their property and franchises, and it shall become necessary for the city of New Orleans to expropriate the same, the price to be paid on such expropriation, shall be paid by said board out of the proceeds of the bonds aforesaid. The outstanding mortgage bonds of such companies may be assumed by the city as part of the price. Nothing in this act shall be held to affect the right of either the state of Louisiana or the city of New Orleans in the pending litigation against the New Orleans Water Works Company or the New Orleans Sewerage Company." Acts 1899, No. 6. The sewerage and water board, thus established and empowered, appointed a board of advisory engineers, and in June, 1900, the board last mentioned recommended that the general su-

perintendent be authorized to make a careful examination of the existing sewers, and to inventory and appraise the property of the sewer company, and this was followed by a similar recommendation from the board's committee on sewerage and water. On December 15, 1900, the board of advisory engineers reported to the general superintendent as follows: "The examination made of the sewers built in the city before 1895 by the New Orleans Sewer Company has given very satisfactory and gratifying results. It has demonstrated that a large brick sewer, twenty feet below the surface of the ground, and small pipe sewers, five to twelve feet below same, can be built so as to remain in a stable condition in the peculiar soil underlying. It has also produced sufficient evidence from which to assume that the amount of ground water seepage likely to enter the sewers may be taken at one million gallons per square mile of territory per day, or one-third of the average rainfall. This seepage water will not only improve the condition of the upper layers of the soil in the city, but also facilitate the satisfactory carriage of the sewage during the early years, when comparatively few houses have been connected with the system, and it will also give the sewage a great dilution. [Signed] B. M. Harrod, Rudolph Hering, George W. Fuller, L. W. Brown, A. C. Bell, Board of Advisory Engineers." On July 18, 1901, the sewerage and water board adopted the following resolution: "Whereas, after duly authorized survey and investigation, it has been declared in the official reports of the general superintendent of the sewerage and water board that certain property belonging to the New Orleans Sewer Company, consisting of real estate, material, and more or less completed work of construction, may be made available in executing the adopted plans for the new sewerage system of this city, with marked economy and without impairment of the efficiency of the system, under these plans: Be it resolved that the committee on sewerage and water of this board be instructed and fully empowered to have such additional and supplementary survey and investigation of the aforementioned property made, with the assistance or employment of disinterested experts, at their discretion, as will fully and definitely establish what portion, if any, of the said property may safely be acquired for utilization in the work of construction under the plans adopted for the new sewerage system, and that the said committee make report and offer recommendations covering the results of their labors, to be submitted to this board, if practicable, not later than its next regular meeting in August." This was modified in September, so as to provide that the experts should make a careful appraisalment of the value of the property, and to authorize the committee to invite the sewer company to participate in the survey and bear half of the expense, one expert to be appointed on

each side. Agreeably to the action thus taken, A. C. Bell, former city engineer, was appointed on behalf of the water board, and G. A. Nettleton on behalf of the sewer company, and they made the investigation together. Mr. Nettleton estimated the property to be worth \$229,444.80. Mr. Bell valued it at \$169,619.83. During the course of this investigation, to wit, on November 17, 1901, there was published in the Daily States of this city a letter from the secretary of the sewerage and water board calling the attention of the public thereto, and inviting any persons who might see fit to do so to avail themselves of the opportunity thus afforded to inspect the sewers. As soon as the investigation was completed, the reports of the experts were submitted to Messrs. Hering and Fuller, consulting engineers of the board, who, upon January 14, 1902, gave their opinion in writing, as follows: " * * We beg to state that we have very carefully considered the various matters in the premises, and have reached the following conclusions: (1) As to the condition of the pipe and brick sewers of the New Orleans Sewer Company, and, after minor repairs suggested by the experts, their fitness for incorporation into the new sewerage system for which plans were recently adopted, the evidence at hand shows they can be incorporated with absolute safety. The thoroughness of the several inspections of these sewers, and the resulting records, place this matter in such a light that, on an engineering and physical basis, it is no longer a question open for discussion. (2) As to the value of the sewers and other tangible property of the sewer company, we have made a detailed examination of the two appraisements, by Mr. Bell, on behalf of the sewerage and water board, and by Mr. Nettleton, on behalf of the sewer company. Mr. Bell has made a very conservative report in the interests of your board, and we see no reason whatever for supposing that any reputable contractor would undertake to construct this work for a sum less than his estimate. Mr. Bell's figures as to unit prices correspond quite closely with those considered by your board of advisory engineers at their meeting in December, 1900, and applied to the average conditions and volume of work represented by the entire sewerage system now proposed for your city. Mr. Nettleton, on the other hand, appears to regard the value of the comparatively few existing sewers as having no connection with the large mileage for the remainder of the city, and lays stress upon the difficult features which were encountered in the actual and pioneer construction of the first portion of the entire system. We believe that this explains, to a considerable degree, the discrepancies in the two estimates, due to differences in the prices usually prevailing in the same place for very large and for small volumes of work. (3) We have no hesitancy in stating our opinion that the sewerage and water board could well

afford to pay at least the amount estimated by Mr. Bell for these existing sewers. If they were to be replaced, independently of the remaining portions of the complete system, we think it not unlikely that Mr. Bell's figures might be considerably increased, as shown by actual lettings. Rather than to hold in complete abeyance the construction of exceedingly important modern sanitary work for your city, by a disagreement as to their true value, we consider that the discrepancy in the two appraisements is of small significance when viewed as a broad business proposition, and with reference to the vital interests associated therewith." On the witness stand, during the trial, the general superintendent, Mr. Earl, designer of the plans for the constructed sewers, and designer of the plans for the new system (in all essential particulars exactly similar), Mr. Crotts, his first assistant to-day, and his first assistant when the existing sewers were constructed, and Mr. Stephens, the engineer of Stewart & McDermott, the contractors who built those sewers, expressed, in the most positive manner, the same views as Messrs. Bell and Nettleton and Messrs. Hering and Fuller, with regard to the condition of the existing sewers, their durability and absolute safety, as well as easy practicability of incorporating them in the new system. In addition to the investigation thus made in regard to the value of the tangible property of the sewer company, the board made inquiry as to the value of the privileges and franchises of which that company claimed to be the owner, and as to the status of the litigation then pending upon the subject, and which had been pending for several years, between the company and the city, and it learned that three among the ablest law firms in the city, giving separate opinions, had advised: (1) That, assuming the sewer company to have been in delay, such delay did not, ipso facto, dissolve its contract, but only gave the city the right to elect between granting further time, insisting upon specific performance, or claiming a dissolution; (2) that, assuming the city to have elected to claim a dissolution, the contract would, nevertheless, remain in force until dissolved by judicial decree; and (3) that the facts of the case were such as to justify the expectation that the courts would grant the company further time, under Civ. Code, art. 2047. Consulting its own legal adviser, the very able and efficient city attorney, the board was informed that in his opinion the city would ultimately win the suit; that, although he did not think any writ of injunction restraining the board from sewerage construction should issue from either the state or United States courts, he could not foresee what steps might be taken by the company or its bondholders for the purpose of so restraining the board; that, if an injunction should issue from the state court, it could be bonded, but if one should issue from the United States court, it could not be bonded;

that in case of proceedings in the United States court and an appeal to the supreme court of the United States, the litigation might last for two or three years; and, finally, in answer to the inquiry made by the board, whether, under existing conditions, the board should advertise for bids for the construction of the new sewerage system, without any effort to secure the rights, if any, and the property, of the New Orleans Sewer Company, he stated, "My advice in the premises is that the board should use every effort to obtain an amicable settlement of the pending litigation, and acquire whatever right, if any, and property the company may have, and, in case such efforts fail, the suit should be energetically prosecuted to a conclusion." And that the city attorney has found no reason to change the opinion thus expressed is shown by the fact that, whilst he has ably and earnestly argued on behalf of the city its case against the sewer company, he has also testified as a witness that the contract entered into by the sewerage and water board was in his opinion advisable, that the price agreed on was reasonable, and that the action of the board in the premises was wise and judicious.

Basing its action, therefore, in so far as the availability and pecuniary value of the tangible property was concerned, upon the advice of civil engineers of the highest standing, employed and paid for that service, and, in so far as the claims of, and the pending litigation with, the sewer company were concerned, upon the advice of counsel, upon whom, under the law, and from any other point of view, it was fully authorized to rely, the board, after some negotiations, in which the sewer company demanded \$400,000, finally, upon February 20, 1902, closed, by its ratification, subject to the action of the city council, a contract which had been agreed on between its executive committee and the sewer company, to the following effect: "The sewerage and water board to pay the New Orleans Sewer Company, * * * in cash, the sum of \$295,000, with a warranty of satisfaction, by the board, of all taxes unpaid and legally due by said company to the city of New Orleans or the state of Louisiana, on said property, and a pledge to effect immediate settlement of the suit now pending in the civil courts for the forfeiture of the charter and franchise of New Orleans Sewer Company." The taxes referred to amount to \$9,173.20; so that the total price agreed on was \$304,173.20. And the contract so made was ratified by the city council a few weeks later. It may be remarked, in concluding this résumé of the facts and of the evidence adduced, more particularly in the case against the sewerage and water board, that, the two plaintiffs having taken the stand as witnesses, Mr. Brennan testifies, in substance, that his principal ground of complaint in bringing the suit was that the board was about to pay too much for the property to be

acquired; that he would have been willing for it to have paid \$200,000, "but \$95,000 for the franchise was too much;" and Mr. Douglas testifies that he does not believe in sewerage.

Opinion.

There is no suggestion in the pleadings that the sewerage and water board or the city council were actuated by any corrupt motives in making and ratifying the contract which is here attacked; nor is it specifically charged that they have been guilty of gross neglect of duty, extravagance, or misconduct, though this latter charge may, perhaps, be inferred from other allegations. The grounds of complaint are (1) that the board is without authority to buy the property, and (2) that the price is too high. Under article 321 of the constitution, it was competent for the general assembly to have proposed an amendment to that instrument, without regard to any petition from the taxpayers of New Orleans; and the validity of an amendment, proposed as the general assembly had the right to propose it, and adopted, as the electors throughout the state had the right to adopt it, is in no manner affected by any petition which may, previously, have been presented to a municipal council or to the general assembly. Assuming, then, for the purposes of the argument, that when the taxpayers of New Orleans asked that a tax be levied for the "construction," throughout the city, of a free sewerage system, the language was selected with the deliberate purpose of restricting the use of the money to be raised to "construction," and of preventing its use, no matter how advantageous it might be, in the purchase of sewers already constructed. It nevertheless remains that an amendment to the constitution has been proposed and adopted whereby the sewerage and water board is established and is authorized to use the proceeds of the tax in question in acquiring, whether by construction or otherwise, "in the name, and for the benefit, of the city of New Orleans, the plant and franchises of any water or sewerage companies in the city of New Orleans," subject only to the condition that any contract having that purpose in view shall be ratified by the city council. If the taxpayers had any reason to complain that the amendment did not correctly interpret their petition, their remedy was to have made that fact known before it was proposed, or to have defeated it when it was submitted to the electors for adoption. It is not, however, suggested that there was any complaint, or that any effort was made in either of the directions indicated, and it is fair to suppose that it was considered desirable that it should be made clear that the proceeds of the tax to be levied might be used for the purchase, as well as the construction, of a sewerage plant, and it was made clear, accordingly, and beyond recall. It is said that the language of the amendment does not apply to the property of

the sewer company, because that property does not constitute a "plant," but consists, mainly, of some thousands of feet of constructed sewers not yet connected with any machinery or other apparatus; and we are referred to certain testimony to the effect that the pumping station, with the machinery, pumps, etc., of the waterworks company, are the "plant" of that company. The conclusion to be drawn from this argument and illustration is that if the building, machinery, pumps, etc., thus referred to should be burned, or otherwise destroyed, the waterworks company would be without a "plant," or any other property, that the sewerage and water board would be authorized to buy. We do not concur in this view, and we should, probably, be doing injustice to the witnesses by so interpreting their testimony. A building in which engines and pumps are established for the distribution of water, but from which there are no pipes or conduits leading, may be called a waterworks plant, and a system of pipes intended for the distribution of water, but with no provision by which that distribution can be made, may, with equal propriety, be so called; and in neither case would the misnomer be more serious than if we should call an animal, otherwise a horse, by that name, though he should come into the world with but two legs, or should lose all of his legs after his arrival. So far as the instant case is concerned, the word "plant" is used in the amendment to the constitution with direct and unmistakable reference to one waterworks company and one sewer company (for there are no others in New Orleans), and in order to designate the physical means, such as they are, which those particular companies have provided for the accomplishment of the ends for which they were established. And it is sufficient for that purpose.

Considering the remaining ground upon which the plaintiffs rest their action, i. e., that the price which the defendant has agreed to pay for the property is excessive, it will be observed that the constitution, as amended, in conferring authority on the sewerage and water board to acquire the "plant and franchises" of any sewerage companies, imposes no other restriction or limitation than that the acquisition shall be ratified by the city council. There is no provision as to the manner of the acquisition, or, if it should be by purchase, as to the price or terms of payment. Whether, therefore, such property should be purchased at all, and, if so, at what price, and on what terms, are matters that are left by the same high authority from which this court receives its jurisdiction to the discretion of the board and of the city council. "This discretion," says Mr. Dillon, "where it is conferred, or exists, cannot be judicially interfered with or questioned, except where the power is exceeded, or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus, where the

law or charter confers upon the city council or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, whilst acting within the scope of their authority, cannot be controlled by the courts. In such a case, the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers." (Italics by Dillon.) Dill. Mun. Corp. pp. 151, 152, § 94. The same doctrine is somewhat differently stated as follows: "The general rule is that, where legislative or discretionary powers are conferred upon municipal corporations, the courts will not interfere, unless, in the exercise of such discretion, there is fraud, manifest oppression, or gross abuse * * *. The courts will not restrain, control, or coerce the action of a municipal corporation on the ground that it is merely unwise, extravagant, or erroneous, or a mistake of judgment." 20 Am. & Eng. Enc. Law (2d Ed.) pp. 1229, 1230, and notes. And, whether stated in the one way or the other, it finds support in the jurisprudence of this court and of the country. First Municipality v. Pease, 2 La. Ann. 542; Certain Inhabitants of Melpomene St. v. City of New Orleans, 14 La. Ann. 452; Cannon v. Same, 27 La. Ann. 16; Watson v. Turnbull, 34 La. Ann. 856; Handy v. City of New Orleans, 39 La. Ann. 112, 1 South. 593; Conery v. Waterworks Co., 41 La. Ann. 910, 7 South. 8; New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 192, 7 South. 559; Johnson v. Same, 105 La. 151, 29 South. 355; Hughes v. Board (not yet officially reported) 32 South. 218; Semmes v. City of Columbus, 19 Ga. 471; Shannon v. O'Boyle, 51 Ind. 565; City of Athens v. Camak, 75 Ga. 429; Baird v. Mayor, etc., 96 N. Y. 567. In the present instance, the sewerage and water board did not exceed its powers in contracting for the purchase of the property in question. There is no fraud imputed to it, or shown; nor is there any invasion of private right, manifest oppression, or gross abuse. The board is composed of the nine members constituting the drainage commission,—that is to say, the mayor of the city, the chairmen of the council committees on finance, budget, and water and drainage; the president and two members, selected by it, of the board of commissioners of the Orleans levee district; and the president and one member, selected by it, of the board of liquidation of the city debt,—to whom are added seven property taxpayers, appointed by the mayor of the city, from time to time; for terms of 12 years, being one from each municipal district; thus making 16 members, of whom it was necessary to have obtained the assent of 12, as also the assent of a majority of the members of the city council, for the purposes of the contract in question. These citizens have attained their present high and responsible positions, whether elected or appointed thereto, because they

have the confidence of the community in which they live, and, in the estimation of that community, are competent to discharge the duties of those positions. In order fairly to judge the particular action which is here made the subject of complaint, it is to be borne in mind that the people of New Orleans are not only demanding a system of sewerage, but are demanding that it be speedily provided; and we are, then, to ask whether any one situated as were those upon whom rests the burden of satisfying that demand would have done better, or otherwise, than was done by them. They sought the best expert advice obtainable as to the availability, for the purposes of the sewerage system which has been adopted, and as to the cash value, of the sewers which had been already constructed, and of other property which had been acquired for a similar purpose, and they consulted the legal adviser assigned to them by law as to the status and possible effect upon their future operations of certain litigation in which the right of a private corporation to establish and maintain sewers in New Orleans was involved. They went further, and invited the public, whom they are endeavoring to serve, to participate in their deliberations, and, after a most careful consideration of the subject, they acted upon the information and advice so obtained. It is true that there was no other proper course for them to have pursued, and if this court should undertake to discharge the duties which the constitution has imposed upon them it could not, properly, do otherwise than as they have done; that is to say, institute what it might believe to be a competent investigation of the physical and legal questions presented, and then act in accordance with its best judgment. But the right and authority to determine how to establish a system of sewerage in New Orleans, with whom to contract, what property to acquire, and how best to expend the money to be raised, are matters which, happily, are not confided to this court, but to the sewerage and drainage board and the city council. And, it appearing that those bodies have acted within the scope of the authority conferred upon them, honestly, carefully, and in good faith, those for whom they have acted are bound as a single individual would be bound under like circumstances. If there is any law in this state under which a contract so made can be annulled, for no other reason than because the price paid is thought to be excessive, our attention has not been called to it. Beyond this, it could, perhaps, be shown that the contract in question presents the essential features of a "transaction or compromise," which is declared to be "an agreement between two or more persons, who, for preventing or putting an end to a law suit, adjust their differences, by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." Civ. Code, art. 3071. And

concerning which agreements it is provided that they have, "between the interested parties a force equal to the authority of the thing adjudged. They cannot be attacked for error of law or for lesion. * * *" Id. 3078. We therefore conclude that the contract in question should be sustained as valid and binding, and that the demands of the plaintiffs, Brennan and Douglas, should be rejected. In this situation, it would seem that the suit brought by the city against the sewer company must abate, since the city has acquired by contract all that it claims in that suit, and, by the same contract, is bound, with the sewerage and water board, to "effect the immediate settlement" thereof. If, however, further action by this court should be considered necessary, it may be taken in the future.

For these reasons, it is ordered, adjudged, and decreed that the judgment appealed from, in favor of the plaintiffs, James A. Brennan and James H. Douglas, and against the defendant the sewerage and water board, be annulled, avoided, and reversed, and that there now be judgment in favor of the said defendant and against said plaintiffs, rejecting the demands of the latter, at their cost in both courts.

On Application for Rehearing.

(June 30, 1902.)

In this case, it is ordered, adjudged, and decreed that the decree heretofore entered be supplemented by the addition of the following, to wit: "It is further ordered, adjudged, and decreed that the judgment appealed from, in favor of said plaintiffs, James A. Brennan and James H. Douglas, and against the New Orleans Sewer Company and the board of liquidation of the city debt, be annulled, avoided, and reversed, and that there now be judgment in favor of said defendants and against said plaintiffs, rejecting the demands of the latter and dissolving the injunction issued at their instance, at the cost of said plaintiffs in both courts."

WOODROOF v. HUNDLEY.

(Supreme Court of Alabama. June 3, 1902.)

WILLS—EXECUTION—PRIMA FACIE PROOF— EVIDENCE—DECLARATIONS OF TESTATOR—INSTRUCTIONS.

1. On a will contest, proponent, to render the will admissible in evidence, must show prima facie its due execution.

2. On a will contest, proponent proved the death of testatrix, the genuineness of her signature, the death of those whose names appeared as attesting witnesses, and the genuineness of their signatures. A witness testified that she was in the room when the attorney and attesting witnesses came to attend to the execution of the will: that she left, but on returning, an hour later, she saw the will on the table, signed, etc. *Held*, that there was a prima facie showing of due execution.

3. The testimony was admissible, though the

witness was not in the room during the writing of the will, and did not see it signed by any one.

4. It was proper not to admit declarations of testatrix that the will in question was not her will.

5. It was proper not to admit, as tending to show revocation, evidence that testatrix had, before her death, conveyed certain property, or that she had offered or attempted to sell certain other property, or that certain beneficiaries named in the will were not of kin to her or were dead, or that there had been a change in the testatrix's church relations, or that an estrangement between the testatrix and the contestant's father had passed away some time before her death.

6. The court refused to charge that if the jury found from the evidence that it were as reasonable to infer that the alleged attesting witnesses to the alleged will subscribed their names thereto out of testatrix's presence, as that any two of them subscribed their names in her presence, then they might find in favor of the contestant. *Held*, that the instruction was misleading, in that the rule is that if any theory consistent with the validity of the will can be suggested, which appears to the court to be as probable as the theory on which the argument for the invalidity is based, the will, as found, must be maintained.

Appeal from probate court, Limestone county, James E. Horton, Judge.

Proceedings for the probate of the will of Mary Ann Walton, deceased. From a judgment for proponent, contestant James W. Woodroof appeals. Affirmed.

James W. Woodroof, one of the next of kin of said Mary Ann Walton, filed his contest for the probate of said will, and assigned the following grounds therefor: "(1) That the instrument in writing propounded by John Hundley as the last will and testament of said Mary A. Walton, deceased, was not duly executed as her last will and testament. (2) That said instrument in writing was revoked by the said Mary A. Walton, deceased, by another instrument in writing subsequently executed in the presence of witnesses as required by law by said Mary A. Walton, deceased, as and for her last will and testament. (3) That said instrument was procured by fraud and undue influence exerted upon said Mary A. Walton, deceased. (4) That said instrument was revoked by said Mary A. Walton by another instrument in writing subsequently executed by said Mary A. Walton in the presence of witnesses as required by law. (5) That at the date of said instrument in writing said Mary A. Walton's physical and mental condition was such as to render her incapable of executing a valid last will and testament. (6) That said instrument in writing was revoked by said Mary A. Walton by tearing the same apart with the intention of revoking it." Each of the witnesses whose names were affixed to said will as attesting witnesses were shown to be dead. The proponent proved the death of the testatrix, the genuineness of her signature attached to said will, the death of the three witnesses whose names appeared as attesting witnesses, and the genuineness of their signatures, and also introduced evidence tending to show that the

will offered for probate was executed by the testatrix in Nashville, Tenn., just before she was going to undergo a serious operation, and that it was prepared for her by an attorney in Nashville; her idea being, as stated, that, not knowing whether or not she would survive the operation, she wished to have her property disposed of as she desired. This will was executed on the 11th of September, 1876. Mrs. Fannie M. Hundley, a witness for the proponent, testified that she had known the testatrix since 1854; that she was a legatee and devisee under the will; that she accompanied the testatrix to Nashville when she went for the purpose of having the operation performed. She then testified to having occupied the same room with the testatrix, and was in said room when the attorney and the witnesses whose names were signed as attesting witnesses came to the room for the purpose of having the will executed; that a few minutes after these persons entered she retired from the room, and was absent for an hour or more; that as she was returning to the room she met said persons coming from the room of Miss Walton; that when she entered the room she saw a table near Miss Walton's bed, and lying on said table she saw the will which is sought to be probated; that the last page of said will was exposed, and she saw the signature of Miss Walton affixed thereto, and also those of the attesting witnesses, but she was not present when said will was signed, and when the witnesses whose names were signed thereto signed it. The contestant separately objected to each portion of this witness' testimony, as stated above, upon the ground that she was not in the room at the time of the writing of the will, or when it was signed by the testatrix or either of the attesting witnesses. The court overruled each of such objections, and to each of these rulings the contestant separately excepted. The contestant sought to introduce in evidence certain statements made by the testatrix to the effect that the will which she had executed in Nashville was not her will, and also that before her death she had conveyed certain property or had offered to sell other property which was disposed of in said will; that certain of the beneficiaries named in the will were not of kin to her, while the testatrix was a half-sister of the contestant's father; and also that the estrangement which had existed between the testatrix and the contestant's father had been adjusted and passed over some time before her death; and also that there had been a change in the church relations of the testatrix. To each portion of this testimony, as offered by the contestant, the proponent separately objected. The court sustained each of such objections, and refused to allow the introduction of such testimony, and to each of such rulings the contestant separately excepted. The evidence as to the revocation of the will of the testatrix was substantially the same as was shown on the former appeal in

this case, and special reference is here made to the facts pertaining thereto, as found in said report, which is found in 127 Ala. 642, 29 South. 98. The court, at the request of the proponent, gave to the jury the following written charges, to the giving of each of which the contestant separately excepted: "(2) I charge you, gentlemen of the jury, that there is no evidence before you to support the second ground of contest. (3) I charge you, gentlemen of the jury, that there is no evidence before you to support the fourth ground of contest. (4) I charge you, gentlemen of the jury, that there is no evidence before you to support the fifth ground of contest. (5) I charge you, gentlemen of the jury, that there is no evidence before you to support the sixth ground of contest." Among the other charges requested by the contestant, and to the refusal to give each of which the contestant separately excepted, was the following: "(13) If the jury find from the evidence that it is as reasonable to infer that the alleged attesting witnesses to the paper offered in evidence as the last will of Mary Ann Walton, deceased, subscribed their names thereto out of her presence, as that any two of them subscribed their names in her presence, then they may find in favor of the contestant."

R. W. Walker, Milton Humes, and W. T. Sanders, for appellant. Thos. C. McClellan and Oscar R. Hundley, for appellee.

TYSON, J. There was but one issue of fact for the determination of the jury on the trial of this case, notwithstanding there were numerous grounds of contest interposed. That issue was whether the evidence offered by the proponent was sufficient to authorize the jury to find that the will was duly executed. Confessedly, if the will was properly admitted in evidence, the jury had the right to so find. So, then, preliminary to the introduction of the will in evidence, it was incumbent upon proponent to show *prima facie* its due execution. This he did when he made proof of the death of the testatrix, the genuineness of her signature, the death of the three persons whose names appear as attesting witnesses, and the genuineness of their signatures, when coupled with the circumstances testified to by Mrs. Hundley. *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98.

But it is insisted that Mrs. Hundley's testimony was irrelevant, and should not have been admitted. This insistence seems to be predicated upon the theory that she was not in the room at the time of the writing of the will, or when it was signed by any one. In other words, she did not see its execution. We do not understand the rule to be, when the attesting witnesses are dead, that all the circumstances tending to show their attestation in the presence of the testator cannot be proven. The establishment of that fact, we take it, may be proven by circum-

stances as well as by direct or positive evidence. Indeed, were the witnesses living, the fact of their attestation in the presence of the testator, when controverted, we doubt not, might be shown by circumstantial evidence. Otherwise, proof of the execution of a will would be restricted to the testimony of the witnesses attesting it, and its probate dependent upon their veracity. Such a rule would place it in the power of a single witness to defeat its probate and effectually destroy it. Indeed, this result would follow should the witnesses, though honest and truthful, be unable to recall the fact of attestation in the presence of the testator. The circumstances bearing upon the execution of the will, as detailed by Mrs. Hundley, were clearly competent.

The evidence with respect to the revocation of the will by tearing was substantially the same on this trial as upon the former. In our opinion heretofore we held, after a careful and thorough consideration of the question, that no act of revocation had been shown, and that all declarations of the testatrix subsequent to the making of the will tending to show that she had revoked it were clearly incompetent. We adhere to what we said in that opinion upon this question, as well as upon the one involving the proof of its execution. There was no error in the exclusion of the declarations of the testatrix offered by the contestant. So, too, the fact that the testatrix had, before her death, conveyed certain property, or that she had offered or attempted to sell certain other property, or that certain beneficiaries named in the will were not of kin to her or were dead, or that there had been a change in the testatrix's church relations, or the estrangement between the testatrix and the contestant's father had passed away some time before her death, were incompetent. None nor all of these things were nor could be evidence of a revocation.

The assignments of error are so numerous that it is impracticable to treat each of them separately. However, all of those insisted upon in argument, and based upon exceptions reserved to the admission and exclusion of testimony, are disposed of by what we have said. We have only left for consideration written charges given at the request of the proponent, and those refused to the contestant. As to those given for proponent, there was clearly no error. There was an entire absence of evidence to support the grounds of contest designated in each of them. As to those refused to contestant, only one is insisted upon,—No. 13. This charge was clearly misleading, if not wholly bad. The rule is, "If any theory consistent with the validity of the will can be suggested which appears to the court to be as probable as the theory on which the argument for the invalidity is based, the will as found must be maintained." *Barnewall v. Murrell*, 108 Ala. 379, 380, 18 South. 831.

There is no error in the record, and the decree of the probate court admitting the will to probate is affirmed.

SHEATS v. SCOTT.

(Supreme Court of Alabama. June 10, 1902.)

MORTGAGES—CONSIDERATION—CONDITION—
AL DELIVERY—MODIFICATION—TITLE
—ADMISSIONS—EVIDENCE.

1. Where, in an action to require a mortgage to be surrendered and canceled, defendant claims solely through plaintiff under the mortgage, plaintiff's interest in the property stands admitted, and need not be proved.

2. Where a judgment was recovered against plaintiff and defendant as sureties on the bond of a postmaster, and plaintiff agreed to pay one-half if defendant secured a settlement of the judgment for \$500, and, to assist in raising the money to tender such sum, gave defendant a note and mortgage for \$250, such mortgage cannot be enforced by defendant after such tender was rejected, and he subsequently settled the judgment by paying a larger sum than \$500 without plaintiff's consent.

3. Where plaintiff executed and delivered to defendant a note and mortgage, to be used in case defendant secured a settlement, for a stated sum, of a joint judgment against them, they may modify the agreement so as to permit the application of the note and mortgage on a settlement for a larger amount.

Appeal from chancery court, Morgan county; Wm. H. Simpson, Chancellor.

Action by Charles C. Sheats against H. B. Scott for injunction to restrain the foreclosure of a mortgage, and to require it to be surrendered and canceled. From a judgment for defendant, plaintiff appeals. Affirmed.

It was averred in the bill that at the April term, 1896, of the United States court, a judgment was rendered against the complainant and the defendant and others, as sureties on the official bond of one Olmstead as postmaster at New Decatur, in favor of the United States, for \$3,362.31; that on April 25, 1898, the complainant executed a note to the defendant for \$250, and secured the same by a mortgage upon certain real estate; that said note and mortgage were executed to secure the defendant from advancing for complainant the sum of \$250, to be used in an effort to compromise the judgment which the United States had recovered against the sureties on said Olmstead's bond; that on April 28, 1898, the defendant, said H. B. Scott, on behalf of himself and the other said sureties, submitted a proposition to the United States authorities to compromise said judgment by paying \$500, and deposited in a bank, which was designated as the government's depository, the \$500, besides the cost of the suit, \$250 of which was for the complainant, and \$250 was for the defendant, which was furnished or advanced by the defendant, Scott, on the note and mortgage which the complainant had executed to him for that purpose; that this proposition of compromise was declined and rejected, and the money that had been deposited for the purpose of effect-

ing the compromise was ordered to be returned to the parties, and was returned to the defendant. It was then averred in the bill that, by reason of the money to secure which said note and mortgage was executed having been returned to the defendant, there was a total failure of consideration to support the same, but that notwithstanding this fact the said defendant was threatening to foreclose the mortgage under the power contained therein, had advertised the property for sale, and, unless restrained, would sell said property. The prayer of the bill was that an injunction be issued, restraining the defendant from selling the lands conveyed in the mortgage, and that the defendant be required to surrender said note and mortgage, and the same be canceled and held for naught. The defendant filed an answer to the bill, and admitted that the facts stated therein were substantially true, but alleged that they were not all the facts relating to the transaction. He then averred in his answer that the complainant was indebted, and his property heavily incumbered; that, after the recovery of the judgment against the complainant and the defendant as sureties, it was agreed between the complainant and the defendant that the latter should take an active part in adjusting the compromise, and that in accordance with this agreement the plaintiff executed the note and mortgage for \$250 in order to enable the defendant to raise that much money, as the complainant's part and contribution of the proposition of compromise; that the defendant, in accordance with said agreement, obtained on said note and mortgage \$250, which he procured to pay the agreed part of the complainant in the proposed compromise; that the first proposition of compromise was declined by the government authorities, and one or two propositions of compromise were made by the defendant, but were rejected; that finally the defendant received notice that the United States government would compromise the judgment for \$1,000, and that this proposition was accepted by the defendant; that the complainant, Sheats, was kept advised of the various steps and negotiations for the compromise, and approved of them; that he agreed to pay all the interest which the defendant was bound to pay in order to carry the loan based on the note and mortgage; that Sheats knew of every step taken, and heartily concurred therein, and agreed with the defendant that the mortgage he had given should stand as security for said \$250 which was to be used by the defendant in said settlement; that said \$250 raised by the defendant on the note and mortgage executed by Sheats was used by him in effecting the compromise by the payment of the \$1,000; that Sheats pleaded his poverty, and stated to the defendant that he was unable to pay more than \$250; that, since the advertisement of the property by the complainant for sale under the power contained in the mortgage, the complainant had stated to the defendant

that he would raise the money and satisfy the claim.—Interest and costs. Under the opinion on the present appeal, it is unnecessary to set out in detail the facts in the case. On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

Harris & Eyster, for appellant. E. W. Godbey, for appellee.

SHARPE, J. From the pleadings and evidence it appears that the consideration upon which the note and mortgage in question were given was an agreement on defendant's part to pay for complainant one-half of a total of \$500 in case an offer of that sum was accepted in compromise of a judgment held by the government against them and others as sureties on a postmaster's bond. Defendant offered the \$500 by placing it in bank at the disposal of the government, but the offer was declined, and the money returned to him. Some months later he made a similar offer and deposit of \$500, and of \$62 additional to cover costs of the suit, but it was not accepted, and the sum deposited was refunded to him. After a year from the date of the note and mortgage, and after they matured, he effected a compromise by paying \$1,062 in settlement of the judgment. Whether defendant was entitled to treat \$250 of the sum he expended in the settlement as a sum secured by the mortgage has been the chiefly disputed question. It is not questioned that the preliminary agreement and defendant's undertaking to supply money was a sufficient consideration to uphold the note and mortgage originally, but complainant insists that the substantial consideration failed when the offer of \$500 was rejected and that sum was returned to defendant, and that thereby the mortgage became extinguished. It is immaterial that evidence was not directed to showing complainant's interest in the mortgaged property. Defendant, by claiming it solely through complainant under the mortgage, is held to admit he has an interest. *Sullivan v. McLaughlin*, 99 Ala. 69, 11 South. 447; *Lang v. Wilkinson*, 57 Ala. 259; *Bernheim v. Horton*, 103 Ala. 380, 15 South. 822; *Pollard v. Cocke*, 19 Ala. 188. The original contract, having only provided for a compromise at \$500, had no effect to either bind or authorize defendant to commit the complainant to a borrowing of money to pay on a compromise at more than that sum. Though the increase of expenditure involved was borne immediately by defendant, the change in amount was not immaterial to complainant; for, in the absence of a release from the contribution which the law compels as between sureties, such change involved an increased liability on complainant for contribution. It was, however, within the competency of the

parties to modify the agreement so as to change the application of the money provided for by the note and mortgage, by having it paid on the settlement as finally made. To have done so would not have been an attempt to substitute a different debt for the one secured, or a new consideration for one that had failed; for before the money was actually paid to the government the debt intended to be contracted and secured could not, under the contract, have come into existence. As to whether there was such a modification the evidence is in conflict. By a majority of the court this question of fact is determined in favor of the defendant, and in consequence the decree will be affirmed.

HIGMAN v. HUMES et al.¹

(Supreme Court of Alabama. June 4, 1902.)
REDEMPTION BY JUNIOR MORTGAGEE—SUFFICIENCY OF BILL—PLEADING.

1. A bill in equity by a junior mortgagee against a senior mortgagee for redemption, which fails to allege that the junior mortgage debt is due, and makes no tender of the amount which shall be ascertained by the court to be due on the senior mortgage, is demurrable.

Appeal from chancery court, Morgan county; Wm. H. Simpson, Judge.

Suit by John Higman against Milton Humes and others. From a decree in favor of defendants, complainant appeals. Affirmed.

E. W. Godbey, for appellant. Humes, Sheffey & Speake, for respondents.

TYSON, J. The bill in this cause is filed by a junior mortgagee against the holder of a senior mortgage, and seeks an accounting from him, and the foreclosure of the mortgage held by the complainant. It is so clearly a bill for redemption that it is unnecessary to discuss its nature and character. There is no offer contained in it to pay such sum as may be ascertained to be due upon the first mortgage. "A suit to redeem is a suit in equity, and is subject to the rule that he who seeks equity must do equity." 2 Jones, *Mortg.* (5th Ed.) § 1070, and note 11. The essential requisites of maintaining this suit are that the mortgage debt should be due and payable; that the complainant should offer to pay the same when ascertained and fixed by the decree. Indeed, without such an offer the bill is wanting in equity. *Fouche v. Swain*, 80 Ala. 151; *Smith v. Conner*, 65 Ala. 371; 3 Pom. Eq. Jur. § 1219, and note 2; 2 Jones, *Mortg.* § 1095; 17 Enc. Pl. & Prac. p. 965. If complainant "is unable to foreclose his mortgage, for the reason that it is not due, or for other cause, then he cannot redeem a prior mortgage against the consent of the holder of it; for in such case he cannot bring the mortgagor before the court for the purpose of completing his remedy by foreclosure, and he cannot compel the mortgagee

¹ Rehearing denied June 23, 1902.

to assign to him." 2 Jones, Mortg. § 1102. The bill under consideration was clearly subject to the grounds of demurrer which the chancellor sustained.

Affirmed.

JENKINS et al. v. BRAMLETT.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

ACTION—DEATH OF PLAINTIFF—REVIVAL.

1. Where, on the death of the plaintiff in ejectment, the action was revived "in the name of L. W. B., executor of the estate of E. A. B., deceased, as party plaintiff," the revivor is in the name of L. W. B. personally, and not as executor, and unless he has an interest in the lands as heir or devisee he cannot recover them.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by L. W. Bramlett, executor of the estate of Elias A. Bramlett, against Emma F. Jenkins and others. From a judgment for plaintiff, defendants appeal. Reversed.

Aiken & Martin and Boykin & Lee, for appellants. George D. Motley, for appellee.

TYSON, J. This action was commenced by Elias A. Bramlett, and upon his death was revived "in the name of L. W. Bramlett, executor of the estate of Elias A. Bramlett, deceased, as party plaintiff." After the revivor, the cause was tried by the presiding judge without a jury, resulting in a judgment in favor of the plaintiff.

The object sought to be attained by the revivor was to prevent an abatement of the suit; to substitute as party plaintiff the person succeeding to the right of the original plaintiff to the possession of the lands in controversy; and to allow such substituted plaintiff to recover, if entitled to, as if the action had been originally begun by him. After an order of revivor, the person named therein becomes in legal effect the party plaintiff in the action; and, so far as his right to maintain it is involved, he occupies the same position as if he had originally commenced it; and this is true without an amendment of the complaint. His character as plaintiff, whether that of an individual or as executor or administrator, must be determined upon the same principles had he begun the action. The revivor confessedly could have been made in the name of the personal representative of the deceased or his devisees. Code, § 38; Pearson v. King, 99 Ala. 125, 10 South. 919; 18 Enc. Pl. & Prac. 1125, 1126. In this case it was not made in the name of the personal representative, but in the name of L. W. Bramlett as an individual. The words in the order of revivor, "executor," etc., immediately after the name of Bramlett, are mere descriptive personæ, and the action was by him in his individual capacity, and not as executor.

Lucas v. Pittman, 94 Ala. 616, 10 South. 603. Under the will of Elias A. Bramlett, the original plaintiff, he has no interest, either as heir or devisee, in the lands sued for. He therefore should not have been allowed to recover them. It is unnecessary to consider the exceptions reserved by defendants to the ruling of the court upon other matters. The judgment will be reversed, and one will be here rendered in favor of the defendants.

Reversed and rendered.

HUNDLEY v. COLLINS et al.¹

(Supreme Court of Alabama. May 15, 1902.)

CHURCHES—MEMBERSHIP—EXPULSION—RESTORATION—MANDAMUS—JURISDICTION.

1. Under Code, §§ 1302-1305, providing that, on complying with the requirements therein specified, the members of a church are incorporated, such corporation relates only to the properties or temporalities of the church, and does not affect the church as a spiritual or ecclesiastical organization; and when a trustee of the corporation and elder of the church is expelled by the church, as an ecclesiastical body, from membership therein, the court has no jurisdiction to compel his restoration to membership by mandamus, though by his expulsion from the church he is disqualified to hold the office of trustee.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Action by Orville M. Hundley against Ira F. Collins and others for mandamus to compel the restoration of plaintiff to church membership. From a judgment for defendants, plaintiff appeals. Affirmed.

Orville M. Hundley filed his petition, in which he averred that the Christian Church of Huntsville, Alabama, was a corporation created and organized under the laws of Alabama in the year 1888; that the petitioner was one of the original members who were associated together under the organization and incorporation of said church, and had "since continued a member thereof, observing all its usages, keeping the faith and rules thereof"; that at the organization of said church as a corporation, the petitioner, Ira W. Collins, and R. H. McMullen were elected trustees, and were thereafter elected such trustees of said church in December, 1894, and that the petitioner, Ira F. Collins, R. A. McBride, and Anthony W. Moseley were elected elders of such church; that "the said Christian Church is of a denomination of Christians known as 'Disciples of Christ,' of which Alexander Campbell was originally preacher, if not the founder; that each church was independent, not subject to the control of any higher or other ecclesiastical judicature; that the elders thereof are not elected for any definite time, and cannot be deposed otherwise than by a majority of the church to which they may belong, after preferred charges, of which they have notice and an opportunity to appear and answer; that on July 11, 1900, in the

¹ Rehearing denied June 16, 1902.

¹ Rehearing denied June 11, 1902.

presence of such members of the church as were then assembled, said Ira W. Collins, one of the elders of said church, produced and read a paper, signed by him and said R. A. McBride as elders, "purporting to be and intended as an expulsion of your petitioner and his wife," and two other persons, from membership in said church. This paper, read at said meeting, which was attached as an exhibit to the petition, commenced as follows: "Dear Brethren and Sisters: It becomes our solemn duty to obey the word of God in all things, and as much as in us lies." It then proceeded to state that as the petitioner, O. M. Hundley, and his wife, and Oscar R. Hundley and A. W. Moseley, had been guilty of disorderly conduct in a great degree, by refusing to open the house of worship for services, "it rests upon us, as those striving to do God's will, to declare at this time our withdrawal of Christian fellowship from those guilty of such conduct." It then asked if there were any persons who knew of any scriptural reason why this action should not be taken, and if so it became their duty to let such reason be known, and then stated that, there being no such reason given, "the church registrar is hereby ordered to cancel the names of said parties."

The petition then avers that neither the petitioner, nor his wife, nor either of the other parties were present at said meeting of said church when the paper writing was produced and read by said Collins; nor did either have any notice or information of the existence of such paper; that no charges had ever been preferred against the petitioner; that there had been no general meeting of the congregation to hear and try said charges; that said writing read by said Collins at said meeting was not submitted to the vote of such members of said church as were then assembled; and that no such vote was taken or offered to be taken.

The prayer of the petition was that "a writ of mandamus, directed to the said corporation 'The Christian Church of Huntsville, Alabama,' and of date July 11, 1900, a copy of which marked 'M' is part of this petition, may be stricken from the file of the records or memorials of said church, if such files there be. And that any minute entry or other record of the proceedings on said paper writing, if such minute entry or record there be, may be expunged. And further commanding that your petitioner be restored to membership in said church, and to his relation as elder thereof and therein. And that such other order may be had in the premises as justice may require."

To this petition the respondents demurred upon several grounds, stating in various forms that civil courts could not entertain jurisdiction of the question presented by said petition, and said court in which the petition was filed was without jurisdiction to determine the validity of any action upon the part of this church with its membership. This de-

murrer was sustained, and judgment was rendered, decreeing that the petition be dismissed and the writ of mandamus be denied.

R. O. Brickeel and Oscar R. Hundley, for appellant. Cooper & Foster, for appellees.

HARALSON, J. 1. The sections of the Code under which the "Christian Church of Huntsville" was incorporated, provide, "that members of any church or religious society * * * desiring to be incorporated, shall elect not less than three, nor more than nine trustees," section 1302 (1694); that "Such trustees shall, within thirty days after their election, file in the office of the judge of probate of the county in which the corporation is to exercise its functions, a certificate stating the corporate name selected, the names of the trustees, and the length of time for which they were elected, which certificate shall be subscribed by them and recorded. The members of such society, their associates and successors are, from the filing of such certificates, incorporated by the name therein specified." Section 1303 (1695).

The succeeding section, 1304 (1696), provides, that corporations created under this article of the Code, may hold real and personal property, not exceeding in value \$50,000, may receive property by gifts, will or devise, holding the same in conformity with all lawful conditions imposed by the donor, and exercise such other powers as are incident to private corporations.

Section 1305 (1697) provides, how suits may be commenced against such corporations, and section 1306 (1698), how mortgages on any part or all of the property of the corporation must be executed.

2. It is to be observed, that these provisions of the Code for the incorporation of churches or religious societies, and all powers conferred thereunder, relate alone to their properties or temporalities, and have no reference to the churches or societies as such, which bodies, as spiritual or ecclesiastical organizations, exist independent of their charters. A church or religious society may exist for all the purposes for which it was organized independently of any incorporation of the body under the statutes of the state; and, it is a matter of common knowledge that many do exist and are never incorporated. For the promotion of religion and charity, they may subserve all the purposes of their organization, and, generally, need no incorporation except incidentally, to further these objects. They do not place themselves beyond the pale of the protection of the law as to properties, for the lack of incorporation. It is the province of a court of equity to protect such organizations in what they hold, in order to sustain trusts, because of their charitable uses, which would otherwise be held void. *Williams v. Pearson*, 38 Ala. 299; *Burke v. Roper*, 79 Ala. 138; 20 Am. & Eng. Enc. Law (1st Ed.) 804, 811.

Wherever there is an incorporated church, there are two entities, the one, the church as such, not owing its ecclesiastical or spiritual existence to the civil law, and the legal corporation, each separate though closely allied. The church in the ordinary acceptance of the word, is a voluntary association of its members, united together by covenant or agreement, for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spread of divine truth among others, as they understand and teach it. It is purely voluntary, and is not a corporation nor a quasi corporation. *Parker v. May*, 5 Cush. 345; 20 Am. & Eng. Enc. Law, 775. On the other hand, a corporation is formed for the acquisition and taking care of the property of the church, and is in no sense ecclesiastical in its functions.

In *Sale v. Baptist Church*, 62 Iowa, 26, 17 N. W. 143, 49 Am. Rep. 136, the church was incorporated, and the proceeding was by mandamus to reinstate a member expelled by the church. In drawing the distinction between the church and the corporation the court said: "The only and primary object of the corporation is the acquisition and taking care of property. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters. * * * By virtue of her church membership, the plaintiff became a member of the corporation, organized for religious and ecclesiastical purposes. The corporation was not organized for pecuniary profit. No such profit can accrue to any member. No property interest, or any other valuable civil right, has been affected by the action of the church. The plaintiff has not, and cannot suffer any civil damages whatever. This view is in harmony with *Hardin v. Baptist Church*, 51 Mich. 137, 16 N. W. 311, 47 Am. Rep. 555, where numerous authorities are cited." In this case it was held that mandamus would not lie to restore to membership one claiming to have been wrongfully removed from a church notwithstanding that church membership was a condition of membership of the corporation. We refer in this connection to the case of *Ryan v. Cudahy*, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, as reported in 49 L. R. A. 353, where will be found on page 384, under the head of "Ecclesiastical Tribunals," a synopsis of the decisions of a great number of courts on the subject in hand, sustaining the views we announce.

"The two bodies, viz.: the corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals with things purely temporal and material." *Petty v. Toocker*, 21 N. Y. 267; *Nance v. Bushy*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

The foregoing is quite sufficient to show that the spiritual entity called a church, made up of members belonging to it, existing without any special law to that effect, is a different and distinct body in the contemplation of law, from the same body when incorporated under statutes for the purpose—the two having different functions to perform, the one religious, and the other civil.

Under our statutes for the incorporation of churches, it is to be noted, that the members of the church become incorporated, and not simply the trustees required to be elected preparatory to proceeding in the court of probate to obtain incorporation. It was a proper, simpler and less troublesome proceeding, consulting the conveniences of the church, that certain designated members should be chosen to perform this service for and on behalf of all the members, rather than require all the members themselves to do so. The trustees having been elected, all they are required to do, to complete the incorporation under the statute is, within 30 days after their election, to file in the office of the judge of probate, the certificate required by section 1303 (1695) of the Code, and the members of the church, from the filing of such certificate, become incorporated by the name therein specified. Each member is an incorporator, recognized as a legal civil body distinct from the church as a spiritual body, theretofore and thereafter continuously existing.

In this case, it is alleged the petitioner was both a trustee and elder of the church. To be a trustee, the statute required him to be a member of the church; and it also appears that under the rules of the church, elders must be members. Trusteeship and eldership are then dependent upon membership in the church. It follows, if one is excluded from membership, his office of trustee or elder ceases by virtue of the act of exclusion. Each of these offices it appears is filled by the members of the church, acting as a church.

It is averred in the petition, that on the 11th July, 1900, at a meeting of such members of the church as were then assembled, such action was taken as was intended to be an exclusion of petitioner from said church. The petitioner treats the act as one of exclusion, since the prayer of the petition is, that he "be restored to membership in said church, and to his relation as elder therein and thereof." It is not pretended, nor can it be, that this act was done by the corporation, and not by the church. The petition sets out a paper drawn and presented as the foundation of the church's action. It begins by an admonition addressed to the "Dear Brethren and Sisters,"—an address of Christian endearment usual among church people,—reminding them that it is their solemn duty to obey the word of God, in that it commands them to withdraw themselves from every brother that walketh disorderly,

proceeding to aver wherein the petitioner and certain others had been guilty of disorderly conduct; and ends by declaring it to be their duty to withdraw Christian fellowship from petitioner and others. No one can presume that such a paper referred to the brethren and sisters of the church in their corporate capacity; but by the language employed it must be supposed,—since it is not applicable in any other connection,—that those addressed were the members of the church sitting in conference, where the spiritual well-being and concerns of the ecclesiastical, spiritual body were to be considered and passed on. There were no property interests involved, nothing touching what are termed the temporalities of the church, as contradistinguished from its spiritualities. The petitioner had no pecuniary interests, in any direction, involved in the proceeding, and it did not touch any of his civil rights at any point. It may be, the church proceeded irregularly according to common usage in such cases; but it is averred, that this church "is of the denomination known as 'Disciples of Christ,' of which Alexander Campbell was the original preacher, if not the founder," and that "each church is of itself independent, not subject to the control of any higher or other ecclesiastical judicature." As an ecclesiastical body, therefore, it was a law unto itself, self-governing and amenable to no court, ecclesiastical or civil, in the discharge of its religious functions. It could make and unmake its rules and regulations for the reception and exclusion of members, and in reference to other matters; and what other body religious or civil could question its right to do so? Certainly, if it violated no civil law, the arm of civil authority was short to reach it. Admitting, therefore, as we must on demurrer, that petitioner had no notice of this proceeding, and that it was irregular according to common usage, the church being independent, and not subject to higher powers, and being a law unto itself for its own procedure in religious matters, what it did towards the expulsion of petitioner was not unlawful, even if it was not politic and wise. If the civil courts may in this instance interfere to question the exclusion of petitioner, they may do so, in any instance where a member of that or any other church is removed, on the allegations of irregular and unfair proceedings for the purpose. This would open a door to untold evils in the administration of church affairs, not consistent with the principles of religious freedom as recognized in this country, where there is no established church or religion, where every man is entitled to hold and express with freedom his own religious views and convictions, and where the separation of state and church is so deeply intrenched in our constitutions and laws.

These views are in accord with the decisions of other states and of the supreme court of the United States.

In *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 13 L. R. A. 301, which is an exhaustive opinion on the subject, on review of many authorities, and directly applicable to the conditions of this case, it was said by the court, through Judge Lurton: "The relations of a member to his church are not contractual. No bond of contract, express or implied, connects him with his communion, or determines his rights. * * * The church undertakes to deal only with the spiritual side of man. It does not appeal to his purely human and temporal interests. Admission to its fold is prescribed alone by the church, professing to act only upon the word of God. It claims the power of the keys by divine and not human authority. Its right to determine the grounds of admission has never been questioned. Why shall the co-ordinate right of exclusion be scrutinized by the civil power? * * * Civil courts deal only with civil and property rights. If, to determine a property right, it becomes necessary to adjudicate an ecclesiastical question, the courts will go only so far as is necessary to determine the effect of ecclesiastical law or relations on property rights. We are not to be understood as approving an expulsion from church membership by irregular methods and without notice to the member. But here we have a fact to deal with—the fact that this church, sitting as a court, has determined for itself that it had the power and the right to exclude these complainants. They have as a judicature, adjudged that they had jurisdiction, and that the usage and law of the church did not demand other trial or notice than such as attended the public action of the church. The law of the church provides for no appeal to a higher tribunal. They may have erred in their procedure. It is not for a civil court to revise their action in a matter so vital to their freedom as a church. * * * We have been referred to no reported case where any civil court in this country has undertaken to overrule the fact of excommunication upon any ground whatever."

In *Shannon v. Frost*, 3 B. Mon. 253, it was said: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or exclusion. Our only judicial power in the case arises from the conflicting claims of the parties to the property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. * * * When they [the complainants] became members, they did so on the condition of continu-

ing or not, as themselves and their church might determine. In that respect, they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal."

In the leading case of *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666, on this subject, where Justice Miller reviews the cases English and American, and maintains the doctrine of the noninterference by state courts over ecclesiastical bodies in matters of religion, it is said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeal as the organization itself provides for. * * * It is easy to see that if the civil courts are to inquire into all these matters (theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them), the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive those bodies of the right of construing their own church laws, and would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, when property rights were concerned, the decision of all ecclesiastical questions. * * * In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has

been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

In *State v. Bibb Street Church*, 84 Ala. 23, 4 South. 40, this court said: "In accordance with the principles of our institutions, and the organic law, the courts refrain from interfering when the office or functions are purely ecclesiastical or spiritual, disconnected from any fixed emoluments, salary, or other temporalities. In such case, there is no legal, temporal right, of which the civil courts can take jurisdiction."

There can be no difference in the principles announced as argued by appellant's counsel, whether they are sought to be applied in a court of law or in courts of equity.

It is clear from what has been said, without reference to alleged defects in the petition for mandamus, making it, as contended, unavailable in this case, that there was no error in the ruling of the court below in denying the mandamus, sustaining the demurrer to the petition and dismissing it.

Affirmed.

BUTLER v. BUTLER et al.¹

(Supreme Court of Alabama. April 15, 1902.)

EJECTMENT — ADVERSE POSSESSION — EVIDENCE — TENANTS IN COMMON — PARTIES.

1. Defendant, with his family and his father, lived on the father's land until his death. During that time, defendant, by unequivocal acts, recognized his title. Defendant entered by permission of his father, and there was no evidence that he ever brought home to his father knowledge of a disavowal of the servient character of his occupation. On the father's death, defendant claimed title by adverse possession as against the other heirs, and they brought ejectment. *Held*, that plaintiffs were entitled to a directed verdict.

2. Where defendant, with his family and his father, lived together on the father's land, by his permission, until his death, and there was no evidence that the father was informed that defendant claimed the land adversely, evidence that defendant told third persons that he claimed the land as his own was properly excluded.

3. Where defendant and his father lived together on his father's land until his death, when defendant claimed the land by adverse possession as against plaintiffs, the other heirs, evidence of declarations of the father that he had given the land to defendant was inadmissible.

4. Where, on the death of the owner of land, one of his heirs, being in possession, denied possession to the other heirs, each of them was entitled to be let in; and, in an action for that purpose, it was not material whether all of the excluded heirs joined.

Appeal from circuit court, Randolph county; A. H. Alston, Judge.

Action by Clark Butler and others against Daniel Butler. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. B. & W. H. Bridges, for appellant. Samuel Henderson, for appellees.

¹ Rehearing denied June 17, 1902.

¶ 2. See Evidence, vol. 20, Cent. Dig. § 1112.

McCLELLAN, C. J. This statutory action in the nature of ejectment is prosecuted by Clark Butler and others, sons and daughters of W. H. Butler, deceased, against Daniel Butler, also a son of said W. H. Butler. Plaintiffs derive their title as heirs at law of their father. Defendant, conceding the original title of the father, claims that the title is now vested in him by adverse possession. It is shown, without conflict, that during all the period of defendant's occupation of the land, down to the death of W. H. Butler, in January, 1899, the latter was also living on the land; he and defendant and defendant's family living together thereon. The law in such cases refers the possession to the title, and hence, *prima facie*, the possession throughout that period was in W. H. Butler, and defendant had no possession adverse to him. It is shown, also without conflict, that, so far from claiming adversely to his father, Daniel Butler, by unequivocal acts, such as giving the land in for taxes in the name of his father, throughout that period recognized the title of W. H. Butler in and to the premises. Nor is there any room for controversy, on the evidence adduced or offered, that Daniel entered, not in hostility to, but by permission of, W. H. Butler. And if he ever at any time brought home to his father a knowledge of a disavowal of the servient and permissive character of his occupation, there is no hint of it in the evidence introduced on the trial. In the absence of such evidence, the fact that defendant declared to third persons that he claimed the land as his own was of no consequence, and evidence of it was properly excluded from the jury. *Jones v. Pelham*, 84 Ala. 208, 4 South. 22.

Nor did the court err in excluding the proposed evidence as to declarations of W. H. Butler to the effect that he had given the land to Daniel, the defendant. Of course, these declarations were not competent, and they were not offered, to show a conveyance to Daniel. Their sole office in the case would have been to show that Daniel, and not W. H., held the possession of the premises, and that the possession of the former was adverse to the latter. Considered as showing this, they also necessarily showed their own incompetency, since, with the declarant out of possession, there was no predicate for his declarations; they were not within the doctrine of *res gestæ*, or any exception to the rule against hearsay.

As to the further declarations of W. H. Butler to the effect that he had put Daniel in possession, it need only be said that their tendency was to prove what was not controverted in the case, and what was of detriment, rather than advantage, to the defendant, to wit, that Daniel entered and held possession by permission of his father.

On the considerations adverted to first above, with the evidence as it was before the jury, the plaintiffs were entitled to the

affirmative charge which the court gave; and they would have been none the less so entitled had the testimony of Whit Butler that he "never knew it to be anybody's land but W. H. Butler's," and of T. J. Lovvorn that he "never heard of anybody claiming the land but W. H. Butler," been excluded. Hence we need not inquire whether the court's rulings in respect of said testimony were correct or not.

Plaintiffs and defendant being tenants in common in the land as heirs at law of W. H. Butler, deceased, the effect of the judgment for plaintiffs is to let them into possession with the defendant. As each one of the dispossessed tenants is entitled to be thus let in, it is not material whether all of them have joined in this action.

Affirmed.

STREET et al. v. HOOTEN et al.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

STOCK-LAW DISTRICTS—CONSTITUTIONAL LAW—AMENDMENT OF STATUTE.

1. An act approved December 10, 1890, provided that stock-law districts might be established in Clay county, within which it should thereafter be unlawful to permit stock to run at large. Act Feb. 11, 1897, provided for extending the limits of established districts by incorporating adjoining territory, but was invalid because of failure to comply with Const. art. 4, § 2, relating to amendment of statutes. Acts 1898-99, p. 1776, entitled "An act to amend an act entitled an act to provide for the extension of stock law in Clay county, approved Feb. 11, 1897," provided that the stock law might be extended to territory which was not included within the provisions of the act of 1890, and re-enacted all such provisions as were applicable to, or intended to apply to, such extended territory. *Held*, that the title of the act of 1899 sufficiently stated the subject, which was to extend the stock law in Clay county, and neither the sufficiency of the title, nor the validity of the act, was affected by the fact that the act was stated to be an amendment of an unconstitutional act.

2. Acts 1898-99, p. 1776, provides that the adjacent stock-law districts established under it "shall be governed by the law prohibiting stock from running at large in Clay county," and provides a complete system for the organization and regulation of such districts; incorporating and re-enacting all the provisions of the prior law applicable to such districts. *Held*, that such reference to the prior law was not an attempt to extend the act without re-enacting its provisions, and did not affect the validity of the act.

3. Acts 1898-99, p. 1776, extending the stock law of Clay county to districts adjacent to those already established, is not void because of failure to require notice of an application for such extension, since the legislature could forbid the running at large of stock without notice to the owners.

Appeal from Clay county court; W. J. Pearce, Judge.

Petition by J. C. Street and others to the court of county commissioners of Clay county to have certain territory incorporated in a stock-law district. J. W. Hooten and others filed a demurrer. From a judgment for de-

¹ Rehearing denied June 16, 1902.

tendants the petitioners brought certiorari, and from an order dismissing the same they appeal. Reversed.

On June 5, 1899, the appellants and others, describing themselves as "persons living or owning real property adjacent to a stock-law district in the county of Clay," and desiring to have certain adjacent territory incorporated in such stock-law district, filed in the commissioners' court of Clay county a petition in which said adjacent territory was described by government numbers, and in which petition it was averred that it was to the interest of the citizens of said new district to have the same attached or added to said stock-law district, "and to be governed as now provided by the stock law in said county"; that the majority of the freeholders in said territory were desirous of having the same added to said stock-law district; and that petitioners had given notice as required by law of the making of this application. The prayer of this petition was that the commissioners' court make an order declaring such territory to be placed in the stock-law district of Clay county. The petition was filed under the act approved February 23, 1899, amendatory of the act approved February 11, 1897. J. W. Hooten and two other citizens who owned property in the territory described in the petition appeared before the commissioners' court and resisted said petition, and filed demurrers thereto. The grounds of this demurrer were substantially as follows: (1) That the act under which the petition was filed was unconstitutional and void, in that it was in conflict with section 2, art. 4, of the constitution; (2) that said act was unconstitutional and void, in that the subject of said act was not clearly expressed in its title, and it seeks to explain the provisions of an existing stock law in Clay county by reference to its title, without re-enacting and publishing it at length; (3) that such act purports to amend a previous act, and contains new and independent provisions and sections; (4) that, while said act purports to be an amendatory act, it is original in respect of all of its sections, with the exception of section 1; (5) that the lines of such district sought to be established are run in arbitrary, capricious, and unreasonable manner, excepting many portions or subdivisions of sections and parts of lands, so as to except the property of persons opposed to said stock law, although adjacent to the district, or surrounded by the lands included therein. The commissioners' court sustained these demurrers, and ordered the petition dismissed. Thereupon the said petitioners filed a petition in the county court of Clay county, addressed to the judge of said court, setting forth the facts as stated above, and making the petition filed in the commissioners' court, and the demurrers and orders of the court, exhibits thereto; and it was averred in said petition that the commissioners' court dismissed the petition filed therein, and refused and still refuses to grant the

prayer of said petition, although the petitioners and signers of said petition offered to show that a majority of the freeholders owning real estate in the territory described in said petition are desirous of having said territory added to the stock-law district, and offered to show all facts necessary to the extension of the stock law in Clay county to said territory under the provisions of the act approved February 23, 1899, and that it had complied with all the requirements of said act. It was then averred in the petition filed in the county court that the judgment sustaining the demurrers to the petition in the commissioners' court was void and illegal, and that the same should be annulled, quashed, and vacated. The members of the commissioners' court and the judge of probate of said county, as ex officio chairman of the court of county commissioners, and J. W. Hooten and associates, who had filed the petition in the commissioners' court, were made parties respondent to this bill. The prayer of the petition was for the issuance of a common-law writ of certiorari to the court of county commissioners, requiring them to send up the records, papers, and proceedings in said cause, and that upon the hearing of this petition the said judgment of the commissioners' court sustaining the demurrers be quashed, vacated, and annulled. The members of the commissioners' court and the judge of probate demurred to the petition for certiorari, and assigned substantially the following grounds therefor: (1) That the facts stated in such petition show that the demurrers of J. W. Hooten and others were well taken, and the judgment of the commissioners' court sustaining them was proper and correct; (2) that the statute under which said proceedings were had in the commissioners' court was unconstitutional and void, as being in conflict with and violative of section 2, art. 4, of the constitution of Alabama; (3) for that the lines of such proposed stock-law district, as shown by the petition filed in the commissioners' court, are run in arbitrary and capricious manner, and such district, as so laid off, was evasive of the spirit and reason of the statute under which the petition was filed. J. W. Hooten and others separately demurred to the petition for certiorari on the ground that they were improper parties, in that the proceeding was one to revise the proceedings of the court of county commissioners. Upon the submission of the petition for certiorari, upon the demurrers, there was a judgment rendered sustaining said demurrers and ordering that the petition for the common-law certiorari be dismissed. From this judgment the petitioners appeal, and assign the rendition thereof as error.

Knox, Bowle & Dixon and Borden H. Burr, for appellants. Whitson & Graham, for appellees.

McCLELLAN, C. J. An act approved December 10, 1890, provided for the establish-

ment of "stock-law districts" in Clay county by a majority vote of the electors of a beat, or that part of a beat, in which it was proposed to establish such district. This act made it unlawful, and punishable by a fine of not less than \$5 nor more than \$50, for any person to permit stock to run at large in any district established under it, and provided, further, "that for any damage done by stock running at large in such prohibited territory the owner of such stock shall be liable to the injured party," etc., and that judgment for such damages should be a lien on the deprelating stock, to be enforced by an order of seizure, etc.; that prosecutions of actions for damages "may be tried before any justice, or notary public with justice's jurisdiction in the beat where the offense or damage occurs, and when the amount of damages does not exceed fifty dollars"; that if the justice of the peace or notary public is incompetent, or there is a vacancy in such office, then "such trial shall be had before a justice of the peace or notary public of the nearest beat thereto; and that for such trials and prosecutions said justices' courts shall always be open; but three days shall be given to the opposite party." The act also provides that such districts shall be inclosed with a lawful fence, etc. It seems that prior to February 11, 1897, one or more such stock districts had been established in Clay county. At least, on that day another act was approved, "to provide for the extension of stock law in Clay county." This act is as follows:

"Section 1. Be it enacted by the general assembly of Alabama, that from and after the passage of this act, that any person or persons living adjacent to a stock law district in the county of Clay desiring to become attached to said stock law district for the purpose of preventing stock from running at large, in a specified territory, adjoining a stock law district, may petition the court of county commissioners of said county, setting forth the lines of the proposed district to be added to said adjoining stock law district, that if in the judgment of said court it will be to the interest of the citizens in said new district to be attached or added to said stock law district and be governed as now provided by law in said county, they may grant an order that the said new district shall be a stock law district in which stock shall not run at large and shall be governed by the law prohibiting stock from running at large in Clay county, Ala. Provided that the citizens living in said new district shall build a fence to prevent trespass by stock owned by citizens living out of the stock law district.

"Sec. 2. Be it further enacted, that all applications by petitions to said court as herein provided shall be advertised fifteen days prior to the sitting of said court by posting three notices, one at the court house door of said county, and two in the community of the proposed district.

"Sec. 3. Be it further enacted, that noth-

ing in this act shall be so construed as to conflict with the stock law now in force in Clay county."

Acts 1896-97, pp. 739, 740.

The expressed purpose of this act, and its effect if valid, is to extend the provisions of the act of December 10, 1890, to parts of Clay county to which it did not before apply, and to which, it may well be, it could never have been extended under its own terms; and this without any other reference to the older act than as "the stock law in Clay county," and "the law prohibiting stock from running at large in Clay county, Ala.," and without re-enacting and publishing at length the provisions so extended. It would seem that this act of 1897 is violative of the organic mandate that " * * * no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," and is therefore void. Const. art. 4, § 2; *Stewart v. Commissioners*, 82 Ala. 209, 2 South. 270.

On February 23, 1899, a third act relating to the running at large of live stock in Clay county was approved. The title of this act is, "To amend an act entitled 'an act to provide for the extension of stock law in Clay county,' approved February 11, 1897." Acts 1898-99, p. 1774. In the body of this act of 1899, the subject of the extension of the stock law for Clay county to territory which had not been subjected to its operation, and probably could not be, under the provisions of the original law (the act of 1890), is treated of, and all its provisions are germane and cognate to that subject. Now, that, clearly, is the subject which is expressed in the title quoted just above; for a title which expresses a purpose to amend an earlier enactment, referring to the earlier enactment by its title, in which the subject of the proposed legislation is clearly expressed, is no more or less than the expression of a purpose to deal with the subject so expressed in the title of the earlier enactment. And it is of no consequence in this connection that the earlier enactment may be unconstitutional and void, and that the later one purports to amend it. These considerations do not prevent the words used in the title of the last act from carrying their accustomed significance. It cannot change their meaning that they are quoted from the title of the invalid statute, any more than if they were quoted from any other writing. And the fact that the later act, by its title, proposes to amend the earlier invalid enactment, has no bearing upon the question whether the subject of the later act is expressed in its title. The subject of the later act is the extension of the stock law of Clay county, and this is none the less so because of its being proposed to deal with that subject by way of emendation of the former attempted enact-

ment. And hence our conclusion that the act of February 23, 1899, clearly expresses its subject in its title.

The further inquiry is: Does the act of 1899, as did that of 1897, attempt to extend the provisions of the act of 1890 without re-enacting them and publishing them at length? We think not. An examination and comparison of the two acts will disclose that no provision of the act of 1890 is extended or attempted to be extended to territory not covered by that act, and proceedings under it, by the act of 1899, except those which are in fact re-enacted and incorporated in full in the latter act, and published at length as a part of it. The last act, indeed, provides a perfect system of law whereby territory adjacent to a stock district established under the first may be incorporated therein, and regulated after such incorporation, and is in itself a complete enactment. The provisions for such incorporation are different from the provisions of the original act for the establishment of stock-law districts, but they require to their operation the aid of no provision of the original act not found in this one; and all the rights, duties, liabilities, penalties, and proceedings intended to be given, imposed, or prescribed under the new act are fully set forth therein; and, in so far as its provisions are those of the original act, they are re-enacted and published at length, and, in so far as new provisions are intended to be made, they take the place of those in the old act, and are in themselves complete and self-executing expressions of the legislative will. So that the act of 1899 may be executed in all particulars without any reference to the act of 1890, or to the operation of the latter act, further than that a stock-law district must have been established under it, to which the territory proposed to be dealt with under the act of 1899 is adjacent. It is true that in the first section of the act of 1899 there is a provision that the adjacent districts established under it "shall be governed by the law prohibiting stock from running at large in Clay county, Alabama,"—the reference being to the act of 1890; but this provision is rendered innocuous by the fact that every provision of the "law prohibiting stock from running at large" in said county having operation in the territory treated of in the act of 1899 is re-enacted in and by that statute in full, and published at length.

This act of 1899 is not void for its failure to provide for any notice of the application to the commissioners' court for the incorporation of adjacent territory into an existing stock-law district. No man has such estate or interest in the lands of another as entitles him to turn his live stock at large upon it, and a requirement that he keep his stock on his own premises deprives him of no property right or other right assertable in any court. The legislature might, in the exercise of its police power, have forbidden

the running at large of all stock in Clay county, or in any part thereof, absolutely, without notice to owners of stock there; and it was clearly competent for that body to confer upon the commissioners' court the power to designate the districts in which the stock law enacted by the legislature should operate and be effective, without any notice to persons living and owning stock within any such district. The act of 1899 does, however, clearly contemplate that the commissioners' court shall enter upon an investigation as to whether it is to the interest of the citizens of the district, or according to the wishes of the freeholders of the district, for it to be enacted into a stock-law district; and such investigation should, of course, be made.

Here, then, we have in the enactment of 1899 a statute the subject of which is clearly expressed in its title, and which in and of itself is a complete act, in no wise dependent upon the act of 1890 or upon any other law for any provision necessary to its full effect and operation according to the manifest legislative intent. Under the act of 1899, we apprehend that the districts to be incorporated with existing stock-law districts should at least embrace all the territory lying within their boundary lines. For instance, territory embracing the whole of a township,—using the word, as in common parlance, to denote territory six miles square,—except some part lying away from the township lines, and surrounded by other lands of the township, cannot, under any proper construction of the statute, be established into a stock-law district. And so, for another instance, a section, excluding the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, or the like,—the excluded part being entirely surrounded by that proposed to be embraced,—should not be established as such district. And the same might be true in respect of land materially jutting into the general contour of the proposed district, or where there are quarter sections lying over upon, and other land extending from the township line into, the proposed district, where the general line of the district follows the township line; and the like cases. The rationale of this is obvious. To construct, so to speak, a district entirely surrounding land not nominally embraced in it, would be to subject the proprietor of such land to all the burdens of this law, and, in effect, to embrace his land within the prohibitory district, without allowing him a voice as a freeholder in the matter; and the statute provides for the ascertainment of the wishes of all the freeholders in the proposed district. But this question did not properly arise in this case on the hearing before the commissioners' court. The petition does not show any such case as is instanced above, and the demurrer intended to raise the point was essentially a speaking demurrer. The point should be made by answer.

Assuming, therefore, that the act of 1897

is unconstitutional and void, the petition should yet have been sustained under the act of 1899. The county court erred in not quashing the judgment of the commissioners' court on the demurrer. The judgment of the county court will therefore be reversed, and the cause will be remanded to the county court, with directions to that court to enter a judgment quashing the order or judgment of the commissioners' court sustaining the demurrer to the petition filed in said commissioners' court.

Reversed and remanded.

BROWN et al. v. FOWLER.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

NOTES—INDORSERS—FIXING LIABILITY—COMPLAINT—PLEA—WAIVER—EVIDENCE—PROMISE TO PAY—ADMISSIONS—TRIAL.

1. Under Code, § 894, providing that a holder of a note is excused from bringing the suit required by section 892 at the next term of court after the maturity of the note against the maker, in order to fix the liability of the indorser, when by any act or promise of the indorser the plaintiff is induced to delay bringing such suit, where delay has been so induced an action may be maintained against the indorser, without suing the maker, at any time.

2. Where a complaint alleges that defendants indorsed a note, which is set out in full, and that between its maturity and the next term of court they each requested him not to sue the maker, and promised to pay the debt, and thereby induced him to delay suit, wherefore he now sues to recover of them the amount of the note and the costs of a suit against the maker, with interest, the action is properly against the indorsers as such.

3. Where the holder of a note was induced to delay suit against the maker by a promise of the indorsers to pay, the fact that the holder afterwards recovered judgment against the maker was not a waiver of such promise.

4. In an action by the holder of a note against the indorsers, the refusal of the court to strike out allegations of the complaint that plaintiff had recovered against the maker, and that execution thereon had been returned, "No property found," was not reversible error.

5. Under Code, § 894, providing that the holder of a note is excused from suing the maker in order to fix the liability of an indorser, when by any act or promise of the indorsee the holder is induced to delay such suit, where such delay was induced by an express promise to pay the note the promise need not have been in writing.

6. In an action against the indorsers of a note, an allegation in the complaint, as to the indorsement, that on the day of the date of the note "the defendants indorsed a written obligation executed" by the maker "in words and figures following" (setting out the note) is sufficient.

7. Where the complaint in an action against the indorsers of a note alleges that the holder was induced to delay suing the maker by the express promise of the indorsers to pay the note, a demurrer to a plea denying that there was any consideration for such promise was properly sustained.

8. Where the complaint in an action against two indorsers of a note alleges that they indorsed it, the presumption is that they indorsed

separately, and evidence that either promised to pay the note is good, as against him.

9. Where the holder of a note was induced to delay suit against the maker by the request of the indorsers, and their promise to pay the note, in a suit against them thereon evidence of the solvency and property of the maker of the note at its maturity is irrelevant.

10. Where, in an action against the indorsers of a note, they denied having induced the holder to delay suit against the maker, a corporation, by promising to pay the note, it was proper to show on cross-examination of one of the defendants that he and the other defendant owned the majority of the stock of the maker.

11. Where, in an action against the indorsers of a note, they denied having induced the holder to delay suit against the maker by promising to pay the note, testimony that they said to witness that they told the holder that either of them was worth the debt, and that they had offered to give him a mortgage on the maker's property, and pay \$300 per month until the debt was paid, was properly received.

12. On an issue as to whether defendants had promised to pay a note on which they were indorsers, a letter subsequently written by one of them containing an individual promise to pay, and stating that they wanted the plaintiff to hold the paper, was admissible.

13. Where a portion of the testimony of a witness was unobjectionable, a motion to strike out his entire testimony should be overruled.

14. Where the complaint in an action against two indorsers of a note alleges that they each promised to pay the note, the plaintiff may recover on proof of a separate promise by each; a joint promise not being necessary.

Appeal from circuit court, Etowah county; J. A. Bilbro, Judge.

Action by W. H. Fowler against J. R. Brown and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The complaint, as amended, was as follows: "The plaintiff claims of the defendants the sum of two thousand four hundred and twenty-one and ⁵⁶/₁₀₀ dollars, with interest thereon from the 13th day of April, 1897, due upon the following state of facts: Plaintiff avers that on the 2d day of December, 1893, the defendants indorsed a written obligation executed by the Ragland Coal & Coke Company, a corporation, in words and figures as follows: [Here follows the note, which was indorsed by the defendants, and was dated December 2, 1893, and made payable to the plaintiff December 25, 1894, and was signed "Ragland Coal & Coke Company, by J. R. Brown, G. M."]"

The complaint averred the payment of a certain amount on said note. It then averred the institution of a suit on March 18, 1896, against the Ragland Coal & Coke Company on said note, the recovery of judgment in said suit, the issuance of execution upon said judgment and the return thereof "No property found." It was then averred in said complaint as follows: "Plaintiff avers that between the 25th day of December, 1894, and the 18th day of March, 1895, defendants each requested plaintiff not to bring suit against said Ragland Coal & Coke Company, and expressly promised to pay the debt evidenced by said note, thereby inducing plaintiff to delay bringing suit against the said Ragland

¹ Rehearing denied June 16, 1902.

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. §§ 1-32, 1490.

Coal & Coke Company. Wherefore plaintiff now sues to recover of defendants the said sum of two thousand four hundred and twenty-one and $\frac{86}{100}$ dollars, and also the said sum of eight and $\frac{05}{100}$ dollars, the costs of suit, together with interest on said sum of two thousand four hundred twenty-one and $\frac{86}{100}$ dollars."

To this complaint the defendants demurred upon several grounds, which may be summarized as follows: (1) The complaint shows that the plaintiff's only cause of action or demand is against the Ragland Coal & Coke Company, and not against these defendants. (2) The complaint fails to show any cause of action or any state of facts against these defendants whereby they are legally bound for the payment of debt or demand described in the complaint. (3) The complaint fails to show how or in what way the defendants indorsed said note so as to bind them. (4) The complaint shows that the plaintiff failed to bring suit against the maker of the note at the first term of the court to which suit could have been brought, and the complaint fails to show that defendants, in writing, signed, waived or agreed that the time of bringing suit against the maker may be extended, as is required by law, in order to bind them as indorsers on said note. (5) It is shown in the complaint that the alleged promise of the defendants to pay said demand rests solely in parol, while the law requires that the consent waiving or extending the time within which suit should be brought, in order to bind the indorser, should be in writing, signed by the indorser. (6) Because the complaint fails to show any excuse for the plaintiff not bringing suit, and obtaining judgment against the maker of said note at the first term of the court to which suit could have properly been brought. (7) The complaint shows that the alleged promises of the defendants to pay said notes were wholly without consideration. (8) Because the complaint shows that the alleged promise to pay was a mere parol promise to pay the debt of another, and such promise is void under the statute of frauds. (9) Because it is not shown by the complaint that the plaintiff was, in any way, induced by the defendants to delay the bringing of suit against the makers of said note at the first term of the court to which said suit could properly have been brought, and it shows that suit was not brought for more than a year after it could have properly been brought. (10) It is shown in the complaint that the plaintiff waived and abandoned the alleged promises of these defendants to pay the note mentioned and described in the complaint, by the bringing of the suit against the maker of the note,—Ragland Coal & Coke Company,—and prosecuted the same to judgment. These demurrers were overruled. The defendants also moved the court to strike from the complaint that portion wherein the plaintiff averred the bringing of suit and the recovery of judgment against the Ragland

Coal & Coke Company, and the issuance of execution thereon and the return of said execution, upon the ground that such averments were immaterial and impertinent to any issue in the cause. This motion was overruled, the ruling upon said motion being shown only in the minute entry.

The defendants pleaded the general issue and by special plea denied that they, or either of them, requested the plaintiff not to bring suit at any time prior to the April term, 1895, of the circuit court of St. Clair, which was the first term of the court after the maturity of the note, or that prior to the April term, 1895, of the circuit court of St. Clair county, they or either of them expressly promised to pay the debt evidenced by said note, or in any other way induced the plaintiff to delay the bringing of suit thereon against the maker of said note. They also pleaded the following special pleas: "(4) That the alleged promise of defendants upon which plaintiff relies for recovery as against these defendants was wholly without consideration." "(6) That plaintiff failed to bring suit to the first term of the court to which suit could be brought after the maturity of the note mentioned in plaintiff's complaint against the maker thereof, whereby these defendants were exonerated as indorsers thereon. (7) That the plaintiff failed to bring suit against the maker to the second term of the court to which suit could have been brought after the maturity of the note mentioned in plaintiff's complaint; that if suit had been so brought against the maker and diligently prosecuted to judgment the money could have been made, the maker being solvent."

To the fourth plea the plaintiff demurred upon the grounds that no consideration was necessary to uphold the alleged promise, and that said plea was a mere conclusion of the pleader and stated no fact on which issue could be taken.

To the sixth plea the plaintiff demurred upon the ground that, under the facts set out in the complaint, the failure to sue at the first term of the court to which suit could have properly been brought, does not relieve the defendants from liability, and it was shown by the complaint and plea, taken together, that plaintiff was induced to delay bringing suit by the acts and promises of defendants.

To the seventh plea the plaintiff demurred upon the following grounds: (1) It does not deny the fact that plaintiff was induced to delay suit by the acts and promises of the defendants. (2) Under the facts shown by the plea and complaint, taken together, no duty rested on plaintiff to bring suit to the second term of the court. (3) The complaint and plea, taken together, show that the liability of the defendants had been fixed by suit in due time against the maker. The demurrers to these pleas were sustained.

On the trial of the cause, the plaintiff introduced in evidence the note sued on, which was described in the complaint, and which

showed that it was indorsed in blank by the defendants, J. R. and W. T. Brown. The defendants objected to the introduction of this note in evidence, on the ground that it was illegal, immaterial and irrelevant. The court overruled the objection, and the defendants duly excepted. The plaintiff then offered in evidence the transcript of the record, proceedings and judgment in the cause of the plaintiff, W. H. Fowler, against the Ragland Coal & Coke Company instituted in the circuit court of St. Clair county on March 18, 1897, the issuance of execution upon said judgment, and the return of the sheriff on said execution "No property found." Each of the defendants objected to the introduction of said transcript in evidence, on the ground that it was illegal, immaterial and irrelevant. The court overruled the objection, and the defendants duly excepted.

John G. Fowler, a brother of the plaintiff, as a witness, testified that, while his brother was absent from home, he authorized the witness to collect the note sued on; that on December 25, 1894, the date of the maturity of said note, he asked J. B. Brown, the general manager of the Ragland Coal & Coke Company, for its payment, stating that the plaintiff, his brother, wanted his money; that in this conversation said Brown stated that he would protect the plaintiff, and offered to give him a mortgage on the company's property to secure said debt; and he stated further in said conversation that neither he nor his brother wanted suit brought on the note; that there was no use in suing, inasmuch as he and his brother were worth the money and he would protect the debt. This witness testified to having had a conversation with W. T. Brown, in which practically the same statements were made. He also testified that he did not know at that time that the defendant W. T. Brown was the treasurer of the Ragland Coal & Coke Company. There was no objection interposed to the testimony of J. G. Fowler during the time he was being examined as a witness, but after his examination was completed, the bill of exceptions recites that "the defendants and each of them severally and separately moved to exclude the evidence of the said John G. Fowler from the jury upon the ground that it contained no express promise to pay the debt mentioned in plaintiff's complaint by the defendants, or either of them, as indorsers of the written obligation mentioned in the complaint of plaintiff in this cause, because said evidence did not show or tend to show that the plaintiff was induced by said statements or conversation of the defendants individually, or either of them, to delay bringing suit on the said obligation, and because said evidence was immaterial, irrelevant and illegal. Because the evidence of the said Jno. G. Fowler showed that the statements of Jas. R. Brown and W. T. Brown were made as officers of the Ragland Coal & Coke Company, and not as

individuals." The court overruled each of said motions to exclude the testimony of the witness J. G. Fowler, and to this ruling each of the defendants separately excepted.

The plaintiff, W. H. Fowler, as a witness, testified to substantially the same facts as were testified to by J. G. Fowler. There was no objection to the testimony of the plaintiff at the time it was being given, but after his examination was finished each of the defendants moved the court to exclude all the testimony of the witness Fowler, upon the same grounds as were made the basis of the motion to exclude the testimony of the witness Jno. G. Fowler. The court overruled the motion and the defendants duly excepted.

It was shown by the testimony of the defendants that on December 25th, and some time before and after, the defendant J. R. Brown was the general manager of the Ragland Coal & Coke Company, and the defendant W. H. Brown was the treasurer. Each of the defendants denied having by word or act induced the plaintiff to delay bringing suit against said company on the note here sued on, and denied the promises individually to pay said debt or to become responsible therefor.

During the examination of J. R. Brown as a witness, he was asked by the defendants' counsel the following questions: "If on December 25, 1894, the Ragland Coal & Coke Company was solvent?" "What property, if any, the Ragland Coal & Coke Company owned on December 25, 1894, and what was the market value thereof?" "What property, if any, the Ragland Coal & Coke Company owned between December 25, 1894, and March 18, 1895, and what was the value of such property?" The plaintiff separately objected to each of these questions, the court sustained each of such objections, and to each of these rulings the defendants separately and severally excepted.

On the cross-examination of said J. R. Brown, the plaintiff's counsel asked him the following question: "If on the 25th of December, 1894, he, witness, and defendant W. T. Brown did not own a majority of the capital stock in the Ragland Coal & Coke Company?" Each of the defendants objected to this question, upon the ground that it called for illegal, irrelevant, incompetent and immaterial evidence. The court overruled the objection, and to this ruling each of the defendants separately and severally excepted. The witness answered that he and the defendant W. T. Brown did, at said time, own a majority of the capital stock in said company.

There was further evidence introduced by the defendants tending to show that the plaintiff and his brother did not know until after the commencement of the suit against the Ragland Coal & Coke Company that the law required suit to be brought against the maker of said note to the first term of the

court to which it could properly be brought in order to bind the indorsers.

In rebuttal the plaintiff introduced one N. O. Hamilton as a witness, who testified that he had a conversation with both of the defendants in 1896 or 1897, and that in such conversations they stated to the witness that they had told plaintiff that they were responsible for the note of the Ragland Coal & Coke Company, and were worth the debt. The defendants separately and severally moved the court to exclude the testimony of the witness on the ground that it was illegal, irrelevant, incompetent and immaterial. The court overruled the objection and the defendants duly excepted.

The plaintiff then introduced in evidence a letter from the defendant John R. Brown addressed to John G. Fowler, in which letter the defendant John R. Brown practically admitted his personal obligation upon said note, by reason of his promises to pay the plaintiff. This letter was written on the letter head of the Ragland Coal & Coke Company, but was signed by J. R. Brown as an individual, and not in an official capacity. The defendants each objected to the introduction of said letter in evidence, upon the ground that it shows on its face that it was written at the instance of the Ragland Coal & Coke Company, and that the promise to pay said debt was the promise of the Ragland Coal & Coke Company, and not the promise of the defendants as individuals. The court overruled this motion, allowed the letter to be introduced in evidence, and to this ruling the defendants severally and separately excepted.

The court, at the request of the plaintiff, gave to the jury the following written charges: "(1) The court charges the jury that if after the 25th day of December, 1804, and before the 18th day of March, 1895, defendants requested plaintiff not to sue the Ragland Coal & Coke Company, and expressly promised to pay the debt evidenced by the note, and thereby induced plaintiff not to sue at the first term of the court after the note fell due, then defendants were not discharged from liability as indorsers by plaintiff's failure to sue the Ragland Coal & Coke Company at the first term of court. (2) The court charges the jury that they may look to the letter written by J. R. Brown to John Fowler, in connection with all the other evidence in the case, in ascertaining whether defendants between the dates named in the complaint expressly promised to pay the debt, and induced plaintiff to delay bringing his suit. (3) The court charges the jury that, even if John G. Fowler did not know that it was necessary to sue the maker to the first term of the court after maturity of note, yet if defendants after the maturity of the note, and before the 18th day of March, 1895, requested plaintiff not to sue the Ragland Coal & Coke Company, and expressly promised to pay the debt, and thereby induced plaintiff not to sue the Ragland Coal & Coke Company

to the next term of the circuit court of St. Clair county, then the jury should find a verdict for the plaintiff."

The defendants each severally and separately excepted to the giving of each of said written charges, and also severally and separately excepted to the court's refusal to give each of the following charges requested by them: "(1) The court charges the jury that, if they believe all the evidence in this case, they must find the issues in favor of the defendants. (2) The court charges the jury that if they find from the evidence that the alleged promises of the defendants to protect the plaintiff in the payment of the note in controversy was made by defendants in their capacity as general manager and treasurer of the company, the maker of the note, and not in their personal capacity, or intending to by such promises personally bind themselves, then under all the evidence in the case the verdict of the jury must be for the defendants."

M. M. Smith and Inzer & Greene, for appellants. Amos E. Goodhue, for appellee.

HARALSON, J. 1. The Code prescribes a form for a suit by an assignee against the assignor or indorser of a note, upon which suit has been brought to charge the maker, judgment obtained and execution issued according to law and returned "No property found," as required in such cases, before proceeding against the assignor or indorser to make him liable, as by section 892 of the Code. There is no form prescribed for suits to charge the indorser, when he has in writing waived suit to charge himself (Code, § 893), or when the holder of the indorsed or assigned paper is excused from bringing suit for one of the several causes excusing him from so doing, as prescribed by section 894 of the Code. That section provides: "That the holder is excused from bringing the suit, obtaining the judgment and issuing execution thereon," when one of the prescribed conditions, as therein laid down, exists. The seventh and last of these excuses is, "when, by any act or promise of the indorser, the plaintiff is induced to delay bringing such suit." The statute, itself, seems plainly to excuse the bringing of the suit at any time against the maker, after default to sue to the first term after the note is due, to hold the indorser liable, when one of the excuses for not doing so exists, and that under this section, with one of the excuses for not so suing the maker existing, the holder of the indorsed paper, without afterwards suing the maker at all, may proceed against the indorser, as against the maker in the first instance, to enforce his, the indorser's, liability on the same. In *Lindsay v. Williams*, 17 Ala. 229, it was said by Dargan, C. J.: "We should hold, if an indorser (holder) did not know in what county the maker resided, and could not by diligent inquiry ascertain the county of his residence

in time to sue to the first court, that this would be a sufficient excuse for failing to sue at the first term, and I think it may be questioned whether it would not dispense with the necessity of a suit altogether, even if the holder by inquiry should afterwards ascertain the residence of the maker."

The complaint in this case, appears to be apt, in declaring the liability of the defendants as indorsers of the note. It is a mistaken view, that the suit is upon the judgment which the plaintiff obtained in the circuit court against the maker of the note, or a special action on the case against defendants,—one or the other of which, the defendants, on appeal, suggest the action to be. It is a clear case of a suit by the payee of a non-negotiable note against the indorsers thereon, to charge them with its payment. The complaint alleges, that the defendants indorsed the note, which is set out in *hæc verba*, and avers, that in the interim between the maturity of the note—the 25th December, 1894—and the first term of the court to which suit might have been brought,—the 18th day of May, 1895,—“defendants, each, requested plaintiff not to bring suit against said Ragland Coal & Coke Company, (the maker of the note) and expressly promised to pay the debt evidenced by said note, thereby inducing plaintiff to delay bringing suit against the said Ragland Coal & Coke Company, wherefore plaintiff now sues to recover of defendants, (the indorsers of said note) the sum of \$2,421.56, and also the said sum of \$8.05, the costs of suit against the makers, with interest,” etc. While the statute, under the allegations of the complaint, did not require this suit to be instituted against the maker before suing the indorsers to charge them, it was clearly not against their interest for it to have been done. It was a step in their interest, to enforce payment, if it could be done, out of the maker of the note, without resort to the defendants as indorsers. It was an act of good faith, without the effect, as contended by defendants, of a waiver of the promises of defendants to pay, as an inducement to delay suit, and one at which they cannot be heard to complain. The refusal of the court to grant the motion of defendants to strike that part of the complaint setting up the institution of that suit, the rendition of judgment therein, issuance of execution thereon and its return of “No property found,” was not reversible error. Furthermore, the ruling on the motion appears alone in the minute entry and is not here reviewable. Nor was there reversible error in overruling the demurrer to the complaint on the same ground, or for allowing in evidence the certified transcript of the judgment, the execution and the return of the sheriff thereon.

2. The legislative history of sections 892, 893 and 894 of the Code was reviewed, and construction carefully given to them by Brickell, C. J., in the late case of *Caulfield v. Finnegan*, 114 Ala. 39, 21 South. 484. Of sec-

tion 894, and its subdivision 7, it was said: “Without now assuming to decide what acts, or promises, inducing the delay of suit, the subdivision may comprehend, it is enough to say, that an express promise to pay the debt with or without writing, or representation of the solvency of the maker, inducing the delay of suit, made before the period of suit had expired, we incline to the opinion, would constitute a promise, or an act, within its meaning. The promise to pay, must, however, be express; it must not be a mere implied promise deduced from a verbal waiver of suit,—for that would render nugatory the mandate of the statute that the waiver to be availing must be in writing (section 893), and if it was in writing, there would be no occasion for resorting to the subdivision.” A clear distinction is drawn in the decision between a waiver of time for bringing suit under section 893, and an express promise to pay the debt, as an excuse for not suing, under section 894. In the one case, the waiver must be in writing, and in the other, the promise need not be.

3. The complaint alleges, as to the indorsement of the note,—its date having been given as the 2d December, 1893: “Plaintiff avers that on the 2d day of December, 1893, the defendants indorsed a written obligation executed by the Ragland Coal & Coke Company, a corporation, in words and figures following” (setting out the note). The act of indorsement, either in blank or in full, without qualification, says Mr. Parsons, “forms a new contract with the indorsee, that the maker will pay the same at maturity, when duly called upon and notified, and that the indorser will pay the same if he does not. It is an original undertaking, and not a promise to pay the debt of another under the statute of frauds.” 2 Pars. Notes & B. pp. 23, 25; Story, Prom. Notes, § 135. The indorsement is *prima facie* evidence, between the immediate parties, of a full and valuable consideration, but as a matter of defense, it may be inquired into, the burden being on him who disputes the consideration. 2 Pars. Notes and B. 23; Story, Prom. Notes, §§ 7, 181, 196; *Gee v. Nicholson*, 2 Stew. 512; *Parkman v. Ely*, 5 Ala. 346; Code, § 1800.

The demurrer to the complaint was properly overruled.

4. The demurrer to defendants' pleas was properly sustained. The fourth is not a denial of the consideration of the note, but of the promise to pay, to induce defendant not to sue the maker. What consideration there was for the promise is set out in the complaint, which the plea of the general issue put in issue. Furthermore, there was no valuable consideration needed for the alleged promise. The vices of the sixth and seventh pleas fully appear from what has already been said.

5. The presumption from the allegations of the complaint is, that defendants separately indorsed said note. Any evidence on the

part of either of them that he made a special, individual promise to pay was good as against him; and the evidence tends to show that each defendant recognized the debt as his individual obligation, and made such promise.

6. Evidence of the solvency of the Ragland Coal & Coke Company at the time the note fell due, and the property then owned by it and its value, as proposed to be proved by defendants, were facts entirely irrelevant to the issue in the case, and was properly disallowed by the court. On the cross-examination of the defendant, J. R. Brown, examined in chief by defendants, he was asked by plaintiff's counsel, "If on the 25th of December, 1894, (which was the date of the maturity of the note), he, witness, and W. T. Brown did not own a majority of the capital stock in the Ragland Coal & Coke Company." There was no error in allowing him to answer against the objection that the evidence sought was illegal and immaterial, that they did own a majority of the stock. The vital issue in the case was, whether or not the defendants requested plaintiff not to sue the coal and coke company, and promised to be personally responsible for the debt. If they had no interest in the company, it might appear unreasonable, that they made such a request and promise; but, if they owned a majority of the stock in the company, and practically controlled it, they had motive and interest in such request and promise, and it was competent to go to the jury in determining on all the evidence, whether they made such request and promise or not.

7. Evidence, of N. O. Hamilton was offered by plaintiff, that in the year 1896 or 1897, he had a conversation with the defendants in Asheville, in which they said that they had told the plaintiff that either of them was worth the debt; that W. T. Brown said that he went to Fowler and told him that he and his brother were worth the debt, and both of them said that they had offered to give plaintiff a mortgage on the company's property and pay \$300 per month until the debt was settled. Motion was made by defendants to exclude this evidence, on the ground that it was illegal, irrelevant and immaterial. There was no error in overruling the motion. The evidence tended to show an admission by defendants of the request and promise alleged to have been made to induce plaintiff not to sue the maker of the note, and was competent in connection with the other evidence tending to establish the promise.

8. The letter of J. R. Brown to J. G. Fowler in 1896, was properly admitted, against the objection of illegality and irrelevancy, and because it appeared to have been written for, and at the instance of the coal and coke company. It contains an individual promise to pay at that time, and also an expression of what he and the other indorser had desired in the past, viz., "We wanted you to

still hold the same paper." When taken with all the evidence, it tends to support the main issue in the cause.

9. The motion to exclude the evidence of John G. Fowler was properly overruled. The motion went to the entire evidence, portions of which were unobjectionable. No objections appear to the evidence as the witness gave it. Furthermore, the evidence tends to establish the promise as alleged. The same is true of the evidence of W. H. Fowler.

10. There was no error in the charges given at the request of plaintiff. The suit is not on a joint contract, or cause of action, as contradistinguished from a several undertaking by defendants. The parties, as the evidence tends to show, each made the promise counted on. Under the allegations of the complaint, the plaintiff might have sued either of defendants without the other and maintained the suit on his individual promise. It is only when the complaint avers a joint contract or cause of action, that the evidence must show, for a recovery, a joint and not a several promise. *Jackson v. Bush*, 82 Ala. 396, 1 South. 175; *Jones v. Engelhardt*, 78 Ala. 505. Charge 2 may have been subject to an objection of being argumentative, or laying stress on a particular phase of evidence, but this is not reversible error.

It needs no discussion to show that the charges requested by defendant were properly refused.

Let the judgment be affirmed.

Affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. BATES.¹

(Supreme Court of Alabama. May 14, 1902.)

CARRIERS—PASSENGERS—WRONGFUL EXPULSION—PLEADINGS—ERROR WITHOUT INJURY—APPEAL—BILL OF EXCEPTIONS—SIGNING—STIPULATION.

1. Where plaintiff's complaint alleged that while a passenger on defendant's railway car he was wrongfully ejected, for which he claimed damages, to which defendant set up several pleas,—one being the general issue,—error in sustaining a demurrer to a plea which merely amounted to a denial that plaintiff had a right to ride on the car was without injury, since evidence to that effect could be introduced under the general issue.

2. Plaintiff alleged that defendant railway company was accustomed to carry passengers on a certain freight train; that he purchased a ticket to ride thereon, and was assured by the ticket agent that he could ride thereon; and that he was wrongfully ejected by the conductor. Defendant pleaded that the coach on which plaintiff attempted to ride was being transported in connection with a freight train, but not for the transportation of passengers; that defendant's rules prohibited the carrying of passengers on such train; that the conductor had no knowledge of the alleged statements of the ticket agent; and that the ticket was unlimited, and could be used on any passenger train. *Held*, that such pleas did not deny the allegations of the complaint, nor were they good as pleas in confession and avoidance, and a demurrer thereto was properly sustained.

¹ Rehearing denied June 17, 1902.

3. A paper in the transcript on appeal purporting to be a bill of exceptions, but not signed by the judge, cannot be considered, though the attorneys stipulated that, the trial judge having died before the bill was signed, such bill should be considered as though duly signed; the statute providing for establishing a bill of exceptions where the judge fails or refuses to sign.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Action by William B. Bates against the Nashville, Chattanooga & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint contained three counts. The first count of the complaint was as follows: "The plaintiff claims of the said defendant one thousand dollars damages, because the said defendant was on and prior to April 16, 1898, engaged in the business of a common carrier and a carrier of passengers between Elora, Tennessee, and Huntsville, Alabama, and as such was running trains propelled by steam to and from Elora, Tennessee, to Huntsville, Alabama, upon its railroad, known as the Nashville, Chattanooga & St. Louis Railroad, a part of which runs through Madison county, Alabama, and on and prior to said 16th day of April, 1898, the said defendant had been and was accustomed to run from said Elora, Tennessee, to Huntsville, Alabama, a certain train, composed in part of cars for carrying freight, and in part of cars for carrying people, or passenger coaches, and it had been and was accustomed to carry passengers for hire between said points, and which said train reached New Market, a station between said points in Madison county, Alabama, on said day at about 9 o'clock a. m.; and on said day plaintiff purchased from the ticket agent of defendant, one Lansden, a ticket from said station at New Market to Huntsville, Alabama, for which he paid fifty-five cents (the amount demanded therefor by said agent), and bought said ticket for the purpose of becoming a passenger and going on said train from New Market to Huntsville, Alabama, and said ticket was so sold to plaintiff by said agent, who assured him that he (plaintiff) could become a passenger and make said trip on said train; and plaintiff waited at said station from about a quarter to 9 o'clock, when he purchased said ticket, until about 9 o'clock a. m., when said train arrived at said station of New Market, and was assured by said agent in the meantime that he could make such trip on said train; and at 9 o'clock said train arrived, and plaintiff, having said ticket, got upon and into one of the passenger coaches thereof, which was open, and in order and proper condition for the reception of passengers; and, before said train left New Market, the conductor, one Tobe Smith, although plaintiff had showed him his ticket, which was in all respects legal, and entitled him to passage, and made him aware of the assurances

given him (plaintiff) by the ticket agent that he could ride on said train, unlawfully, wrongfully, wantonly, and without regard to the rights of plaintiff, refused to allow him to ride on said train, and required him to leave said train, and told him if he did not do so he would put plaintiff off by force; and plaintiff was, against his will, forced to leave said train, and was laughed at by the conductor and brakeman and the agent, and thereby treated with indignity, and was greatly inconvenienced, as he was unable to reach Huntsville in time to take the west-bound train for Memphis, where he had an important business engagement, which he was thereby prevented from filling, and lost the entire day in waiting for said train, and was forced to buy another ticket; the time within which the first one was good having expired before a train arrived at New Market on which he was permitted to travel, to plaintiff's damage one thousand dollars. Hence this suit." The defendant demurred to the complaint, and to each count thereof, upon the following grounds: "(1) That there is not shown in the complaint a cause of action against the defendant, in that said complaint fails to aver that the ticket which was purchased by the plaintiff entitled him to ride on the train which he attempted to board. (2) Said counts of the complaint fail to aver that the train upon which the plaintiff endeavored to ride was for the purpose of carrying passengers at the time plaintiff offered to ride thereon." This demurrer was overruled. Thereupon the defendant pleaded the general issue and the following special pleas: "(2) That on the 16th day of April, 1898,—the day on which the plaintiff endeavored to get transportation on the train named in the complaint,—said train was not being run for the transportation of passengers, but only for the transportation of freight, and the plaintiff had no right to ride thereon. (3) The passenger coach upon which the plaintiff endeavored to ride upon the ticket purchased by him was at the time being transported in connection with a freight train, but not for the transportation of passengers, and there was at the time said plaintiff endeavored to board said train a rule of the defendant company, in existence and in force, that no passengers should be carried upon said train; and the conductor, in refusing to permit the plaintiff to travel thereon, was acting within the scope of the said rule. (4) At the time the plaintiff endeavored to ride upon the train of the defendant, the conductor had no knowledge of the alleged statements made by the agent of the defendant to the plaintiff, and the said train was being run for the transportation of the freight alone; and the said conductor, in refusing to permit the plaintiff to ride thereon, was acting within the scope of a rule of defendant company which prohibited passengers from riding upon said train. (5) The ticket purchased by the plaintiff was

an unlimited ticket, and was good for passage until it was used; and, if any loss occurred on account of the purchase of said ticket, it was because the plaintiff failed to present it to the defendant for passage on the train on which he came to Huntsville, and, if so presented, it would have been good for his said passage, or on any passenger train." To these pleas the plaintiff demurred upon the following grounds: "(1) They each fail to deny that it had been the custom of the defendant to carry passengers upon said train upon which the plaintiff was refused passage. (2) Said pleas each fail to deny that defendant's agent sold plaintiff the ticket for the purpose of taking passage on said train upon which he was denied passage." To the fifth plea the plaintiff demurred severally upon the ground that whether the ticket was presented or not would not affect plaintiff's right to recover, but merely cause to show whether the value of the ticket was lost to plaintiff or not. These demurrers were sustained. The cause was tried upon issue joined upon the plea of the general issue. The bill of exceptions in this case was not signed by the judge who tried the cause, but at the end of the bill of exceptions there was the following agreement of counsel, which was signed by counsel for the defendant and the plaintiff within the time allowed by the order of the court for preparing and having signed a bill of exceptions in said cause: "The Hon. H. C. Speake, the judge who tried this case, having died before the bill of exceptions was signed, it is hereby agreed by and between the parties, by their attorneys of record, that the foregoing pages, purporting to be a bill of exceptions, is a correct bill of exceptions in this cause, and shows all matters occurring in the trial not otherwise appearing of record; and it is further agreed that this bill of exceptions shall be filed by the clerk of the circuit court of Madison county, and shall become a part of the record in this case, and shall be entered in the record for the supreme court as a part thereof, and shall be received by the supreme court as the true bill of exceptions in the case, as if the same had been established in the supreme court as provided by law."

Oscar R. Hundley, for appellant. S. S. Pleasants and Douglass Taylor, for appellee.

DOWDELL, J. The complaint alleges a wrongful ejection of the plaintiff from the defendant's train by the conductor, and upon which the plaintiff had purchased a ticket to ride. The damages claimed are based upon the alleged wrongful act, and the action is clearly one in tort. The assignment of error based on the ruling of the court on the defendant's demurrer to the complaint is not insisted on in argument. Moreover, we think the complaint states sufficiently the cause of action, and the demurrer was without merit.

The defendant filed five pleas, the first being the general issue. Demurrers were sustained to the second, third, fourth, and fifth pleas, and this action of the court constitutes appellant's second assignment of error on the record. The second plea, to which demurrer was sustained, amounted to nothing more than a denial of the plaintiff's right to ride on the train. It set up no matter in defense of the act which was not available under the plea of the general issue. Every benefit the defendant could possibly have under this plea was likewise open to it under the plea of the general issue. So if there was error in sustaining the demurrer to the plea, it was clearly error without injury. See *Railroad Co. v. Hall* (at the present term) 32 South. 259, and authorities there cited.

The third, fourth, and fifth pleas are manifestly bad. They are not good as pleas in confession and avoidance; nor do they, or either of them, deny the allegations of the complaint. The court properly sustained the demurrers to these pleas.

The remaining assignments of error are based upon matters arising in what appears in the transcript, and were intended to be a bill of exceptions. That which in the transcript purports to be a bill was never signed by the presiding judge. It is attempted to be made a part of the record, as a bill of exceptions, by the agreement of counsel. This cannot be done. This subject is controlled by the statute. The statute provides, in cases of failure or refusal of the judge to sign a bill of exceptions, how the same may be established. Unless the bill of exceptions becomes a part of the record, pursuant to the requirements of the statute, it cannot be looked to or considered for any purpose. Such being the case, there is nothing to support these assignments.

We find no error in the record, and the judgment must be affirmed.

LONG v. CAMPBELL et al.¹

(Supreme Court of Alabama. May 21, 1902.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—COLLUSION BETWEEN GRANTOR AND ASSIGNEE—RESERVATION FOR BENEFIT OF GRANTOR—INCAPACITY OF ASSIGNEE—MISMANAGEMENT—CREDITORS' BILL—SCOPE OF LIEN—APPEAL—QUESTIONS REVIEWED—CROSS APPEAL OR CROSS ERROR.

1. The lien acquired by the filing of a bill pursuant to Code, § 818, by a creditor without a lien, for the purpose of setting aside as fraudulent a conveyance by his debtor, attaches only to the property embraced in the conveyance attacked.

2. A deed of assignment for the benefit of creditors bona fide in its inception cannot be rendered fraudulent by collusive acts between the grantor and assignee subsequent to its execution.

3. A deed of assignment for the benefit of

¹ Rehearing denied June 23, 1902.

² See Assignments for Benefit of Creditors, vol. 4, Cent. Dig. § 441.

creditors purporting to convey all of the grantor's property "except his homestead" is not invalid, as containing a reservation for the benefit of the grantor; there being no reservation of benefit in anything conveyed, and the property excepted being equally subject to the claims of creditors after as before the assignment.

4. Incapacity or mismanagement on the part of an assignee of an estate assigned for the benefit of creditors is ground for his removal at the instance of a creditor, but not ground for avoiding the deed of assignment.

5. If an appellee wishes to have rulings of the trial court adverse to him reviewed, he must either take a cross appeal or cross-assign errors.

Appeal from chancery court, Lauderdale county; Wm. H. Simpson, Chancellor.

Suit by John S. Long against W. P. Campbell and others. From a decree in favor of defendants, complainant appeals. Affirmed.

This bill was filed by the appellant, John S. Long, a simple-contract creditor, against William P. Campbell and William T. Price, his assignee, and sought to set aside, as fraudulent and void, a certain deed of general assignment made by said Campbell in August, 1890, to William T. Price, as assignee, and to enforce a lien in behalf of the complainant on the property embraced in the deed of assignment. The assignee having died pending the suit, and his estate being insolvent, the case was revived against Samuel S. Broadus, the receiver of the said estate appointed by the United States court. After the death of the assignee an amended bill was filed, praying for the appointment of a receiver of the assigned estate, but no action was taken by the court; and afterwards S. S. Broadus was appointed receiver by the United States court in the case of the Louisville Banking Co. against W. P. Campbell, and an amendment to the original bill in this case was filed, making him a party.

The original and amended bills show that W. P. Campbell, who was engaged in the business of a private banker at Florence on the 30th August, 1890, made a deed of general assignment to William T. Price, as assignee. Price had been the confidential clerk and cashier of Campbell in his banking business for several years, and was wholly insolvent. The bill alleges that there was no change of possession of the assigned estate, but that W. P. Campbell continued in the sole possession, management, and control of the same as fully after the assignment as before. It alleges that he collected and disbursed the assets of the assigned estate as he saw proper, paying and compromising with certain creditors, and leaving others unpaid; that at the time of his assignment he was indebted to complainant in the sum of \$5,000 by written guaranty. The facts briefly averred as to this indebtedness was as follows: On the 2d of April, 1890, the Foster Manufacturing Company, a corporation engaged in business at Florence, executed to complainant its two notes, for \$5,000 each, payable, respectively, in 90 days and 4 months. These

notes were given in renewal of notes of similar amount executed by the said Foster Manufacturing Company, payable to F. H. Foster, and by him indorsed to complainant. These notes were not paid on maturity, and complainant agreed to an extension of 90 days and 4 months, provided they were indorsed by all of the directors of the Foster Manufacturing Company, among whom was W. P. Campbell, who was then a private banker, enjoying high credit. Said Campbell was not only a director, but a large stockholder, of the corporation, and, in addition to his own stock, had a large amount of stock of the company pledged with him for debts due by F. H. Foster and the company. After some negotiation it was agreed that all the directors, except Campbell, should indorse the two notes; Campbell making a written agreement that he would pay the note maturing at 4 months if the company failed to do so. A copy of this written agreement is attached as an exhibit to the bill. Default was made in the payment of the note, and Campbell, having failed in business in the meanwhile, declined to pay as he had agreed. The bill alleges that the deed of assignment was fraudulent on its face, as well as made to hinder, delay, and defraud creditors; that, by the express terms of the deed, Campbell excepted from its operation the homestead in which he then lived, which complainant alleges was of great value,—worth at least \$10,000. The deed of assignment, which was attached as an exhibit to the bill, was as follows, down to the habendum clause: "This deed of conveyance, executed at Florence, Alabama, on the 30 day of August, 1890, by and from William P. Campbell, party of the first part, to and with Wm. T. Price, party of the second part, witnesseth that whereas said party of the first part, in the transaction of the business as a banker at Florence, Alabama, under the firm name of W. P. Campbell & Co., has become involved to such an extent that he is not able to meet his obligations as they mature, and is anxious to provide for the payment of all amounts due by him to his creditors: Now, in consideration of the premises, and the payment of one dollar cash in hand by said party of the second part to said party of the first part, the receipt whereof is hereby acknowledged, said party of the first part does hereby give, grant, bargain, sell, and convey to said party of the second part all of the property, real, personal, and mixed, held, owned, or possessed by said party of the first part, whether in his individual name, or in his firm name of W. P. Campbell & Co., or jointly with others, including all notes, accounts, and evidences of debt, and every species of property whatever, except his homestead in which he now resides." The bill then averred that this reservation of property which was far in excess of the exemption allowed by law made the deed fraudulent and void as to creditors. The bill further averred that no inventories or schedules were

ever filed by the assignee of Campbell; that Campbell collected and appropriated the assets to his own use, and that no dividend was ever declared; that at the time of the assignment the property was considered of great value,—about \$200,000; and that no settlement of any kind was made by the assignee with the creditors, and the assignee died insolvent. It is alleged that Price was a mere dummy; Campbell exercising full control and dominion over the estate, and collecting and appropriating the assets to his own use, or the settlement of certain favored claims. The bill avers that the said assignee was merely nominally the assignee, but that “yet, in fact and in truth, he has, since the said deed was executed, continued to be, as he was prior to that time, merely the clerk of W. P. Campbell, exercising no more control since than he did before its execution over the property or assets of said W. P. Campbell, and takes no action except as directed and controlled by the said William P. Campbell.” The bill further alleges that although expressly required by the pretended deed of trust to employ clerical aid and make an accurate schedule of the assets and liabilities of the said Campbell, the said assignee failed and refused to comply with this provision of the deed, or to file a schedule, as required by law, in the probate and chancery courts of Lauderdale county, and that the failure to so comply with the requirements of the deed and the provisions of law was to aid the said Campbell and to benefit him; that the creditors of the estate have been kept in complete ignorance of the condition of the estate, to enable the said Campbell to speculate upon the creditors. The prayer of the bill was as follows: “That the said defendants may make a full and true discovery and disclosure of and concerning all and singular the transactions and matters aforesaid; that the deed in this bill mentioned, from Wm. P. Campbell to William T. Price, of date August 30, 1890, be declared void, and may be vacated and annulled; and that it be referred to the register to take and state an account of what would be a reasonable attorney’s fee for collecting said note, and a decree rendered in favor of orator for the amount of said note, made Exhibit A to this bill, and a lien declared in favor of orator on so much of the property in said deed described as may be necessary to discharge orator’s claim, or on the homestead of said W. P. Campbell, before described, and a sufficient amount of said property in said deed mentioned or shown to have come into the hands of said William T. Price as such pretended assignee or trustee, necessary to discharge orator’s claim, be sold, or that said homestead be sold for payment of same.” An answer was filed by Campbell and Price. The execution of the agreement or guaranty was admitted. It was claimed, however, that, after the indorsement of the note guaranteed, the words “we hereby waive all exemption” were interpolated. In the language of the

answer, it was alleged “that after the notes went into the hands of the complainant the writing on the back of the said note was so altered as to discharge said indorsers from liability, without the consent of the said Campbell, thereby discharging him.” All fraud was denied. It was claimed that the exemption of the homestead was simply intended to reserve such homestead as the law exempted. It was alleged that Campbell’s control of the property after the assignment was with the consent of certain creditors, expressed at a meeting held after the execution of the deed. It was admitted that Campbell had purchased property, settled or compromised with certain creditors, and exercised control over the assigned estate, and that no schedules were filed. A demurrer to the effect that the guaranty showed no consideration, and was therefore void, under the statute of frauds, was interposed, which demurrer was overruled by the court. S. S. Broadus, as receiver, filed an answer and demurrers to the original and amended bills. The seventh ground of demurrer filed by Broadus was that the bill, as amended, failed to show any legal or equitable ground why the complainant should be preferred in the payment of the debt alleged to be due by Campbell over the other creditors of said Campbell. It is unnecessary to set out in detail the facts as adduced.

On the submission of the cause on the pleadings and proof, the chancellor decreed that the defendant W. P. Campbell was indebted to the complainant on account of his guaranty to pay the note of the F. H. Foster Manufacturing Company; that said guaranty was not within the meaning of the statute of frauds, and that he was not released and discharged because of the entry of the clause waiving exemptions, this having been done with Campbell’s knowledge and consent; that it does not appear that the execution and acceptance of the deed of assignment was intended to hinder, delay, or defraud the creditors of W. P. Campbell; that the subsequent mismanagement and squandering of the assets of the assignor and assignee, at most, only gave the creditors the right in equity to have the property placed in the hands of a receiver of the court for preservation and proper application; that the exception from the deed of assignment of the assignor’s homestead did not render said deed invalid, and the complainant is entitled to no lien thereon. It was also decreed that the seventh ground of demurrer interposed by Broadus as receiver be sustained. It was further ordered that a reference be held by the register to ascertain and report the amount due complainant from the defendant. This reference was held, and the register made his report of the amount due from W. P. Campbell. Before the hearing of this report, W. P. Campbell filed his plea, setting up that he had been adjudged a bankrupt. Thereupon the chancellor rendered his decree, suspending further

proceedings until the supreme court, to which had been appealed the case in which he had been adjudged a bankrupt, should render its decision in said case. The complainant appeals, and assigns as error the decree, declaring that the deed of assignment was not void, and that the complainant was entitled to no lien, and assigns the rendition of this decree as error.

Emmett O'Neal and Thos. R. Rouehac, for appellant, Simpson & Jones and John T. Ashcraft, for appellees

DOWDELL, J. In a bill by a creditor without a lien, filed for the purpose of setting aside a conveyance by this debtor on the ground of fraud (Code, § 818), the lien acquired by the filing of the bill attaches only to the property embraced in the fraudulent deed or conveyance. If the deed of assignment from Campbell to Price, made for the benefit of the grantor's creditors, was in its inception bona fide and free from fraud, collusive acts of the grantor and assignee subsequent to its execution would not render it void. "The fraud must have entered into the assignment at the time it was made. No subsequent acts of the parties can invalidate an assignment made bona fide." 1 Am. & Eng. Enc. Law (1st Ed.) 869, and notes citing authorities. The deed of assignment conveyed all of the grantor's property, of every kind and description, "except his homestead in which he now resides." It is contended by counsel for appellant that this was such a reservation of benefit to the debtor grantor as would avoid the conveyance. It is perfectly clear that by this exception in the deed the homestead was not conveyed. It is equally clear that the property excepted from the deed, and not conveyed, was subject to legal process by the creditor, just as it was before the making of the deed of assignment. There was nothing in the deed to hinder or delay the creditor in taking any legal proceeding to subject the excepted property to the payment of his debt which he had prior to its execution. There is a plain and evident distinction between the reservation of a benefit and an exception in a deed of assignment. The reservation that taints the deed and avoids the conveyance, whether expressed in the contract or secretly made, is one of benefit to the grantor in the property conveyed. There was no such reservation in the present case. No benefit was reserved to the grantor in anything conveyed. *Frank v. Myers*, 97 Ala. 437, 11 South. 832. There is nothing in the face of the deed to render it void. The chancellor's finding that there was no actual fraud in the transaction at the time of the execution of the deed of assignment, we think, is fully supported by the evidence. Incapacity or mismanagement of the trust estate on the part of the assignee was ground for his removal as trustee at the instance of the creditor, but not ground for avoiding the deed of assignment.

The question as to the validity of the complainant's claim, which is discussed at length by counsel for appellees, is not properly before us for consideration on this appeal. There is neither a cross appeal nor cross assignments of error by appellees, and, in order for the appellees to have any rulings of the court adverse to them reviewed here, it was necessary for them to prosecute an appeal or to cross assign errors under the rules.

The decree of the chancellor is affirmed.

MASSILLON ENGINE & THRESHER CO. v. ARNOLD et al.¹

(Supreme Court of Alabama. May 22, 1902.)

ATTACHMENT—RIGHT OF PROPERTY—APPEAL—BILL OF EXCEPTIONS—SIGNING IN VACATION—ASSESSMENT OF PROPERTY—PRESUMPTIONS.

1. Where the record does not show an order authorizing the signing of a bill of exceptions in vacation, a bill so signed cannot be considered on appeal, though the bill recites that it was signed in pursuance of such an order.

2. Where the verdict in an action to determine the right of property between an attaching creditor and a claimant describes the property as a sawmill, consisting of a boiler, engines, and fixtures, but does not assess each item of the property, as required by Code, § 4143, when practicable, it will be presumed on appeal, in the absence of contrary evidence, that such assessment was impracticable.

3. Where it appears from a recital in a verdict not assessing each item of property, as required, when practicable, by Code, § 4143, in a trial of the right to property, that there was an agreement of the parties, by which the jury was to be governed in their findings, it will be presumed on appeal, in the absence of a contrary showing, that the agreement dispensed with the necessity of assessing each separate item of the property.

Appeal from circuit court, Jackson county:
A. H. Alston, Judge.

Attachment by J. J. Arnold & Co. against Morford & Whitehead. Claim by the Massillon Engine & Thresher Company to the attached property. From a judgment for plaintiff, claimant appeals. **Affirmed.**

J. J. Arnold & Co., as plaintiff in attachment, sued out a writ of attachment against Morford & Whitehead, and caused the writ to be levied upon the property in controversy. Thereupon the Massillon Engine & Thresher Company made affidavit and bond, and interposed a claim to said property; setting up the fact that the property levied upon under the writ of attachment was not the property of Morford & Whitehead, but was the property of the claimant. The verdict of the jury, as shown by the judgment entry, was as follows: "We, the jury, find the issue in favor of the plaintiff for the property described, as per agreement: One sawmill, consisting of boiler, engine, and fixtures, levied on by the sheriff, and described in said levy, or the alternate value of said steam mill, which value is assessed by the

¹ Rehearing denied June 23, 1902.

¶ 1. See Exceptions, Bill of, vol. 21, Cent. Dig. § 52.

jury at the sum of eight hundred and fifty dollars."

Von L. Thompson, for appellant. J. E. Brown, for appellees.

TYSON, J. What purports to be a bill of exceptions in this record was signed by the presiding judge in vacation. Nothing appears in the record of the court below showing that any order was made by the court in term time authorizing a bill of exceptions to be signed after the adjournment of the court at which the trial was had. The recital at the close of what purports to be the bill of exceptions, "Tendered and approved this 15th day of April, 1901, within the time prescribed by the court in which a bill of exceptions may be signed," amounts to nothing more than the statement by the judge, and is insufficient to supply the omission of so important a requirement as the making of an order by the court. It cannot, therefore, be considered for any purpose. *Dantzler v. Mill Co.* (Ala.) 30 South. 674.

With the paper purporting to be a bill of exceptions eliminated, all the assignments of error, except the thirteenth, are disposed of, since they relate exclusively to exceptions reserved upon the trial to the rulings of the court upon the admission and exclusion of testimony and the refusal of written charges. The thirteenth assignment is predicated upon the failure of the jury in their verdict to assess each item of property in controversy separately. It is true that, in suits involving the trial of right of property, it is made the duty of the jury, if practicable, by their verdict, to assess the value of each item of property involved separately. Code, § 4143, and authorities cited thereunder. It is also true, if it is impracticable to assess the value of each piece of property involved, the jury are under no duty to do so. In the absence of all evidence on this point, we are bound to indulge the presumption that the jury did what is required of them. It is but fair to assume that they found it impracticable to assess each item of the property found to belong to the plaintiff, being a "saw mill, consisting of boiler, engine, and fixtures." Besides, there appears by the recitals in the verdict to have been an agreement by which the jury were to be governed in their findings. The judgment entry shows that there was a contest. It recites an appearance in person by plaintiff and claimant and their respective attorneys; that the issue was made up under the direction of the court, upon which there was joinder. Clearly, the only inference to be drawn is that the agreement referred to in the verdict was entered into by the respective parties litigant, or their attorneys, during the progress of the trial, and that it had reference to the character of verdict the jury were to render. As the record, at which we are authorized to look, does not contain a copy of this agreement, and nothing to the contrary

appearing, we feel safe in indulging the presumption that it covered the very defect in the verdict, if it exists, now insisted upon. Doubtless the jury carried out the terms of that agreement, whatever they were. At least, we will so presume. The burden being upon appellant to affirmatively show error, we cannot presume its existence. On the contrary, the presumption must be indulged in favor of the correctness of the judgment appealed from.

Affirmed.

HARDEE v. ABRAHAM.¹

(Supreme Court of Alabama. May 14, 1902.)

JUSTICES OF THE PEACE—APPEAL—SUFFICIENCY OF TRANSCRIPT—PLEADINGS IN APPELLATE COURT—COMPLAINT.

1. Under Code, § 484, providing that, where an appeal is taken from a justice court, the justice must return all the original papers of the cause, together with a statement (signed by him) of the case, and the judgment rendered by him, to the clerk of the court to which the appeal is taken, it is not necessary for the justice to certify anything; but it is sufficient if he returns all the papers, with the signed statement required by the statute.

2. On an appeal from a justice court, the appeal bond taken below, showing the parties and reciting the judgment there rendered, is sufficient to give the court to which the appeal is taken jurisdiction to try the case.

3. On an appeal from a justice court, there is no necessity for a new complaint, where there is a good one among the original papers sent up.

Appeal from circuit court, Lauderdale county; O. Kyle, Judge.

Action by Jacob Abraham, trustee, against John Hardee. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action was commenced in a justice of the peace court. From a judgment in favor of the plaintiff in said court the defendant appealed to the circuit court, and executed a regular appeal bond. The justice of the peace sent to the clerk of the circuit court copies of the papers issued by him, which included the summons and complaint, and the replevy bond given by the defendant. The complaint was in the regular statutory form of an action of detinue. The justice of the peace also sent to the clerk of the circuit court a statement of the case and a judgment rendered by him. This statement was signed by the justice of the peace. Neither the papers nor the statement or transcript sent up by the justice of the peace to the clerk of the circuit court were certified by the justice of the peace. There was no complaint filed in the circuit court. On the case being called in the circuit court, a judgment by default was rendered against the defendant; and upon a writ of inquiry the value of the property was ascertained, and judgment rendered accordingly.

¹ Rehearing denied June 23, 1902.

§ 2. See *Justices of the Peace*, vol. 31, Cent. Dig. §§ 666, 666.

W. T. Lowe and James Jacobson, for appellant. James H. Branch, for appellee.

MCLELLAN, C. J. Section 484 of the Code is as follows: "When an appeal is taken, the justice must return all the original papers of the cause, together with a statement, signed by him, of the case and the judgment rendered by him, to the clerk of the court to which the appeal was taken, within ten days after the taking of the appeal." The transcript filed here in this case contains copies of the papers in the cause before the justice of the peace, a copy of the statement of the case and the judgment rendered, signed by the justice of the peace, and a copy of the bond given on appeal to the circuit court; and the clerk of the circuit court certifies to this court, in substance and effect, that all these papers thus copied are and were in the circuit court. This was a full compliance with the statute set out above. It was not necessary for the justice of the peace to certify anything. The record before us shows that he returned the original papers to the court, together with the statement signed by him, which the statute required, and this was quite sufficient. Indeed, the appeal bond, showing the parties below and reciting the judgment there rendered, was itself sufficient to give the circuit court jurisdiction, and to enable it to proceed with the cause. *Larcher v. Scott*, 2 Ala. 40; *McAlpin v. Pool*, Minor, 316; *Railroad Co. v. Pilgreen*, 62 Ala. 305.

Among the original papers sent to the clerk by the justice of the peace was a perfectly good complaint, and it was entirely proper for a trial to be had in the circuit court on that complaint, or, the defendant not appearing, for a judgment by default to be rendered on that complaint. *Littleton v. Clayton*, 77 Ala. 571.

Affirmed.

NEVILL v. STATE.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

ROBBERY — INDICTMENT — DESCRIPTION OF PROPERTY — COUNTS — ELECTION — EVIDENCE — CORROBORATION — INSTRUCTIONS — EXPLANATIONS — JURY — UNANIMITY.

1. Where, in an indictment for robbery, the property taken was described as "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," "a bunch of keys of the value of one dollar," and "a knife of the value of seventy-five cents," the description was sufficient.

2. Where an indictment for robbery contained three counts, charging the taking in the first of 30 cents, in the second of a bunch of keys, and in the third of a knife, the state could not be required to elect as between the several counts.

3. Where, on a trial for robbery, the complaining witness had testified that a companion of defendant used a pistol while assisting in the robbery, evidence that such companion had

a pistol when seen with defendant an hour or two before was admissible to corroborate such testimony.

4. The refusal of the court to charge the jury that before they can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but that it is wholly inconsistent with every other rational conclusion, was not error.

5. Where the court, at defendant's request, charged that the only foundation for a verdict of guilty is that the entire jury should believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in the indictment, the addition by the court of, "That means, gentlemen, that every member of the jury must believe the defendant guilty, beyond a reasonable doubt, before a conviction should be had," was not error.

6. Where the court, at defendant's request, charged the jury "to acquit unless the evidence excludes every reasonable supposition but that of defendant's guilt," the addition of, "That means you must believe defendant's guilt beyond a reasonable doubt, or acquit," was not reversible error.

7. An instruction that, "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," was not error.

Appeal from circuit court, Morgan county; O. Kyle, Judge.

Tom Nevill was convicted of the crime of robbery, and appeals. Affirmed.

The appellant, Tom Nevill, was jointly indicted with Austin Griffin for robbery, and was convicted, and sentenced to the penitentiary for 10 years. The indictment contained three counts. The first count of the indictment was as follows: "(1) The grand jury of said county charge that, before the finding of this indictment, that Austin Griffin and Tom Nevill feloniously took thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents, the personal property of A. J. Wldner, from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same, against the peace and dignity of the state of Alabama." The second count was the same as the first, except that in said count the property alleged to have been feloniously taken was described as "a bunch of keys of the value of one dollar." The third count was the same as the first, except that the property alleged to have been feloniously taken was described as "a knife of the value of seventy-five cents." The appellant in the present case, Tom Nevill, demanded a severance, which was granted, and he was tried alone. The defendant demurred to the first count of the complaint upon the following grounds: (1) It fails to aver that the 25-cent piece or the 5-cent piece was of copper, silver, gold, or other named metal; (2) that the description of the money was vague and indefinite, and that there is no averment as to the specie of coin; (3) that the kind of coin to which the 25-cent piece and the 5-cent piece belong is not alleged, nor is it

¹ Rehearing denied June 23, 1902.

alleged that it was unknown to the grand jury. To the second count of the indictment the defendant demurred upon the ground that it fails to aver the kind or character of keys constituting said bunch of keys. To the third count of the indictment the defendant demurred upon the ground that it fails to show the kind or character of knife, or that the same was unknown to the grand jury. Each of these demurrers was overruled. After the jury was organized, the defendant moved the court to require the state to elect upon which count of the indictment it would seek a conviction. This motion was overruled, and to this ruling the defendant duly excepted. A. J. Widner was introduced as a witness, and testified, substantially, that on Sunday night, January 20, 1901 as he was going near the depot of the Southern Railway in Decatur, the defendant, Tom Nevill, met him, and ordered him to halt; that Austin Griffin walked up behind him and shoved a pistol in his face; that, while in this attitude, Griffin put his hand in his pocket, and took therefrom a 25-cent piece and a 5-cent piece of money, a bunch of keys worth \$1, and a knife worth 75 cents. The defendant thereupon moved the court to require the state to elect as to which article taken from the witness it would seek a conviction. The court refused this motion, and to this action of the court the defendant duly excepted. The witness further testified that it was dark, and between 11 and 12 o'clock, but that he recognized the defendant, Nevill, and Austin Griffin; that he gave up the money and articles through fear and intimidation caused by the action of the defendant and Austin Griffin. The defendant introduced testimony tending to show an alibi; that, at the time fixed by the witness Widner as the time of the commission of the offense charged, he (the defendant, Tom Nevill) and Austin Griffin were in another part of Decatur, and were not present at the place designated. The defendant, as a witness in his own behalf, testified that he did not see said Widner on the night testified to by him, and that he did not take or assist in taking from him any money, keys, knife, or other property. One of the witnesses for the state was introduced in rebuttal, and testified that between 10 and 11 o'clock she saw the defendant and Austin Griffin near the railroad station of the Southern Railway in Decatur. This witness was asked the following question: "Whether or not Austin Griffin had a pistol between 10 and 11 o'clock?" The defendant objected to the question because it called for irrelevant, immaterial, and illegal evidence, and because it had reference to a time different from that identified as the alleged hour at which the robbery was committed. The court overruled the objection, and the defendant duly excepted. The witness answered that Austin Griffin had a pistol at the time designated in the question, and showed it to the defendant, Tom Nevill. The court,

at the request of the state, gave to the jury the following written charge, to the giving of which the defendant duly excepted: "If any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant." The defendant requested the court to give to the jury the following written charge, and separately excepted to the court's refusal to give said charge as asked: "Before you can convict the defendant, you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but it is wholly inconsistent with every other rational conclusion; and, unless you are so convinced by the evidence of the defendant's guilt that you would each venture to act upon that decision in matters of the highest concern and importance to your own interest, you must find the defendant not guilty." The bill of exceptions contains the following recital as to the court's giving a charge requested by the defendant: "Upon the request of the defendant, the court gave the following written charge: 'I charge you that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every possibility of his innocence and every reasonable doubt of his guilt; and if the state has failed to furnish such measure of proof, and to so impress the minds of the jury of his guilt, they should find him not guilty.' And then added voluntarily the following oral charge: 'That means, gentlemen, that every member of the jury must believe the defendant is guilty, beyond a reasonable doubt, before a conviction should be had.' " The defendant excepted to the giving of the oral part of the charge, as added by the court. The bill of exceptions also contained the following recital as to the charge given by the court at the request of the defendant: "Upon defendant's request the court gave the following written charge: '(a) I charge you to acquit unless the evidence excludes every reasonable supposition but that of defendant's guilt.' And then voluntarily added the following oral charge: 'That means you must believe defendant's guilt beyond a reasonable doubt, or acquit.' " The defendant duly excepted to the giving of this part of the charge, as added by the court.

Marvin West and S. A. Lynne, for appellant. Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. Sufficient particularity of description was observed in the indictment in respect of the property averred to have been taken. As to the money, see *Burney v. State*, 87 Ala. 80, 6 South. 391. As to the other property, see *Churchwell v. State*, 117 Ala. 124, 23 South. 72.

No case for compelling the state to an election as between the several counts of the indictment. *Carleton v. State*, 100 Ala. 180, 14 South. 472; *Butler v. State*, 91 Ala. 87, 9 South. 191.

As a circumstance tending to corroborate the state's witness Widner, wherein he testified that Griffin used a pistol while helping defendant to rob him, evidence that Griffin had a pistol when seen with defendant an hour or two before that occurrence was admissible.

Charges like the one here refused to defendant were condemned as argumentative in *Rogers v. State*, 117 Ala. 9, 22 South. 666; and *Amos v. State*, 123 Ala. 50, 26 South. 524. Because this charge was faulty in that respect, there was no error in its refusal. In *Amos' Case*, supra, opinions favoring such charges were expressly repudiated.

The explanation by the court of the first charge given for defendant apparently had reference to the required unanimity of the jury in finding a verdict. Reversible error is not found in that explanation, or in the court's explanation of the second given charge.

While a lack of unanimity would have made a conviction improper, it did not necessarily require an acquittal. A mistrial might have been proper. The charge given for the state asserts no more, in effect.

Affirmed.

SHEFFIELD CITY CO. et al. v. TRADESMEN'S NAT. BANK.¹

(Supreme Court of Alabama. Dec. 18, 1901.)

TAX SALE—SUBSEQUENT TAXES—PAYMENT BY PURCHASER—LIEN.

1. The purchaser of land in 1894 at a sale for the taxes assessed thereon for the year 1893 thereafter paid the taxes subsequently assessed for several years. He then, without having sued to recover the land or having been sued by the owner, sued to have the amount he paid at the sale and for subsequent taxes adjudged a lien on the land, and to enforce such lien. Code 1886, § 459, provides that from the 1st day of January of each year the state and county shall have prior liens for taxes which may be assessed during that year for the use of the state and county. Code 1896, § 3921, is to the same effect, except that the lien is from October 1st. Code 1886, § 597, and Code 1896, § 4078, provide that, when the sale of any land for taxes is ineffectual to pass the title to the purchaser, such sale shall operate as an assignment to the purchaser of the rights and liens of the state and county in and to the lands sold. Code 1896, § 4083, provides that if, in any suit by the purchaser to recover lands sold to him for taxes, a recovery is defeated on the ground that the sale was invalid for any reason other than that the taxes were not due, the court shall ascertain the amount of taxes for which the land was sold, and such taxes as the plaintiff has, since the sale, paid, with interest, and render judgment against the defendant therefor, with costs, which shall constitute a lien on the lands sued for. Section 4084 makes similar provisions for ascertaining such amounts,

and for judgment and lien if the purchaser is sued by the owner of the land, and is defeated because of the sale being found invalid. *Held*, that in the absence of a suit brought under section 4083 or section 4084, and determination therein of the invalidity of the sale, no lien accrued to the purchaser for such taxes paid by him after his purchase.

Appeal from chancery court, Colbert county; Wm. H. Simpson, Chancellor.

Action by the Tradesmen's National Bank against the Sheffield City Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

The bill in this case was filed by the appellee, the Tradesmen's National Bank, against the appellants, the Sheffield City Company, C. B. Ashe, as receiver of the Sheffield City Company, Robert H. Wilhoyte and Thos. L. Fossick, as trustees, and E. F. Enalen. The purpose of the bill and the facts of the case are sufficiently stated in the opinion.

The prayer of the bill was as follows: "That your honor will, on the hearing of this case, decree that orator has a lien on the property hereinbefore described for the moneys paid out by orator as before stated, together with the interest thereon, in accordance with the laws of Alabama in regard to property sold for taxes. That the register of this court be required to take and state an account, and ascertain and report what amount of principal and interest is due orator by reason of the payments made by orator as hereinbefore set forth. That your honor will by your decree direct that said lands be sold, or that so much thereof as may be necessary be sold, and the proceeds of said sale be applied to the payment of the amount so found to be due to orator."

On the submission of the cause on the pleadings and proof, the chancellor decreed that "complainant has a lien on the property mentioned and described in the bill, for the moneys paid out for taxes as set forth in the bill, in accordance with the laws of Alabama in respect to real estate sold for taxes, when the sale, on account of irregularities, is ineffectual to pass the legal title; and that said lien exists independent of the statutory remedy given for its enforcement, when a suit in ejectment fails, and may be enforced in a court of equity." There was then an order of reference to the register to state an account, and ascertain the amount of state, county and municipal taxes paid by the complainant, for which the lands were liable at the time of the sale mentioned in the bill, and for the payment of which they were sold, and the interest thereon, and also the amount of the taxes on the lands which the complainant has paid since such sales, with interest thereon.

Upon the coming in of the report of the register ascertaining such amounts, it was in all things ratified and confirmed, and it was decreed that said lots be sold if the amount so ascertained to be due was not paid within 60 days after the enrollment of the

¹ Rehearing denied June 17, 1902.

decree. From this decree the defendants appeal, and assign the rendition thereof as error.

R. H. Wilhoyte and Joseph H. Nathan, for appellants. Simpson & Jones and Kirk & Rather, for appellee.

HARALSON, J. The principle is generally recognized in the books, that taxes are not a lien unless expressly made so by statute.

Mr. Cooley says: "In considering this remedy by suit, it is to be kept in mind that it exists only by force of the statute. The statute must, therefore, be closely followed in the proceedings." Cooley, *Tax'n*, 449, 444.

Mr. Desty observes: "A tax is not a lien unless it is expressly made so by law or ordinance which imposes it. The lien on real estate for taxes has no existence, unless there be some statute creating it, and such statute must be strictly construed." Desty, *Tax'n*, 734; *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894, 25 Am. & Eng. Enc. Law, 267; 1 Jones, Liens, § 112; 1 Pom. Eq. Jur. § 281; End. Interp. St. 154, 434, 435.

In *Chandler v. Hanna*, 73 Ala. 392, it is said: "The rule is general, of great practical importance, and has been frequently acted upon, that 'when by a statute a new right is given, and a specific remedy provided, or a new power, and also the means of executing it are provided by statute, the power can be executed and the right vindicated in no other way than that prescribed by the statute.'"

* * * The rule does not collide with the general rule, that the jurisdiction of a court of equity is not impaired by statutes conferring upon other tribunals jurisdiction which was exclusively equitable, unless the statutes expressly take away the equitable jurisdiction; nor with the other well-settled rule, 'that if a statute gives a remedy in the affirmative, without a negative, express or implied, for a matter which was actionable at the common law, the party may sue at the common law as well as upon the statute; for this does not take away the common-law remedy.' * * * In the cases to which these rules are applied, the right existed and its enforcement lay within the jurisdiction of either the court of equity or the common-law courts.

* * * But when the right is solely and exclusively of legislative creation, when it does not derive existence from the common law, or from the principles prevailing in courts of equity, jurisdiction of it may be limited to particular tribunals, and specific, peculiar remedies provided for its enforcement. The jurisdiction and the remedy being bounded by the statute, can be pursued and exercised only before the tribunals and in the mode the statute provides. Other tribunals cannot exercise the jurisdiction without enlarging the operation of the statute." So it was held in that case, that the lien of a mechanic and material man was a new right, created by statute for which a specific remedy was pro-

vided by action at law, and in the absence of special cause for equitable interposition, a court of equity could not assume jurisdiction of its enforcement. *Walker v. Daimwood*, 80 Ala. 245; *Corrugating Co. v. Thacher*, 87 Ala. 458, 465, 6 South. 366; *Phillips v. Ash's Heirs*, 63 Ala. 414; *Wimberly v. Mayberry*, 94 Ala. 255, 10 South. 157, 14 L. R. A. 305; *Janney v. Buell*, 55 Ala. 408.

The facts of the case to which the foregoing principles are applicable, are undisputed, and as stated by the complainant's counsel, and as appear in the transcript, are, that on the 29th September, 1894, the defendant, the Sheffield City Company, executed a deed of trust of all its property to Wilhoyte and Fossick for the benefit of creditors; that before said deed was made, in June, 1894, the complainant, Tradesmen's National Bank, bought said property, 287 town lots in Sheffield, at a tax sale for state and county taxes, received a certificate of purchase, and afterwards, a deed to the property from the probate judge. Afterwards, in July, 1894, the same property was sold by the city of Sheffield for municipal taxes and bought in by the complainant bank. A deed was accordingly made to it, and the property has been assessed ever since to complainant, and the taxes paid by it and by no one else.

In May, 1898, in the case of *Enslin* against the defendant company and one Harris, O. B. Ashe was appointed receiver of all the assets of the defendant company, and is now acting as such receiver, and he is not nor are said trustees taking any steps to redeem said property, and there are no assets of said corporation out of which said taxes so paid by complainant can be paid, except out of the said lots included in said tax sales. It was not averred that complainant ever went into possession of said property. It is averred that E. F. Enslin claims to have a lien on said property by virtue of a judgment rendered against the defendant company, in the circuit court of Colbert county, on the 11th April, 1895, based on a claim which was due before the execution of said deed of trust.

The bill further alleges, that by reason of certain irregularities, said tax sales were ineffectual to pass the legal title (but not because the taxes were not due) and prays for the enforcement of the lien which the statutes of Alabama give to complainant for the payment of the money paid out for taxes on said property.

It is contended by the defendants that, whether said sales were void or not, complainant has no right to invoke the aid of a court of equity to enforce any lien for the recovery of sums paid out in taxes to the state, county and city on said property since said sale in 1893.

Section 450 of the Code of 1886 (Code 1896, § 3921) provided, that from and after the 1st of January of each year, the state shall have a prior lien upon each and every piece or parcel of property, real or personal, for

the payment of taxes which may be assessed against the owner, or upon such property, during that year for the use of the state, and in favor of the county for taxes during the year, in like manner, for the use of the county. Section 3921 of the Code of 1896, is to the same effect, except that the lien is from the 1st of October, instead of from 1st of January of each year.

Sections 597 of the Code of 1886 and 4078 of the Code of 1896, provide that "when the sale of any land sold for the payment of taxes is, for any cause, ineffectual to pass the title to the purchaser, except in cases in which such sales are in this title [chapter in the section of Code of 1896] expressly declared to be invalid, such sale shall operate as an assignment to the purchaser of the rights and liens of the state and county in and to the land sold." This lien of the state on property, it is to be observed, is for the taxes of the year for which it was assessed. If the property is assessed for a particular year,—as in this case for the year 1896,—the lien extends no further, so far as it grows out of that assessment, than for the security of the taxes for that year. If the property assessed for a particular year, be sold by the state for the enforcement of the state and county taxes of that year, and is purchased by a stranger, the lien, so far as the interest of the state is concerned, is satisfied, and the state has no liens for future assessments to be assigned or conferred on a purchaser. *Winter v. City Council*, 101 Ala. 649, 14 South. 659. The state has its money, and no remedy is bestowed for its recovery back from the state, even if the sale for taxes was ineffectual to pass the title to the purchaser. The rule of caveat emptor applies to him. *Desty, Tax'n*, 850; *Cooley, Tax'n*, 476. So, if that were all, the purchaser would be remediless as to voluntary payment of future assessments of taxes on the property. In other words, the lien which the statute (section 3921) gives the state and county, and which is a prior and superior lien to all other liens, is confined by the terms of the statute,—“for the payment of the taxes which may be assessed against the owner, or upon the property, during that year for the use of the state” and county. But, the sale of the land for the state and county taxes may have been made in such a manner as to be ineffectual to pass the title to the purchaser, in which case, without more, the owner could sue the purchaser and recover the land, although the taxes due the state and county had been fully paid by the purchaser. The legislature sought to remedy this hardship and injustice, and by said section 4078 (597) of the Code, above referred to, provided, so far as the purchaser's interests are concerned, for keeping the state and county lien alive for the benefit of the purchaser, when the sale was ineffectual to pass the title to the purchaser, and assigned it to him, for his security, though the state and county, having been fully paid, have

no pecuniary interest in the matter. The legislature recognized the fact, that it would be most unjust for the owner to recover his land from such purchaser, on account of the irregularity of the sale under which it was sold for taxes, and not refund to him the taxes, costs and expenses of the sale, for which he, the owner, was liable and should have paid. Otherwise, owners of taxable property would be encouraged not to pay their taxes, and speculate on the chances,—far more than equal,—of a recovery of the land from the purchaser, because of irregularities in the assessment and sale. So it was, by that and other sections of the Code, the state has sought to protect purchasers at tax sales in providing a security and a remedy for the money they have paid out for delinquent owners, when the title they acquired from the state was invalid, because of irregularities committed by the officers of the state. In so doing, the owner is not injured, the purchaser is protected, and the general policy of the state to encourage the purchase of property for delinquent taxes, promoted. The point to be emphasized, and not overlooked in every case is, that the lien of the state and county, assigned by the terms of the statute to a purchaser, is a yearly one, and exists in no instance, except for the taxes assessed and payable for the particular year or years for which the property was sold. Several years' taxes and liens therefor may exist, before the sale for some reason may have occurred, but the liens and taxes for each year are separate and distinct. So it is, that a purchaser has and enjoys the benefits of this lien, to the full extent for which it was bestowed, and may enforce it for his reimbursement for the amounts he has paid the state and county for the owner,—in case the sale was ineffectual to pass the title to him, but for no other reason. If the sale was legal, he acquired the title and needed and acquired no lien from the state and county. Here appears the first concern of the state for the protection of purchasers at tax sales, and the provisions enacted for their benefit in securing to them the amounts they have paid at the sale, which delinquent owners owed and were under duty to pay.

It may be added in this connection, as a further safeguard to tax purchasers, that section 4081 (599) entitles the purchaser of land at a tax sale, or any one claiming under him, after the expiration of six months from the date of sale, to maintain an action of ejectment, or statutory action in the nature of ejectment, or of unlawful detainer for the recovery of the possession of the land, to be held by him, subject only to the right of redemption bestowed by statute on the owner. As another remedial safeguard to the purchaser, the legislature further provided, that “no action for the recovery of real estate sold for taxes shall lie, unless the same is brought within three years from the date when the purchaser became entitled

to demand a deed therefor," etc. Code, § 4089; *Capehart v. Guffey* (Ala.) 30 South. 390.

But, as we have stated, so far as the lien of the state and county is concerned, it exists and is provided for and is assigned to the purchaser, only for the taxes of the particular year or years for which the land was sold. Here the legislature might have rested without other provisions on the subject, leaving its revenue system in this regard, incomplete. It was manifest, however, that the titles of purchasers might and would be disputed by owners, and that suits would be brought to test the validity of the assessment and sale of lands for taxes. To meet such contingencies, the legislature took another step forward, and provided still another legislation for their protection, in the enactment of other provisions. It occurred to the legislative mind, that a purchaser, while he had assigned to him by statute the lien of the state and county to protect him in the purchase of the land when originally sold, to the extent of what he then paid, might, under the presumption that he had acquired a good title, go forward thereafter and discharge assessments against the property in future years, which amounts, in case the original sale was declared invalid, should be refunded to him. For relief in such case, section 4083 of the Code was adopted providing: "If, in any suit brought by the purchaser or other person claiming under him to recover lands sold for taxes, a recovery is defeated on the ground that the sale was invalid for any other reason than that the taxes were not due, the court shall forthwith, on the motion of the plaintiff, impanel a jury to ascertain the amount of taxes for which the lands were liable at the time of the sale, and for the payment of which they were sold, with interest thereon from the date of sale, and the amount of such taxes on the lands, if any, as the plaintiff, or the person under whom he claims, has, since such sale, lawfully paid, with interest thereon from the date of such payment, the interest on both amounts to be computed at the rate of twelve per cent. per annum; and the court shall, thereupon, render judgment against the defendant in favor of the plaintiff for the amount ascertained by the jury, and the costs of suit, which judgment shall constitute a lien on the lands sued for, and payment thereof may be enforced as in other cases." Code, § 4083.

The next section, 4084, makes provision for the payment of the purchaser, or other person claiming under him, when sued for possession by the owner, and the purchaser claims and defends under his tax title, and his defense fails on the ground that the sale was invalid for any other reason than that the taxes were not due, and the plaintiff recovers. Provision is then made for the ascertainment of the amounts paid by the purchaser, with interest at 12 per cent. per an-

num, for which he is to have a judgment and lien, as provided in the other section.

These sections, going further than section 4078, as to a lien for which the lands were sold, but including all taxes, state, county and municipal which the purchaser may, since the sale, have paid on the property, gives in addition a lien on it for the whole sum, for his indemnification and reimbursement. *Turner v. White*, 97 Ala. 545, 12 South. 601; *Cobb v. Vary*, 120 Ala. 263, 24 South. 442.

These sections are cumulative of rights and remedies as provided in said sections 3921 and 4078. The latter sections (4083 and 4084) themselves confer a lien for the purposes in them specified, but this lien is distinct from the first one bestowed; and a full and ample remedy is provided in said last-named sections for suits arising under them. The right here bestowed was a new one, theretofore not existing, and the remedy for its enforcement is provided in the same statute which created the right. Under these two sections, as we have said, the lien is created distinct from that given to the state under the former section, 3921. It does not arise and is not bestowed, except at the end and as the result of a judgment in ejectment, and it is, then, and not before, that the judgment which constitutes a lien on the lands sued for arises. They are as distinct as two mortgages on the same land are. They are bestowed on different persons, at different times, on different conditions, and the latter has a 12 per cent. penalty by way of interest, not attached to the former, and embraces municipal taxes, which the lien given the state by statute does not cover.

When this new right is sought to be enforced, the specific remedy if provided by statute must be pursued, and chancery has no jurisdiction to enforce it. Authorities *supra*.

This suit is instituted primarily not to enforce the purchaser's lien assigned to it by the state for the purchase money, etc., paid at the tax sale for the year 1893. Its chief object is to enforce the lien for taxes for subsequent years, when no such lien exists, and cannot exist, except at the end of an ejectment suit, and a judgment rendered therein, in favor of the complainant, as provided in said section 4083. It may be, if the proceeding had been to enforce the lien of the state for the year 1893, assigned under the statute to complainant, that the chancery court, by virtue of its jurisdiction generally to enforce liens, when no other adequate, legal remedy exists or is provided, would have had jurisdiction to entertain the action. *Westmoreland v. Foster*, 60 Ala. 448; *Carmen v. Bank*, 101 Ala. 189, 13 South. 581. But that case is not before us.

It results that the decree of the court below is erroneous, and must be reversed. The judgment of this court heretofore rendered

reversing the decree and dismissing the bill, will be set aside, and judgment will now be rendered, reversing the decree below and remanding the cause.

Reversed and remanded.

BURKE v. BREWER.¹

(Supreme Court of Alabama. April 15, 1902.)
MORTGAGES—REDEMPTION STATUTES—PURCHASE PRICE—TENDER.

1. Code, § 3507, relative to redemption from mortgage foreclosure, provides that the debtor or his vendee must pay or tender to the purchaser or his vendee the purchase money, with 10 per cent. per annum interest, and that such tender shall reinvest title. A purchaser of two tracts of land at a mortgage sale sold one of them, and on an attempt to redeem the other tract the mortgagor tendered the purchase price of the two tracts on mortgage sale, less the sum received by the purchaser at mortgage sale on the sale by him. *Held*, that the mortgagor was not entitled to redemption.

Appeal from chancery court, Lowndes county; W. L. Parks, Chancellor.

Suit by Michael Burke against Willis Brewer. From a decree for defendant, complainant appeals. Affirmed.

After averring in his bill that he had tendered to the defendant \$5,500, the bill contained the recital that the complainant paid into the registry of said court \$5,500. There was also an offer on the part of the complainant to do equity. The prayer of the bill was that the complainant be permitted to redeem the lands described in the bill from the defendants; that there be a reference to the register to ascertain what amount was necessary to be paid in order to effect such redemption, etc. On the final submission of the cause the chancellor rendered a decree denying the relief prayed for, and ordering the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

W. C. Oates, E. F. Jones, Gordon Macdonald, and John D. McNeel, for appellant. Powell & Middleton, for appellee.

DOWDELL, J. The bill filed in this cause is essentially for the enforcement of a statutory right of redemption. It possesses not a single element necessary to the assertion by the mortgagor of any right he may claim to have had to enforce his equity of redemption. The regularity of the sales under the respective mortgages is not in any wise assailed. On the contrary, the validity of those sales is fully recognized. Being a bill, pure and simple, to enforce an alleged statutory right of redemption, one of the essential prerequisites to its maintenance is the payment or tender by the complainant to the respondent, within two years after the sales under the mortgages, of the purchase money, with 10 per centum thereon and all

other lawful charges. Section 3507 of the Code, and authorities cited under it. We do not understand this proposition to be controverted, but the fact in dispute between the parties arises over the amount that should have been tendered. Stating the complainant's contention most strongly, it is that the amount due to respondent was \$3,600 on the sales under the Tulane mortgages, and \$2,745 on the sale under the Tyson mortgage, aggregating the sum of \$6,345. The testimony is in hopeless and irreconcilable conflict on this point, and we shall not undertake to determine who has the right of it, as it is unnecessary, under the view we take of the case. The complainant did not tender the \$6,345, which he admits, both in his bill and testimony, was the amount of the purchase money which was a charge upon the land sought to be redeemed. He predicates his contention for declining to do so upon a credit claimed by him of \$1,600 arising from a sale of the Kendrick place, made by the respondent after he became the owner of the lands, the redemption of which is not sought by the bill, and tendered only the balance of the purchase money after deducting this credit. To a better understanding of the question as to his right to this credit, it will be well to state, in short, some of the facts: The complainant, being the owner of two separate tracts of land, one known as the "Hale Place" and the other as the "Kendrick Place," executed to one Tulane two mortgages; one of these conveying the Hale place, and the other both places. He also executed to one Tyson a mortgage upon both places. These mortgages were foreclosed in January and February, 1896, and both tracts purchased by the respondent's vendors, from whom shortly afterwards (on, to wit, February 12th) he acquired the title thereto. In March following the respondent sold and conveyed to one Whitten, upon a consideration of \$1,600 paid, the Kendrick place. On the 26th day of September, 1896, the complainant tendered to the respondent \$5,500; being the balance claimed by complainant to be due him as purchase money, and 10 per centum thereon, after deducting the \$1,600 which the respondent had received from Whitten. This bill was filed on the 14th of September, 1899, and seeks only a redemption of the Hale place, keeping good the tender of the \$5,500 by paying it to the register of the court.

The only theory upon which it is possible to sustain the complainant's right to the credit claimed is that the Kendrick place belonged to him, and not to the respondent, at the date of its sale to Whitten or at the date of the tender. For if he had been deprived of his property rights in and to it by the foreclosure sale, the regularity of which is not questioned, the money paid by Whitten to respondent was not his, and never could be. It has been uniformly held by this court that the right of redemption under the statute is purely the creature of legislation, and has no

¹ Rehearing denied June 28, 1902.

existence without it. It is merely a personal privilege conferred upon the mortgagor, and is neither property, nor the right of property, —not subject to levy and sale under execution, and prior to the amendment of the statute not assignable. *Powers v. Andrews*, 84 Ala. 291, 4 South. 263; *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 61, 62; *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. 520; *Lehman v. Moore*, 93 Ala. 186, 9 South. 590; *Aiken v. Bridgeford*, 84 Ala. 295, 4 South. 266; *Association v. Parker*, 84 Ala. 298, 4 South. 268. It can never come into existence until after the equity of redemption of the mortgagor—the last vestige of his right in the property conveyed by the mortgage—has been cut off by foreclosure. *Powers v. Andrews*, supra. And when the equity of redemption has been lost to him, he has nothing left but the personal privilege conferred by the statute, which must, in order to rehabilitate himself with the title to or any interest whatever in the lands, be conformed to. In other words, he is bound to perform every condition imposed by the statute in order to reacquire the title. Failing in this, his right to redeem is not perfected, and the purchaser, from whom the redemption is sought, is the absolute owner. *Spoor v. Phillips*, 27 Ala. 197; *Otis v. McMillan*, supra. To repeat, one of the essential conditions to the exercise of this right is the payment or tender of the whole of the purchase money, with 10 per centum thereon, and all other lawful charges. *Beebe v. Buxton*, 99 Ala. 117, 12 South. 567, and cases there cited; *Cramer v. Watson*, 73 Ala. 127. And until a sufficient tender is made, the mortgagor has no right of property in the lands. This being true, the Kendrick place belonged absolutely to the respondent, or, rather, to his vendee, Whitten, when the tender was made; and the \$1,600 belonged to the respondent, and not to the complainant. He was therefore not entitled to have a credit for it on the purchase money which he was bound to tender in order to reinvest himself with the title to the land sought to be redeemed. *Richardson v. Dunn*, 79 Ala. 170.

Affirmed.

TYSON, J., not sitting.

LOUISVILLE & N. R. CO. et al. v. HALL.
(Supreme Court of Alabama. Feb. 13, 1902.)

TRESPASS—PLEADING—POSSESSION OF LOCUS IN QUO—GENERAL ISSUE—APPEAL—BILL OF EXCEPTIONS—SETTING OUT TESTIMONY IN EXTENSO—GENERAL CHARGE—HARMLESS ERROR—DEMURRER TO SPECIAL PLEAS—MATTER PROVABLE UNDER GENERAL ISSUE.

1. Where a joint plea by several defendants refers to, and expressly adopts as a part thereof, a separate plea of one of such defendants, and no objection is made to this manner of pleading, the allegations of the separate plea will be considered as if actually written in the body of the joint plea.

2. Under Code, p. 1201, § 33, providing that bills of exceptions shall not contain the testi-

mony, or any portion thereof, in extenso, except in certain enumerated instances, and authorizing the court to strike any bill which violates this rule, where a bill, not within the exceptions enumerated, contains a complete stenographic record of everything said and done at the trial, except arguments to the jury, it should be stricken.

3. Code, p. 1201, § 33, subd. 1, providing that, where a general charge is asked in good faith, the bill of exceptions may contain a statement of the evidence in extenso, does not authorize the insertion in such bill of the stenographic record of the trial, including questions and answers, and everything said by judge and counsel, but authorizes only a full statement of the evidence, in narrative form.

4. The fact that a bill of exceptions is prepared in accordance with the wishes of the trial judge is no excuse for the violation of Code, p. 1201, § 33, providing that bills of exceptions shall not contain the testimony in extenso.

On Rehearing.

5. In an action of trespass *quare clausum fregit*, the defenses of possession of the locus in quo and of *liberum tenementum* may be proved under the general issue.

6. Where a defendant pleads the general issue, and also files special pleas setting up matters provable under the general issue, error in sustaining a demurrer to the special pleas is harmless.

Tyson, J., dissenting in part.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Action by J. N. Hall against the Louisville & Nashville Railroad Company and others. From a judgment in favor of plaintiff, the defendant above named appeals. Affirmed.

This was an action of trespass *quare clausum fregit* brought by the appellee, J. N. Hall, against the appellant, the Louisville & Nashville Railroad Company, J. I. McKinney, T. H. Mizell, H. A. Shields, the Mobile & Montgomery Railroad Company, and the Western Railway of Alabama, and sought to recover damages for entering upon the premises called the "Joe Hall Boarding House Property," near the city of Montgomery, and laying a railroad track thereon, against the protest of the plaintiff. The defendants pleaded the general issue and several special pleas. The only plea reviewed on the present appeal was in words and figures as follows: "(a) Come all the defendants jointly, and for answer to the entire complaint, and to each count thereof, say that the plaintiff has not now, and had not at the time of the alleged trespass, any paper title or color of title whatever to the locus in quo; that in the year 1884 the plaintiff leased from the Louisville & Nashville Railroad Company the lot of land upon which he built his house, which is the identical house described, and called the 'Joe Hall Boarding House,' situated near the western limits of the city of Montgomery, and described in the complaint; that, at the time of said lease between the plaintiff and the Louisville & Nashville Railroad Company, the Louisville & Nashville Railroad Company was in the actual possession, as lessee, of all the prop-

erty of the Mobile & Montgomery Railway Company, and of all the property of the Western Railway of Alabama, west of the city of Montgomery; that plaintiff's possession under said first-mentioned lease continued of force, and plaintiff held under it, until, to wit, the 28th day of March, 1892, when plaintiff bought from said Mobile & Montgomery Railway Company and the Louisville & Nashville Railroad Company the property described in the deed set out as Exhibit A to plea No. 2 of the Mobile & Montgomery Railway Company, which plea and exhibit are here referred to, and made a part of this plea; that the plaintiff entered under said deed and held the property therein described, and that said deed did not convey the locus in quo upon which the alleged trespass was committed; that the defendants Shields, McKinney, and Mizell entered as the servants and agents of the said Louisville & Nashville Railroad Company, claiming under it; that said Hall never had any claim of inheritance or of purchase to the locus in quo mentioned in the complaint; and that he has never filed in the office of the probate judge of Montgomery county (the county in which said locus in quo lies) a declaration in writing, subscribed by him, setting forth his adverse claim, and particularly describing the locus in quo, of which he claims to be in adverse possession thereof." The plea numbered 2 referred to in plea numbered 3, was as follows: "(2) And for further plea in this behalf by defendant in its own behalf, and not jointly with the other defendants, the said Mobile & Montgomery Railway Company, for answer to the complaint as a whole, and also separately to each count thereof, says that the locus in quo on which said alleged trespass was committed was not at the time of the alleged trespass in the possession of the plaintiff, but that at that time the legal title to the locus in quo was in this defendant, but that the Western Railway of Alabama, a corporation under the general laws of Alabama, was then in the possession of the locus in quo, holding adversely to this defendant, and also to the plaintiff, and that plaintiff in this suit purchased whatever title he had to the locus in quo from this defendant, and that the deed of conveyance under which he claimed the property described in the complaint, and which is the only deed or conveyance under which he claims title to the locus in quo, does not convey the premises contained in the locus in quo; and that, if plaintiff ever claimed said locus in quo adversely to this defendant, he did not give notice of his adverse possession or claim by filing in the office of the judge of probate of the county in which the land lies, to wit, Montgomery county, a declaration in writing, subscribed by him, setting forth such claim, and particularly describing the real estate of which he claims to be in adverse possession. A copy of said deed from this defendant to the

plaintiff is hereto attached, marked 'Exhibit A,' and made a part of this plea." The plaintiff demurred to plea "A" upon the following grounds: "(1) In so far as the same is an answer to counts 1 and 3 of the complaint, that said defendants do not aver that the plaintiff was not in possession of the locus in quo at the time of the alleged trespass. (2) That said defendants do not aver that, at the time of the entry into possession, an adverse claim of possession of said locus in quo by the plaintiff commenced, on or subsequent to the 11th day of February, 1893. (3) So far as it attempts to answer count 2 plaintiff demurs, and assigns as grounds that said defendants do not aver that the plaintiff had no legal title or right of immediate possession at the time of said alleged trespass by said defendants." Under the opinion on the present appeal, it is unnecessary to set out in detail the facts as adduced in the evidence. There were verdict and judgment for the plaintiff, assessing his damages at \$1,000. The appealing defendant assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. & Chas. P. Jones and J. M. Falkner, for appellant. A. A. Wiley and Chas. Wilkinson, for appellee.

TYSON, J. This was an action of trespass *quare clausum fregit*. The complaint contains three counts. The first relies for a recovery upon plaintiff's possession of the locus in quo; the second, upon title; and the third, upon title and possession.

The gist of this action is the injury done to the possession; and, of consequence, to support it the plaintiff must show that, as to the defendants, he had at the time of the alleged injury rightful possession, actual or constructive. Of course, if he has title to the property alleged to have been trespassed upon, he has constructive possession of it, unless he has parted with the possession, conferring on another the exclusive right of enjoyment, against whom he has not the right of immediate possession. *Davis v. Young*, 20 Ala. 151; *Boswell v. Carlisle*, 70 Ala. 244; *Dunlap v. Steele*, 80 Ala. 424; *Fields v. Williams*, 91 Ala. 502, 8 South. 808. As against a stranger, actual possession will support the action, without regard to whether plaintiff had title at the time of the alleged trespass. *Duncan v. Potts*, 5 Stew. & P. 82, 24 Am. Dec. 766; *Lankford v. Green*, 62 Ala. 314. But as against one having title to the property alleged to have been trespassed upon, and having been wrongfully denied possession, in 26 Am. & Eng. Enc. Law (1st Ed.) 600, it is said: "One having title to property, and wrongfully denied possession, can enter without being guilty of trespass; so a tenant, mortgagor, or other person, without title, may have a present right of possession which will justify his entry, or enable him, if in possession, to maintain trespass for the wrongful

entry of another." See, in support of this proposition, note 1 on page 600, and note 1 on page 601, of the same volume, where the cases are collated. This principle was recognized in *Herndon v. Bartlett*, 4 Port. 481, where the court held that the plea of *liberum tenementum* was an answer to a complaint in trespass *quare clausum fregit*, alleging entry with force and arms, and was proper matter for special plea. See, also, 26 Am. & Eng. Enc. Law (1st Ed.) 632-634. In view of the conclusion to strike the bill of exceptions, the only matter before us for consideration is whether the joint plea of all the defendants, designated as "a," was subject to the demurrer interposed to it. That plea refers to, and makes a part of it, plea 2 of the *Mobile & Montgomery Railway Company*,—one of the defendants in the cause. In the absence of all objection to this mode of pleading, we must hold that the effect of this reference, etc., to plea 2, was to incorporate the allegations of fact in that plea into the plea under consideration, and to make those allegations as much a part of this plea as if they had been actually written in the body of it. With the plea thus framed, it contains a denial of plaintiff's possession and title to the locus in quo, and an allegation of *liberum tenementum* in the *Mobile & Montgomery Railway Company*. It is clear that it was not subject to the demurrer interposed to it, whatever may be its defects in other respects. For the error committed in sustaining the demurrer, the judgment must be reversed.

The bill of exceptions must be stricken, on the authority of *Gassenheimer Paper Co. v. Marietta Paper Mfg. Co.* (Ala.) 28 South. 564, on account of being in violation of rule 33 of circuit and inferior court practice. Code, p. 1201. The frame of the bill of exceptions in this case is identical with the one in the *Gassenheimer Paper Co. Case*. Here, as there, it "contains a statement of everything that was done on the trial, and sets forth every word uttered by everybody—witnesses, attorneys, judge, etc.—while it was in progress. * * * No effort is made to present a statement of the testimony or its tendencies, as the rule requires, but it is given verbatim as it comes from the mouths of witnesses. Not only are the objections to testimony stated, but the arguments of counsel upon the objections are set forth at length and in full; and not only are shown the rulings of the court, but every remark of the presiding judge is set forth with care and particularity." It also sets forth rulings against the plaintiff and other defendants in whose favor there was a verdict and judgment, who, of course, do not appeal, and the grounds upon which those rulings were made, and the exception thereto, along with the suggestions, remarks, and arguments of counsel thereon. But it is insisted that all this was necessary because the affirmative charge was given for the plaintiff and refused to these appellants. This

contention is based upon a mistaken interpretation of the provision of the rule to the effect that bills of exceptions may contain a statement of testimony in extenso when the affirmative charge has been asked in good faith. *Woodward Iron Co. v. Herndon* (Ala.) 30 South. 370. It may be, as was said in the case just cited, that "occasionally it may be necessary, in order to convey some shade of meaning which cannot be stated aptly, or where there is doubt as to the meaning, to set forth the question and the answer; but it is not conceived that this necessity can often arise." Here it may be well to call attention to the difference between the bill of exceptions in the *Woodward Iron Co. Case*, which this court did not strike, but imposed the cost of it on the appellant, and the one under consideration. In that case the bill only contained the questions to and answers of the witnesses,—no speeches, remarks, or suggestions of attorneys, remarks of judge, objections and exceptions of successful party, etc. It must be understood, however, that the considerations which were allowed to obtain in the *Woodward Iron Co. Case*, to the end of saving the bill of exceptions from being stricken, will not be indulged in another where the bill is framed as that one was, and prepared after the announcement of the opinion in that case.

Again, it is contended that appellants, out of deference to the wishes of the presiding judge, prepared the bill of exceptions as it appears in this record. The facts upon which this contention is based are shown by an affidavit of the judge. But his conception of what the bill should contain doubtless grew out of a misconstruction of the rule, and his requirement that the bill be constructed in violation of it is no excuse. Had the bill been properly framed, and had he refused to sign it on presentation, it could have been established in this court.

The writer of this opinion, however, thinks that the striking of the bill of exceptions is too severe a penalty to impose, in view of the nature of the case rendering it exceedingly difficult to state in an orderly manner all the testimony or its tendencies, and in view of the fact that the affirmative charge was given for the plaintiff and refused to these appellants. Furthermore, he is induced to this conclusion by the fact that this cause was submitted before the announcement of the opinion in the *Gassenheimer Paper Co. Case*; and, while he concedes that this bill was a more flagrant infraction of the rule than was the one in the *Woodward Iron Co. Case*, still, in view of the considerations which were allowed to obtain in that case, he thinks, under the circumstances, they should be allowed to prevail here. A sufficient punishment, in his opinion, would be an imposition of costs.

Reversed and remanded. Costs of bill of exceptions to be adjudged against appellants.

On Rehearing.

(June 28, 1902.)

The other members of the court, while still adhering to their position in respect to striking the bill of exceptions, however, recede from their conclusion as to a reversal of the judgment in the cause. While conceding there was error in the rulings of the trial court in sustaining the demurrer to the special plea, they now hold that it was error without injury. They predicate their conclusion in this respect upon the proposition that the facts alleged in the plea could have been introduced in evidence, not that they were, under the plea of the general issue,—a proposition of law which is not entirely free from doubt. They rely in support of their conclusion upon *Powell v. Asten*, 36 Ala. 140; *Rodgers' Adm'r v. Brazeale*, 34 Ala. 512; *Stein v. Ashby*, 24 Ala. 521; and *Owings v. Binford*, 80 Ala. 421. It must be conceded that the two cases first named support their holding. The opinions in each of them are by the same judge, and show that he gave but little consideration to the question. Indeed, the cases he cites to support his views do not do so. In each of them the facts stated in the plea to which a demurrer was sustained were afterwards received in evidence upon the trial. But the last two do not, except in a dictum, which, of course, is not authority. The reports of these cases show that the defendant in each of them actually had the benefit of all evidence under other pleas to which he would have been entitled had the pleas to which demurrers were sustained remained in the record. There was therefore no necessity for this court, in reviewing those cases, to say more than that the error was cured by allowing the defendant to introduce the facts alleged in his pleas in evidence under another plea,—a well-recognized principle, which has often been invoked and applied by this court. The writer's position is, error having confessedly been shown in this case, the fact must affirmatively appear from the record that defendants, under their plea of the general issue, had the full benefit of the facts alleged in their special plea, to which a demurrer was improperly sustained. And this fact not appearing from the record, the bill of exceptions having been stricken, the presumption of injury must prevail. This principle was applied and enforced in the following cases, in which precisely the point here under consideration was involved: *Lambie v. Steel Co.*, 118 Ala. 427, 24 South. 108; *Mitcham v. Moore*, 73 Ala. 542; *Graham v. Woodall*, 86 Ala. 313, 5 South. 687; *Rice v. Drennen*, 75 Ala. 335; *Rigby v. Norwood*, 34 Ala. 129; *Falls v. Weissinger*, 11 Ala. 801; *Pinkston v. Greene*, 9 Ala. 19. In *Falls v. Weissinger*, supra, it was said: "It is, however, contended for defendant in error that, although the demurrer to the pleas should not have been sustained, yet, as the defend-

ants below might have proved the same fact which they set up under the other pleas, they have not been prejudiced by the judgment on demurrer, and therefore cannot complain of the decision against them. All the pleas were affirmative, and it devolved upon defendants, after the plaintiff had produced the bond and shown a breach, to sustain a defense by proof. Now, although it may be that the plea of performance would have tolerated the admission of all the facts alleged in the several pleas, yet we must intend, under the circumstances of the case, that the demurrer was sustained because it was supposed that the pleas adjudged bad did not present an available defense; that the court would not have admitted evidence of the fact they alleged. When a demurrer to a plea has been improperly sustained, if it appears that the defendant has had the benefit he could have derived from it upon the trial of issues on other equivalent pleas, he cannot insist upon the error, as no real injury was done him." In *Mitcham v. Moore*, supra, *Brickell, C. J.*, speaking for the court, said: "It is insisted for the appellee that, although the demurrers to the special pleas were sustained erroneously, the error is without injury, as the appellants could have had the benefit of the facts stated in them under the general issue upon which the trial was had. The rule is quite general that, if a demurrer to a special plea is erroneously sustained, the error is without injury, and not a cause of reversal, if it appears that the defendant has had, under the general issue, the full benefit which could have been derived from the special plea. But that fact must affirmatively appear from the record, and, if it does not, the presumption of injury arising from error clearly shown must prevail. * * * The fact does not now appear. The bill of exceptions states all the evidence, and none was given of the facts stated in these pleas, nor is it probable that such evidence would have been admitted if offered." In *Lambie v. Steel Co.*, supra, the same learned judge used this language: "When a demurrer is erroneously sustained to a special count, the presumption of injury arising from error must prevail, though it be true the plaintiff under the common counts could have given evidence of all matters which would have been available under the special count, unless it appears that such evidence was introduced. The fact of the introduction of such evidence does not affirmatively appear, nor is it probable that it would have been received if offered." In *Rice v. Drennen*, supra, *Somerville, J.*, speaking, said: "We are unable to perceive upon what ground the first plea was adjudged bad. * * * The court erred in pronouncing it bad, in whatever form the objection to it may have been presented. It is contended that this action of the court must be regarded as error without injury, as the case seems afterwards to have been tried

upon its general merits. It does not appear, however, that the contestants offered any evidence in the cause whatever, and we cannot know that they were not deterred from doing so by this erroneous ruling of the court. They had the right to suppose that, inasmuch as the plea had been pronounced bad, all evidence offered in support of it would have been excluded by the court on objection taken to it by the petitioner." Excerpts from other cases cited to support my contention might be quoted, but these will suffice to show that no presumption can be indulged to overcome the presumption of injury after error is shown. And unless we indulge the presumption that the trial court would stultify itself by receiving evidence to establish a state of facts, as a defense, after having ruled that the same state of facts alleged in a plea constituted no defense, we are forced logically to the conclusion which the writer contends for as the law. And this cannot be done unless we abrogate the rule laid down in the cases cited above and quoted from, which has obtained in this state since the establishment of this court. Before concluding, I will cite the case of *Troy Fertilizer Co. v. State* (decided at present term) 32 South. —, which fully sustains my contention. In that case, notwithstanding the facts stated in the special pleas, stricken on motion, were received in evidence, this court reversed the judgment because of the error in striking them, although the facts alleged in them were confessedly no defense to the action. It is true, it is said that the facts stated in the pleas could not have been introduced under the general issue, but the record showed that they were received in evidence without objection. The principle underlying the opinion is, error having been shown, it could not be said that no injury resulted to defendant; that it had all the benefit from the evidence that it would have been entitled to had the pleas not been stricken. I was at first inclined to think that the opinion was wrong, but I have become convinced of its correctness. Although the point seems technical, yet to hold otherwise would be to emasculate the statute requiring special demurrers, and to infringe upon the rule which I am so strenuously insisting upon upholding in this case.

SCOTCH LUMBER CO. v. SAGE.¹

(Supreme Court of Alabama. April 9, 1902.)

BONA FIDE PURCHASER—NOTICE—POSSESSION—RECORDS—KNOWLEDGE OF ATTORNEY—DIFFERING RECITALS IN ACT AND DEED—HARMLESS ERROR.

1. Where complainant's claim to land as a bona fide purchaser, without notice of the unrecorded deed under which respondent claims, is established, any error in overruling a demurrer to the part of the bill invoking an es-

toppel against a grantor in defendant's chain of title is harmless.

2. Record of a deed to land by W., having of record an undivided one-seventh interest therein, and an unrecorded deed for five of the remaining six-sevenths, is not constructive notice to a purchaser from the record owners of such remaining six-sevenths that he claimed to have owned six-sevenths instead of one-seventh.

3. After deed to respondent from W., who, according to the record, owned an undivided seventh interest in the land, but who had an unrecorded deed of five of the remaining six-sevenths, plaintiff purchased and obtained deed for the other six-sevenths from one having record title, and being in possession; and neither respondent nor any one under whom it claimed was in open, visible, exclusive, and unambiguous possession. *Held*, that there was nothing in the possession to put complainant on notice of the unrecorded deed.

4. A purchaser of land is not charged with notice of an unrecorded deed by his grantors because his attorney knew of it; he having acquired his knowledge before he was employed to purchase the land for him, and while representing another.

5. A purchaser is not charged with notice of an unrecorded deed by his grantors by knowledge of his attorney, where the attorney, without the purchaser's knowledge, is also representing the sellers, and is personally interested in making the sale; he receiving the purchase money.

6. Recital of the names of the minor children and heirs of W., in an act authorizing them to sell their interests in land, if evidence of who they were, does not, in the absence of other evidence, overcome a recital in the deed that the persons therein named were, at date of its execution, his only children and heirs.

Appeal from chancery court, Clarke county; Thos. H. Smith, Judge.

Suit by Henry M. Sage against the Scotch Lumber Company. Decree for complainant. Respondent appeals. Affirmed.

The purpose of the bill is to partition the lands described in the bill. The complainant claims to own a six-sevenths undivided interest, and alleges that the defendant is the owner of a one-seventh undivided interest. The respondent, by answer, denies the ownership of the complainant of the said six-sevenths undivided interest, and alleges that it not only owns the one-seventh undivided interest as alleged in the bill, but that it owns all of the said lands, and that complainant has no interest whatever therein. The only material issue raised by the bill and answer is as to the ownership of the six-sevenths undivided interest in the lands claimed by the complainant.

Complainant and respondent claim title from a common source. Stephen S. Wiggins owned a certain portion of the lands, his wife, Louisa, owned a certain portion, and their son, Elias R. Wiggins, owned the remainder. Elias R. Wiggins died unmarried and intestate, his estate owing no debts, during the Civil War, and there was no administration on his estate. Stephen S. Wiggins also died intestate about the same time, owing no debts, and no administration has been had on his estate. Louisa died intestate in the

¹ Rehearing denied June 23, 1902.

² 4. See Attorney and Client, vol. 5, Cent. Dig. §§ 92, 93.

year 1871, leaving no debts, and no administration has been granted upon her estate. Stephen S. and Louisa left surviving them the following children, who were also the brothers and sisters of Elias R. Wiggins, to wit: Isabella, John C., Perminda, Elizabeth, Clara, Margaret, and Stephen L. Wiggins,—five daughters and two sons. Isabella is now the wife of Joseph Sheffield. Perminda is now the wife of John H. Horton. Elizabeth was the wife of Geo. W. Davis, but she is now dead, intestate, and left surviving her husband, Geo. W. Davis, and two children, Willie and Wiley Davis. Clara was the wife of the same Joseph Sheffield, who is now the husband of Isabella, but is dead, intestate, leaving surviving her husband, Joseph Sheffield, and one child, David Sheffield. Margaret died, intestate and unmarried, but left one child, William Wiggins, who is also known as William Sheffield. John C. Wiggins is living. Stephen L. Wiggins is dead, but died intestate, and left surviving a widow, Martha, and four children, to wit, Percy, Daisy, Annie, and Reuben.

Up to the time of the death of Louisa Wiggins, in 1871, these lands remained in the possession of the Wiggins family, the widow and children residing upon them together. After her death, the children who were then unmarried lived in one settlement on the lands, and John C. Wiggins also lived on another settlement on them. After the death of Clara, the wife of Joseph Sheffield, who died shortly after Louisa, said Joseph, together with his children, also moved upon the lands. After the expiration of a few years from the death of Louisa Wiggins, all of the Wiggins heirs had moved off of the land. The lands then remained vacant and unoccupied till the spring of 1878, when Joseph Sheffield and his wife, Isabella, and Margaret Wiggins, who lived with them, and the child by Joseph Sheffield's first marriage to Clara Wiggins, moved back on the land, remained a short time, and then moved off. The lands then remained unoccupied for a short time, when a man named Whatley moved upon them in December, 1878, and remained there till the summer or fall of 1879. Whatley occupied as the tenant of John Baggett. After Whatley moved off, the lands were unoccupied, and no one had the possession till the spring of 1896. In May, 1896, John Horton, as the tenant of John F. Proctor, took possession of the lands, and cultivated a portion of them that year. In 1897 Horton held over as tenant of Robert E. Bowden, and subrented a portion of the lands to Joe Pritchett, who cultivated them that year, 1897. Horton has continued in possession to this date. There were three separate settlements on the land, with clearings round each, and also separate cleared lands suitable for farming purposes. The remainder of the lands were woodland.

The title of the complainant was shown by the following written instruments introduced

in evidence: Certificate of the register of the land office, showing the entry of the land; deed from R. R. Wells and others to S. S. Wiggins; deed from Adam Sheffield to Stephen S. Wiggins; power of attorney from Geo. W. Davis, Willie and Wiley Davis; power of attorney from Isabella Sheffield and husband, Joseph, David Sheffield and wife, Mary, and William T. Sheffield or Wiggins, to John H. Horton; Isabella Sheffield and husband, Joseph, David Sheffield and wife, Mary, William T. Sheffield, G. W. Davis, Wiley and Willie Davis, by John H. Horton, attorney in fact for each of said parties, and John H. Horton and wife, Perminda, to John F. Proctor, deed of May 7, 1897, correcting former deeds which had been executed May 8, 1896, and May 16, 1896, respectively; deed from John F. Proctor to Robt. E. Bowden, of September 1, 1896; deed from heirs of Stephen L. Wiggins, deceased, to Robt. E. Bowden, of January 18, 1897; deed from Robt. E. Bowden to Henry M. Sage, of May 31, 1897.

The title relied upon for the respondent was shown by the introduction in evidence of the following written instruments: John C. Wiggins and wife to John Baggett, deed of December 6, 1877; deeds from the several heirs of John Baggett, deceased, passing their respective interests in the lands to N. M. Baggett; N. M. Baggett and wife to Noble & Kimbrough; Noble & Kimbrough to Mattie Baggett; decree of the chancery court in the case of Christian & Craft Grocery Co. and others v. N. M. Baggett and others, ordering the sale of the lands; deed from Jas. C. Savage, register, to William D. Dunn and Christian & Craft Grocery Co., dated July 11, 1896; deed from Wm. D. Dunn and wife to John W. Portis, of July 23, 1896, conveying an undivided interest; Christian & Craft Grocery Co. to Wm. D. Dunn, July 23, 1896, deed of partition of undivided interest; Christian & Craft Grocery Co. to Alexander Gunn, dated January 20, 1897; John W. Portis and Wm. D. Dunn and wife, to Alexander Gunn; Alexander Gunn and wife to Scotch Lumber Co.; certified copy of will of John Baggett. The respondent offered parol testimony to establish an alleged lost and unrecorded deed from the other six heirs of Stephen S., Louisa, and Elias R. Wiggins to John C. Wiggins for the six-sevenths undivided interest in the land.

The complainant showed that N. M. Baggett commenced a suit in the chancery court of Clarke county in the name of his wife, Mattie, and for her, on June 15, 1892, to have re-executed this alleged lost deed (the Wiggins heirs, except John C. Wiggins, being parties to the suit), and that the bill was dismissed in February, 1893. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently shown in the opinion.

On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant owned an undivided

six-sevenths interest in the lands involved in the suit, while the defendant owned an undivided one-seventh interest in the said lands; that the complainant was entitled to the relief prayed for; and ordered the appointment of commissioners for the purpose of partitioning the lands between the complainant and the defendant according to their respective rights and interests as declared in said decree.

Fred S. Ball and Norman Gunn, for appellant. Lackland & Wilson, for appellee.

TYSON, J. The bill in this cause was filed for the partition of lands described in it between joint owners or tenants in common thereof.

Complainant claims to be the owner of a six-sevenths undivided interest, in common with the respondent, whom the bill alleged to be the owner of the remaining one-seventh. The answer of respondent denies the ownership of the complainant as alleged by him, and states the respective interest or ownership of the lands to be, a six-sevenths undivided interest to belong to it, and a one-seventh to belong to complainant. After the filing of this answer, complainant amended his bill in which he set forth the chain of title under which the respondent claims to own the six-sevenths interest. In order to complete this chain of title, an alleged unrecorded and lost or destroyed deed is necessary to be established by respondent by parol evidence. This amendment also asserts title to be in complainant to a six-sevenths interest, and avers that complainant is a bona fide purchaser without notice of the unrecorded and lost deed under and through which the respondent claims title. This amendment, and a subsequent one filed, also invoke an estoppel against one of the grantors in respondent's chain of title. To this the respondent interposed a demurrer, which was overruled. Under the view we take of this case, it is unnecessary to consider the rulings of the court in this respect, for, if respondent has failed to establish the execution, contents, etc., of the lost deed, or the complainant is shown to have paid value for the lands, and the respondent has failed to sustain the burden of proving notice to him, either actual or constructive, of the contents of the lost deed, if it is shown to have ever had an existence, there is no error in the decree of which the appellant can complain. *Caldwell v. Pollak*, 91 Ala. 353, 8 South. 546.

Adverse possession is also relied upon by respondent to show title in the grantee to whom the lost deed was made. Both parties litigant claim to have derived their respective titles from the same source, to wit, the children and heirs at law of the Wigginses. There were seven of these children, and the complainant shows a complete recorded chain of title to the interest claimed by him. While the respondent shows only a complete

chain of title by the records of a one-seventh interest, it insists that John C. Wiggins, one of the seven children, acquired the title of all of his brothers and sisters, except one, by deed executed to him, which was lost, and never recorded. In view of the uncertainty, as shown by the evidence, not only as to signing of this alleged lost deed by all of the alleged grantors, but as to its attestation as to some of the signatures, its acknowledgment by others, and its contents, and when executed, if executed at all, it is doubtful whether the proof is sufficient to warrant us in finding that it ever existed. *Land Co. v. Denny*, 108 Ala. 553, 18 South. 561. But conceding, for the purposes of this opinion, that it was executed as contended for, the respondent must fail for the reason that it is not shown that complainant had any notice, either actual or constructive, of it, if it was ever made; the complainant having shown that he paid value. It will be observed that complainant does not derive his title through John C. Wiggins, or by or through mesne conveyances from him; in other words, he is not a grantor in the chain of title to any portion of the six-sevenths interest claimed to be owned by the complainant. There is, therefore, no privity between them. This being true, the record of his deed to Baggett was not constructive notice that he (Wiggins) claimed to have owned a six-sevenths interest instead of a one-seventh; and the same may be said of the record of the other deeds in respondent's chain of title. *Tied. Real Prop.* § 817 et seq.; 16 *Am. & Eng. Enc. Law* (1st Ed.) p. 800; *Gimon v. Davis*, 36 Ala. 589; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127; *Burch v. Carter*, 44 Ala. 115.

What, then, is there in the facts of the case to show that complainant had actual or imputable notice that John C. Wiggins or those claiming under him ever claimed to own the entire six-sevenths interest in the lands? It is true, it was attempted to be shown that Wiggins was in the possession of the lands for some years after the lost deed was alleged to have been made to him; but the year in which this deed was executed, whether in 1870, 1871, or 1872, is not definitely shown. With the existence of the deed conceded, having shown that there was nothing upon the record to put the complainant upon notice of it, it becomes necessary to determine whether there was anything in the possession claimed under it to put the complainant upon notice. When this complainant negotiated and paid for and received his deed to the six-sevenths interest in these lands, his grantor was in possession under a complete recorded chain of title, claiming to own that interest. Neither the respondent nor any one under whom it claims to have derived title was in the open, visible, exclusive, and unambiguous possession of the lands, which is essential in order for possession to operate as notice of the

unrecorded deed. To go back of the purchase by complainant, when Proctor purchased these lands no one was in the actual possession of them, nor had any one who claimed to own them had the actual, open, exclusive, and continuous possession of them for several years prior thereto, notwithstanding there were, when Baggett's tenant left them in 1879, dwelling houses upon them, and a part of the tract was tillable. So, then, there is nothing in the fact of possession to have put the complainant on notice of the unrecorded deed, or to have even excited suspicion that his grantor did not have title to the interest he claimed to own. *Wells v. Mortgage Co.*, 109 Ala. 446, 20 South. 136; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Watt v. Parsons*, 73 Ala. 202; *Motley v. Jones*, 98 Ala. 443, 13 South. 782; *Griffin v. Hall* (Ala.) 29 South. 783; *Wade*, Notice, § 296.

There is much contention in brief that complainant had notice of respondent's claim because Wilson, one of his attorneys in this cause, knew it. There are two reasons why this contention cannot prevail: First. It appears that Wilson acquired his knowledge while representing Bowden or Proctor, and before he was employed by complainant to purchase these lands for him. Second. The evidence shows that Wilson represented the sellers of these lands also, and was personally interested in making the sale of them to complainant. He was really the seller, and got all of the purchase money that was paid by complainant. He was, therefore, really acting for himself, in his own interest, and adversely to that of his principal, the complainant, without any knowledge on the part of the latter of his dual relation. *Pepper v. George*, 51 Ala. 190; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; 1 Am. & Eng. Enc. Law, pp. 1145, 1149, 1150 (note).

It is insisted that the possession of John C. Wiggins and Baggett was adverse, and that it continued for a sufficient length of time to ripen into title, and that, therefore, respondent has a title to the six-sevenths interest in the lands claimed by it, independent of the unrecorded deed. It is entirely clear to us that the evidence is insufficient to sustain this contention,—to overcome the presumption that John C. Wiggins was holding for himself and co-tenants. *Jackson v. Elliott*, 100 Ala. 609, 13 South. 690; *Johns v. Johns*, 93 Ala. 239, 9 South. 419. Indeed, just how John C. Wiggins' possession could be adverse to the five-sevenths interest which he claims to have derived under the lost deed, which we have shown, if made, is ineffectual to pass title as against this complainant, and not adverse to the co-tenant whose interest the complainant acquired, we are quite unable to understand, for the reason that the theory of this contention is necessarily predicated upon the actual and exclusive possession by Wiggins of the lands.

Certainly, if it was exclusive so as to ripen into title by adverse possession as to the five-sevenths which the respondent claims that it acquired title to by adverse possession, upon the same principle it would have acquired the other one-seventh interest which it is conceded is owned by the complainant; it not being shown that the heir who owned that one-seventh interest was in possession at the time that it is claimed that John C.'s possession was adverse.

The remaining point necessary to be noticed is the one that Emma Wiggins, if there be in existence such a person, should have been made a party respondent to the bill. This contention is based solely upon the difference in the recital of the names of the minor heirs of Stephen L. Wiggins in the act of the general assembly approved December 9, 1896, authorizing them to sell their one-seventh interest in these lands, and the recital of the names of the children and sole heirs of Stephen L. in a deed executed by them to Bowden on the 18th day of January, 1897. If we should hold the recitals in this legislative act to be evidence of the facts stated therein, we could not allow it to overcome the recital in the deed that the persons therein named were at the date of its execution the "only children and sole heirs of Stephen L. Wiggins, deceased," in the absence of other evidence on this point, and especially in face of the admission made by the pleadings, etc., in the cause.

There is no error in the record, and the decree appealed from must be affirmed.

CITY COUNCIL OF MONTGOMERY v. FOSTER.¹

(Supreme Court of Alabama. May 15, 1902.)
STREET IMPROVEMENTS—ASSESSMENTS—ORDINANCE.

1. The only authority for making assessments for sidewalks and street paving being in a charter (Acts 1892-93, p. 36), permitting it against abutting property for not more than one-fourth of the cost, and not in excess of the benefits, an assessment under an ordinance providing for apportioning against the lots a certain portion of the cost without reference to benefits is void.

McClellan, C. J., dissenting.

Appeal from city court of Montgomery; O. D. Sayre, Judge.

Proceeding by the city council of Montgomery against T. Gardner Foster. Judgment for defendant, and plaintiff appeals. Affirmed.

Steiner & Graham, for appellant. Lomax, Crum & Well, Gordon Macdonald, John D. McNeel, Marks & Sayre, and W. T. Seibels, for appellee.

SHARPE, J. Authority in the city council of Montgomery to make special assessments

¹ Rehearing denied June 28, 1902.

against property to defray expenses of sidewalk and street paving is found alone in sections 12 and 34 of the act "To establish a new charter for the city of Montgomery," approved February 21, 1893 (Acts 1892-93, p. 368). In the first part of section 12 is a provision relative to keeping sidewalks clean and in repair at the expense of property owners, and for subjecting property to such expense; but that clause of the statute is not to be here considered, since no item for such cleaning or repairing is involved in this case. The next clause purports to confer power "to require pavements to be laid, and prescribe the kind of pavements to be laid, and to compel the laying of the kind of pavements prescribed, in the streets, sidewalks, alleys, and public places of said city, at the expense of the property owner except as herein provided." The subject is next pursued in section 34, as follows: "Be it further enacted, that it shall be lawful for said city council from time to time, and in such manner as it may be determined to pave, gravel or macadamize any street, avenue, square, public place or alley, in whole or in part, within the corporate limits of said city, whenever said city council may deem it necessary or expedient to do so, and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor, and to pass all such by-laws and ordinances as may be required for assessing the property to be benefited thereby for such amounts as may be fair and reasonable, not to exceed one-half of the construction thereof, and of the expense of laying down the same, and also to collect and enforce such assessments as in the case of city taxes, such assessments to be made on property on both sides of the street, or parts of the streets thus improved per front foot, the assessment not to exceed in any case more than one-fourth of the cost of improvement in front of the property, nor more than ten dollars per front foot of the property taxed, provided, that corner property which has been assessed for the improvement of the street on one front shall not be assessed for the improvement of the street on the other front, exceeding one-eighth of the cost of the improvement on such front, nor exceeding two dollars and one-half per front foot, but in case of corner property the assessment shall include all of the street in front of the sidewalk on the narrowest front of said property." In *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 South. 522, it was held that sidewalk paving, though not specifically mentioned in section 34 as a subject of the powers and limitations there expressed, was included therein by what is said as to street paving. The correctness of that decision has been questioned, but the construction there given the charter is adhered to. By authoritative definition as well as common usage, the term "street" applies to the whole public thoroughfare, including sidewalks; the latter constituting parts of

the street reserved to pedestrians. *Bour. Law Dict.* tit. "Sidewalk"; *Burmeister's Case*, 76 N. Y. 174; *City of Kokomo v. Mahan*, 100 Ind. 242. The term, however, may be employed to designate the way between sidewalks, and how it should be understood in a given case may depend on the connection in which it is used. If section 12 bounded the city's power in respect of sidewalk paving, it is at least questionable whether it could by any rule assess property to pay for such paving, since in general such power is not implied, and can only arise from express legislative grant. *Burroughs, Tax'n*, § 126; *Endl. Interp. St.* § 352. The fact that express provisions for laying and collecting paving assessments are made in section 34 indicates that section 12 was not intended to supply assessing powers, and no good reason is apparent why sidewalk paving should be excluded from those express provisions, and left to be compelled by penalties, or by doubtfully implied powers of taxation. The direction in section 34 for assessing property on both sides of the street for not more than one-fourth the cost of improvements in front of the property may be applied when the improvement is of the whole street, including sidewalks, as well as when the improvement is of the space between sidewalks; the legislative intention being to limit the charge on property to one-half the whole cost, and one-fourth the cost of the entire width being equal to one-half the cost to the center line of the street. Sidewalks are mentioned separately in the act in recognition of the necessity which may exist for improving them alone and to confer power for that purpose. Besides being limited to half such expense, the power to assess is further and materially qualified by the excepting clause of section 12 in connection with that part of section 34 which restricts assessments to property benefited, and to such amounts as may be fair and reasonable. In *Birdsong's Case*, supra, these provisions were construed to authorize the making of such assessments only on a basis of benefits to the property. That construction now prevailing operates to devert this case of the constitutional question discussed in briefs as to whether the legislature has power to authorize unqualifiedly the imposition on property of the whole or of a given proportion of the cost of such improvements. Here the legislature has not attempted to exercise such power.

As appears from the statement filed in the city court the assessment here in question is for "sidewalk and street paving." So much of it as comes from sidewalk paving is based on an ordinance which deviates from the city's charter in that it directs the whole cost of paving an adjoining property, without reference to the extent of benefit to the property. The ordinance relied on as authorizing street graveling charged for likewise ignores the question of benefit, and in that particular is obnoxious to the charter. Mu-

municipal corporations derive their powers from the state and cannot legislate in excess of them. *Birmingham & P. M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615; *Dill. Mun. Corp.* §§ 317, 319, 329. This principle is applied strictly to ordinances proposing to assess taxes on property for local improvements. *Cooley, Tax'n*, 678; *Dill. Mun. Corp.* § 357. We concur with the city court in holding that the assessment made under those ordinances is void. As further expressing reasons for that conclusion we adopt the following from the opinion of the trial judge, expressed concerning the street graveling ordinance, the principle stated being applicable to the sidewalks ordinance as well: "It requires the city engineer to prepare and file with the city clerk a statement showing the number of feet frontage of each lot on each side of the street. He is also required to make a statement of the total costs of the improvement of the street, and to 'apportion against the owners of said lots one-half of the costs of the city of such improvement on said street, to be apportioned against said lots in proportion to the number of feet frontage of each lot on such street: provided, that not more than one-fourth of the costs of such improvement in front of the property, to be taxed, nor more than ten dollars per front foot shall be apportioned to any one lot.' It then provides that the city clerk, on receiving such statement from the city engineer, 'shall assess the amount of such improvement in front of said several lots, and collect such assessments at the same time and in the same manner as city taxes are collected.' The ordinance then gives the property owner an opportunity to file objections to the assessment with the city council, and he is also afforded another such opportunity in this court. In this ordinance there is not a syllable which by any sort of construction can be construed into a recognition of the fact that an assessment by the front foot, even within the limits provided, may not be fair and reasonable. There is not an intimation that the city engineer and city clerk in making the assessment shall consider benefit conferred. The ordinance could not have been framed in terms which would more certainly and effectually deny to these officers the right to consider whether the amount of the assessment was greater than the amount of benefit conferred by the improvement. They are required to proceed according to a fixed plan, and not otherwise. The charter has been held by the supreme court to mean that the assessment is to be made 'fair and reasonable,' notwithstanding the requirements that it be made by the front foot. But this cannot be held to be the meaning of the ordinance. The ordinance means nothing more nor less than that one-half of the costs of improving the entire street is to be distributed among all the lots fronting upon the street in proportion to their frontage. This is a mere matter of arithmetic. The rule is fixed

beyond peradventure, and is arbitrary in the most absolute sense. * * * The foundation of the entire proceeding being a mere nullity, nothing could be built upon it. The property owner could not be put in default by subsequent proceedings. He was not called upon to make objections before the city council or in this court. * * * "There must be an assessment either made pursuant to the levy or adopted as the basis of the levy, else there can be no lawful collection of taxes. In *Hil. Tax'n*, 291, it is said: "Assessment is so far an indispensable incident to taxation that no right of action arises until a legal assessment is made. * * * Even a payment of money as taxes on property before the assessment, and the collector's receipt therefor, are no legal discharge of taxes subsequently assessed thereon." So, in *Cooley on Taxation*, 259, it is said, citing many authorities, that: "Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without assessment they can have no support, and are nullities." *Perry Co. v. Selma, M. & M. R. Co.*, 58 Ala. 560."

Judgment affirmed.

McCLELLAN, C. J., dissents.

MOSES v. PHILADELPHIA MORTGAGE & TRUST CO. et al.

(Supreme Court of Alabama. Feb. 13, 1902.)

MORTGAGE TO SECURE BONDS—ADDITIONAL SECURITY—MONEY DEPOSIT BY MORTGAGOR—INVESTMENT BY TRUSTEE—PURCHASE OF BONDS—ASSIGNMENT OF DEPOSIT BY MORTGAGOR—ASSIGNMENT OF BONDS—RIGHTS OF ASSIGNEE—FORECLOSURE—PURCHASER OF EQUITY OF REDEMPTION—INTEREST IN COLLATERAL DEPOSIT.

1. Where land conveyed in trust to secure bonds is incumbered with a prior lien, and the mortgagor, in order to secure the bondholders against such lien, makes a money deposit with the trustee, and the trustee invests such deposit in some of the bonds secured by the deed of trust, the mortgagor may assign the bonds so purchased by the trustee, just as he could have assigned the original deposit, subject to the equities of the holders of the other bonds.

2. Where land conveyed in trust to secure bonds is incumbered with a prior lien, and the mortgagor, in order to secure the bondholders against such lien, makes a money deposit with the trustee, a subsequent assignment of such deposit by the mortgagor to a third person is an election, the benefit of which is transmitted to the assignee, that the deposit must not be applied to the bonds until after the land has been exhausted; and a purchaser of the mortgagor's equity of redemption in the land at a sale under a judgment rendered after the assignment of the deposit acquires no interest whatever in the deposit.

3. Where land conveyed in trust to secure bonds is incumbered with a prior lien, and the mortgagor makes a money deposit with the trustee to protect the bondholders against such lien, and the trustee invests such deposit in some of the bonds secured by the deed of trust,

and thereafter the mortgagor assigns the bonds so purchased by the trustee, the assignee becomes a bondholder, with all the rights pertaining thereto, subject only to the equities of the other bondholders arising from the purpose of the deposit, and has the right to have the mortgage foreclosed.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Bill by Judah T. Moses against the Philadelphia Mortgage & Trust Company and others to foreclose a mortgage securing certain bonds. From a decree dismissing the bill, complainant appeals. Reversed.

The bill, as amended, averred the following facts: On October 13, 1888, the Montgomery Real Estate Association, a corporation organized under the laws of Alabama, and having its principal place of business in the city of Montgomery, regularly issued 80 bonds in the sum of \$1,000 each, aggregating \$80,000, and to secure the payment of said bonds and the interest coupons attached thereto the board of directors of the said Montgomery Real Estate Association executed and delivered a deed of trust to the Philadelphia Mortgage & Trust Company, conveying to said mortgage and trust company all the property owned by said association. This transaction was authorized by the stockholders of said association. At and before the execution of said deed of trust one Maria L. Sloan had, and still has, a lien upon the lands described in and conveyed by said deed of trust for the payment to her annually during the term of her natural life a sum of \$450. In order that the bonds issued by said association might be more readily sold, there was incorporated in each of said bonds the statement that the trust deed was a first lien on the property conveyed, "subject only to the annuity charge of \$450 per annum, which is secured by the deposit with said Philadelphia Mortgage & Trust Company, trustee, of the sum of \$8,000 in cash, which, with its income, is so deposited for the purpose of securing the prompt payment of the annuity deposited, payable semiannually during the lifetime of" Maria L. Sloan, the beneficiary. The deed of trust did not contain or make any reference to said agreement. Maria L. Sloan was living at the time of the filing of the bill. All of the issue of the bonds by the Montgomery Real Estate Association was placed in the hands of the Philadelphia Mortgage & Trust Company, as the agent of said association, and said mortgage and trust company sold all of said bonds at par to persons whose names were known to the complainant, and received the proceeds therefor. The said mortgage and trust company accounted to said association for only \$72,000 of proceeds from the sale of said bonds, and held \$8,000 of said proceeds in lieu of the cash agreed to be deposited with said trustee to secure the annuity of said Maria L. Sloan. The mortgage and trust company subsequently invested the \$8,000 so retained by it

by purchasing back \$8,000 of said bonds, and held the \$8,000 of said bonds so purchased in lieu of the \$8,000 of cash which was to be deposited to secure the annuity of said Maria L. Sloan. After the repurchase of said \$8,000 in bonds, to wit, in August, 1891, the said Montgomery Real Estate Association, for a valuable consideration, sold to complainant the said \$8,000 of bonds so repurchased by said mortgage and trust company, and held by it in lieu of the \$8,000 in cash agreed to be deposited. Complainant is the owner of said bonds, subject only to the payment of the annuity to said Maria L. Sloan. The \$8,000 of bonds so repurchased have ever since remained in the hands of the mortgage and trust company, and said company has refused and still refuses to recognize any right or interest of complainant in and to said \$8,000 of bonds. The mortgage and trust company has no other right to said \$8,000 bonds so purchased than to secure said annuity of Maria L. Sloan. The Montgomery Real Estate Association promptly paid the interest on the \$72,000 of said bonds held by parties other than the said trustee, and paid the annuity of said Maria L. Sloan up to the time the property conveyed in the mortgage was sold by the sheriff under the execution, to be presently referred to; and upon receiving proof of the payment of said annuity each six months the said mortgage and trust company surrendered to said association the coupons for interest on the \$8,000 of bonds repurchased by it, and this continued up to May 1, 1892, although the mortgage and trust company knew of the purchase by complainant of the \$8,000 of bonds and coupons in August, 1891. At the June term, 1892, of the circuit court of Montgomery, Janney & Cheney, as trustees of Moses Bros., obtained a judgment against the Montgomery Real Estate Association for the sum of \$14,000. Execution was issued upon this judgment, and levied by the sheriff upon all the real estate described in the deed of trust to the Philadelphia Mortgage & Trust Company. The property so levied on was sold, and at said sale Janney & Cheney, as said trustees, bid off the sale for the amount of their judgment and costs, and afterwards sold said property to one David Wright, and executed to him a deed for the property so levied upon and sold. Wright went into possession of said property, and has so remained ever since, receiving the rents, issues, and profits therefrom, and applying the same to his own use; and the purchase by Wright at the sheriff's sale of said property was subject to the annuity of Maria L. Sloan, and subject to the deed of trust securing the payment of \$80,000 of bonds issued by the Montgomery Real Estate Association. The property conveyed by said deed of trust comprised all of the property owned by said association, and said association is insolvent. Since the purchase of said property by Wright, he has paid to the Philadelphia

Mortgage & Trust Company, as trustee, the interest on all of the said \$80,000 of bonds issued by the Montgomery Real Estate Association, except the \$8,000 of bonds which were purchased by and belonged to the complainant. The Philadelphia Mortgage & Trust Company has failed and refused, and still fails and refuses, to compel the said Wright to pay the interest on said \$8,000 of bonds, and has also refused and failed, and still refuses and fails, to foreclose said deed of trust on account of said failure to pay the interest coupons on the \$8,000 of bonds. Since his purchase at the sheriff's sale, Wright had paid, and continues to pay, to Maria L. Sloan, each year, her annuity. The amount of annual interest on the \$8,000 of bonds is \$480, but the complainant has never received any of said interest, although he was entitled to the same since his purchase in August, 1891, and since that time all the interest coupons on said \$8,000 have remained unpaid. On November 1, 1898, the principal of the whole of said \$80,000 became due, but no steps whatever have been taken by the mortgage and trust company to collect the principal and interest due on said \$80,000 of bonds, or to foreclose the deed of trust by sale of the mortgage property. The said David Wright during his lifetime, and his devisees and executors since his death, have some arrangement, of the nature of which the complainant is not informed, with the holders of the \$72,000 of the bonds, other than those claimed by complainant, and with the Philadelphia Mortgage & Trust Company, by which it is understood and agreed between the parties thereto that the deed of trust shall not be foreclosed, and that the complainant shall not be permitted to have the deed of trust foreclosed, and his interest on the \$8,000 of bonds collected and paid to him. On January 23, 1899, the complainant informed the Philadelphia Mortgage & Trust Company, in writing, that he was the owner of said \$8,000 of bonds held by it under said agreement, and demanded of said trust company that the deed of trust be foreclosed; but said mortgage and trust company has failed to pay any attention to the demand of the plaintiff, and refuses to take any action in reference to the foreclosure of said deed of trust. By reason of the fact that the said Wright became the purchaser of the property at the sheriff's sale subject to the said mortgage, and by reason of the fact that said Wright has made some arrangement and agreement, as stated above, with the owners of the \$72,000 of bonds, it is impossible for the complainant to get the consent of \$50,000 in value of said bonds to make a demand upon the trustee for the foreclosure of the deed of trust, as is required in said deed of trust. The property conveyed by said deed of trust is of value largely more than sufficient to pay the amount due upon said 80 bonds and interest thereon. It was then averred in the bill that since the com-

mencement of the suit David Wright had died, leaving a last will and testament, which was duly probated, and the names of his devisees are given, who are alleged to have been over the age of 21 years. The Montgomery Real Estate Association, the Philadelphia Mortgage & Trust Company, and the devisees under the will of David Wright are made parties defendant. The prayer of the bill was as follows: "That the said deed of trust be foreclosed; that the complainant be decreed to be the owner of said \$8,000 bonds so repurchased, and that a reference be held to ascertain the amount of principal and interest due on all of said \$80,000 of bonds; that the property mentioned in said deed of trust be ordered sold subject to the lien of said Maria Sloan for her annuity, and that if the said property, when so sold, brings enough to pay all of said \$80,000 of bonds and the interest due thereon, and sufficient to repay to said David Wright and his executors and devisees the amounts paid by them on the said annuity of the said Maria Sloan, and enough to pay said annuity up to the confirmation of the said sale, together with costs and expenses of this suit, said proceeds of said sale be so apportioned as to pay complainant the amount due on said \$8,000 of bonds and interest; but, if upon the said sale the said property does not bring enough to pay and satisfy the whole amount of principal and interest due on said \$80,000 of bonds and the amounts paid on said annuity by said Wright, his devisees and executors, and the amount due on said annuity to the confirmation of said sale, together with the costs and expenses of this suit, that then your honor will order paid out of the proceeds of said sale the said \$72,000 of bonds owned by others than complainant, and the interest thereon, the amounts paid by said Wright, his devisees or executors, on account of said annuity, and the amount due on said annuity to the confirmation of said sale, and the costs and expenses of said sale, and the balance, if any, paid to complainant on account of the amount due on said \$8,000 of bonds so repurchased and the interest thereon." The defendants made a motion to dismiss the amended bill for the want of equity, and also demurred to it upon several grounds. Upon the submission of the cause upon the motion to dismiss the amended bill for the want of equity and upon the demurrers to the bill, the chancellor rendered a decree sustaining the motion to dismiss the bill for the want of equity, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

Clifford Lanier and Watts, Troy & Caffey, for appellant. Graham & Steiner and John G. Winter, for appellees.

TYSON, J. For a statement of the facts of this case reference is made to the report of

it on former appeal in 29 South. 463. After a return of the case to the court below, the complainant amended his bill so as to state the transaction between the mortgagor and the trustee such as our opinion stated it in effect to have been; that is, that the possession by the trustee of the \$8,000 of bonds was the result of an investment by it of the \$8,000 of cash stipulated to be deposited for the payment of the annuity to Mrs. Sloan. After averring the purchase of the eight bonds by the trustee out of the trust funds, the bill, as amended, seeks a foreclosure of the mortgage, which is past due, and an adjustment of the equities between all the parties so as to give the complainant his pro rata share of the eight bonds out of the proceeds of the sale of the mortgage property after the other bonds are paid. The bill, on motion, was dismissed for want of equity, and the correctness of that decree is now before us for review. Confessedly, if the whole series of bonds (80 in number) had been sold by the trustee, and were outstanding, and \$8,000 of the proceeds had been invested by the trustee, as it had the right to do, in bonds of the United States or bonds other than those issued by the mortgagor, it is clear that the 80 bonds would be secured by the mortgage lien on the property, and that it would be subject to sale for their payment, subordinate, however, to the annuity to Mrs. Sloan. It is also equally clear, on this state of facts, that, if the property should bring enough to pay the bonds in full, the demands and equities of every kind of the holders of them would be satisfied, and the bonds purchased and held by the trustee to indemnify the holders of the 80 bonds against the Sloan annuity would belong to the mortgagor. Of course, if there should be a deficiency, the bonds in the hands of the trustee would have to be applied to its payment as far as necessary. The fact that the trustee invested the \$8,000, which was deposited with it, in 8 of the 80 bonds issued by the mortgagor, does not and cannot affect the principle. Subject to this right and equity of the holders of the 72 bonds, the deposit with the trustee, no matter how invested, belonged to the mortgagor, and, of course, could be assigned, the purchaser taking subject to all equities. The bill alleges such assignment to complainant, and the sole question is, what are his rights as purchaser? If there had been no sale of the equity of redemption of the mortgaged property,—that is, if the mortgagor was still in possession of it, and having transferred its residuary interest in the deposit with the trustee to the complainant,—it is obvious that, when the holders of the 72 bonds are satisfied in any legal manner, as by sale of the mortgaged premises, complainant would be entitled to the deposit or its representative, not only as against the bondholders, but as against the mortgagor. Then how can the fact that the mortgagor's equity of redemption was sold under execu-

tion or otherwise alter the equities of complainant or of the bondholders? Wright, the purchaser of the equity of redemption at execution sale, simply stepped into the shoes of the mortgagor. He holds the real estate subject to all valid liens on it at the date of his purchase. He has no equity to have the Sloan debt paid out of the deposit, or to have the deposit first applied, or applied at all, to the extinguishment of any portion of the debt evidenced by the bonds and secured by the mortgage, so as to reduce the debt against the real estate, and thereby increase the value of the equity of redemption. In short, a sale of the mortgage property under execution was not a sale of the deposit, and therefore the purchaser, Wright, at that sale, acquired no interest whatever in the deposit. To repeat, the bondholders have a mortgage lien on the property for their debt, and as a collateral to them against the Sloan annuity's absorbing the property to their detriment the deposit was made. It can make no possible difference to them whether they are paid first out of the deposit and second out of the mortgage property. The mortgagor would have the right to direct the order of the application, and it exercised this right when it assigned the deposit to the complainant, which assignment antedated the rendition of the judgment upon which the execution was issued under which Wright bought the equity of redemption. By making the assignment to complainant, and retaining its equity of redemption in the mortgage property, the mortgagor armed the assignee complainant with the right to insist that the real estate should be first exhausted. Wright, the purchaser of the equity of redemption, after the assignment of the deposit to complainant, cannot stand in any better attitude than the last assignee of several notes secured by a common lien, which, of course, is subordinate to the rights of the prior assignees. *White v. King*, 53 Ala. 162; *Insurance Co. v. Hall*, 58 Ala. 1. When the mortgagor assigned to complainant its equity to the bonds on deposit with the trustee, the complainant succeeded to all the rights of a bondholder, subject to the rights and equities pointed out above of the holders of the 72 bonds, and therefore has the right to have the mortgage foreclosed by a sale of the property conveyed by it subject to the Sloan annuity, and to have his bonds paid in full if the property should bring enough to pay the other bondholders and him also. Should, however, the proceeds of sale be not sufficient to pay the 72 bonds in full, then, of course, the complainant would get nothing. But should there be any balance after paying the other bondholders, the complainant will be entitled to it to the extent of the amount due upon the eight bonds, including the interest thereon from the date of their assignment to him. The direction that all interest accruing on the bonds after their assignment be allowed to complainant is based upon the principle

that it was the duty of Wright, as of the mortgagor, to pay the Sloan annuity as a first lien, as it is his duty to continue to do so to preserve the property. It is scarcely necessary to say that Mrs. Sloan, so far as appears from the averments of the bill, was not a party to the agreement resulting in the deposit with the trustee. In conclusion, it may not be amiss to say that the question here presented is entirely different from the one reviewed on the former appeal, as will readily appear from a comparison of the two opinions.

Reversed and remanded.

BLAND v. PUTMAN.¹

(Supreme Court of Alabama. Feb. 5, 1902.)

JUDGMENTS—LIEN—REGISTRY—HOMESTEAD—ABANDONMENT—EVIDENCE.

1. Under Acts 1898-99, pp. 34, 35, amending the Code relating to registry of judgments so as to become liens on real estate, and dispensing with the requirement that the registry shall show who is the owner of the judgment, the registry in the office of the probate judge of a certificate of the clerk of the court that on a day stated a named plaintiff recovered of a named defendant in the circuit court of said county judgment for a stated sum, and giving the name of plaintiff's attorneys of record, is sufficient.

2. Where the owner of land on which he has been living rents it for a series of years, and moves away without reservation of any part of the dwelling for use as his residence, and without filing a claim of homestead exemption, as provided by Code, § 2065, he thereby abandons his homestead in the premises.

3. Where the owner of land which has been occupied by a tenant for several years seeks to defeat an execution sale thereof on the ground that it is his homestead, and the only issue is whether, when leasing, he reserved a part of the dwelling for his use as a residence, he should not be permitted to testify that he reserved a part of the house "to live in."

4. On the trial of an issue between the owner of land which has been rented for several years and a judgment creditor to determine whether, at the time of renting, the owner reserved a part of the dwelling for his use as a residence, his testimony as to the physical condition of his wife is irrelevant.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Action by J. R. Bland against G. L. Putman. From a judgment for defendant sustaining his claim that land levied on by execution was his homestead, plaintiff appeals. Reversed.

J. R. Bland recovered a judgment in the circuit court of Madison county against G. L. Putman on the morning of May 26, 1899. Immediately upon the recovery of this judgment the plaintiff secured from the clerk of the circuit court a certificate of said judgment, which he filed at once in the office of the probate judge. This certificate, exclusive of the statement as to the state and county and the signature of the clerk, was in words

and figures as follows: "I, W. T. Lawler, clerk of the circuit court for said county and state, hereby certify that on the 26th day of May, 1899, J. R. Bland, plaintiff, recovered of G. L. Putman, defendant, in the circuit court of said county, judgment for the sum of \$500, and for the further sum of \$35, costs of suit, and that Grayson and Foster are plaintiff's attorneys of record." An execution was issued upon this judgment, and was levied upon certain lands as the property of the defendant, Putman. Thereupon Putman interposed his claim of homestead exemption as to the land so levied upon. The plaintiff in execution contested said claim by regular proceedings. On the hearing of the contest so instituted the certificate by the clerk of the court of the plaintiff's recovery of the judgment against Putman was introduced in evidence. The plaintiff also introduced evidence showing that Putman rented the lands now claimed as exempt to one Thos. Riddle in 1897; that said Riddle went into possession of said lands and occupied them for that year, and the defendant, Putman, lived with his family in Tennessee; that the defendant, Putman, rented the same lands to Riddle for the years 1898 and 1899, and he occupied the house situated upon said lands as his residence. It was shown by the evidence that the house which was so rented to Riddle was prior to the said renting occupied by Putman as his homestead. Riddle as a witness testified that upon the date the plaintiff recovered the judgment against Putman, after the rendition of such judgment, said Putman came to the house occupied by Riddle, and asked him if he would give him (Putman) permission to occupy the side room of said house for a while; that upon his consenting to do so Putman came the following day, and moved a few things in said room, and had occupied it "off and on ever since," boarding with Riddle during the time. Riddle further testified that at the time he rented the place from Putman the latter asked him if he would let him keep some furniture in the side room until he could move it out; that the furniture was left in said room, and in about two weeks thereafter said Putman moved, and that said room had not been occupied up to the day after the rendition of the judgment in favor of the plaintiff. The evidence for the defendant tended to show that at the time he rented the place to Riddle he expressly reserved one of the rooms for his occupancy, and that although his family had moved to Tennessee he claimed his residence and his homestead upon said place. The defendant sought to prove that his wife was afflicted, being both deaf and dumb, but, upon objection interposed by the plaintiff, the court declined to allow such proof to be made, and to each of such rulings the defendant separately excepted. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

¹ Rehearing denied June 23, 1902.

² See Homestead, vol. 25, Cent. Dig. §§ 320, 333.

The court in its oral charge, among other things, instructed the jury as follows: "(1) The fact that the defendant did not file his claim of exemptions in the probate judge's office prior to the recording of the judgment on which the execution in evidence was issued cuts no figure in this case. (2) If at the time the defendant leased or rented said lands he intended to return and occupy them as a homestead, it makes no difference whether he filed his declaration of claim in the probate judge's office or not, and if the jury believe that the defendant did not intend to abandon his home, and that he obtained permission from Thomas Riddle to occupy said premises on May 25th, and that he moved into the house on the 27th, then they should find for the defendant." The plaintiff separately excepted to each of these portions of the court's oral charge, and also separately excepted to the court's refusal to give each of the following charges requested by him: "(1) If the jury believe from the evidence that the defendant in the early part of the year 1897 or 1898 left his home and went into the peddling business, and that since that time the place had been rented out to Riddle, who has occupied the same continuously, and if they further find that before so leaving he did not file a declaration of exemptions in the office of the probate judge of Madison county, then they must find that this was an abandonment of his homestead. (2) If the jury believe from the evidence that the defendant rented his place to Riddle, without having filed a declaration of exemptions in the office of the probate judge of Madison county, you must find that he had abandoned his homestead. (3) If the jury believe from the evidence that the defendant left his home temporarily, with the intention of returning, you must find that he had abandoned his homestead, unless you also find that before leaving he filed in the office of the probate judge of Madison county his declaration of exemptions. (4) If the jury think Putman was mistaken when he said he was here on the 25th day of May, instead of the 26th, and they further find he had abandoned his home up to this time, and that he did not make arrangements with Mr. Riddle until the night of May 26, 1899, then they will find for the plaintiff or contestant." There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

David A. Grayson and E. H. Foster, for appellant. Oscar R. Hundley, for appellee.

McCLELLAN, C. J. In the opinion originally handed down¹ in this case we declared that the registry of the judgment in the case of Bland against Putman was inoperative as a registry importing a lien under the statute,

for that neither the certificate of the clerk of the circuit court nor the registry in the office of the judge of probate showed who was the owner of the judgment; citing *Duncan v. Ashcraft* and other cases so holding with reference to the original statute and its codification. On application for rehearing our attention is drawn to the act of February 23, 1899 (Acts 1898-99, pp. 34, 35), amending the Code, and dispensing with the requirement that the registry of a judgment shall show who is the owner of it. Under this statute the registry of Bland's judgment shown in this transcript was valid, and the judgment was a lien on the land now claimed by Putman as a homestead in effect on and after May 26, 1899.

The evidence showed that Putman rented the land to Riddle for the years 1897, 1898, and 1899 severally. He claims to have reserved a part of the dwelling on the land for use as his residence in each of these rentals. There was some evidence adduced in support of this claim,—enough to carry the question to the jury and render the affirmative charge for plaintiff improper, but not enough to stand against a motion for a new trial on verdict for the claimant. Unless such reservation was made, no claim of homestead exemption, as provided by section 2065 of the Code, having been filed by Putman before he rented the place to Riddle and moved from it, he must be held to have abandoned his homestead in the premises. *Pollak v. Caldwell*, 94 Ala. 149, 10 South. 266; *Blackman v. Hardware Co.*, 106 Ala. 458, 17 South. 629; *Gist v. Lucas*, 122 Ala. 557, 25 South. 41; *Land v. Boykin*, 122 Ala. 627, 25 South. 172; *Porter v. Harrison*, 124 Ala. 296, 27 South. 302. Whether the reservation, if there was any, was for the purpose of continued occupation as a home, was to be gathered from the tangible facts and circumstances in evidence. Putman should not have been allowed to testify that he reserved a part of the house "to live in." And this was, in view of the conclusion to which we are now come, that the registry of the judgment was efficacious, the only issue in the case, the evidence being without conflict to the effect that the registration of the judgment was perfected before his return to the place, on May 26 or 27, 1899.

The court's instructions to the jury and some of its rulings upon instructions requested by the plaintiff are not in harmony with the foregoing views. We deem it unnecessary to point out its errors in this connection more particularly.

As to rulings upon the competency of evidence: As indicated above, we think the court erred in allowing Putman to testify that he made the reservation he speaks of, of a part of the house, for the purpose of living in it. We are unable to see the legal pertinency of his testimony as to the physical condition of his wife. That also should have

¹ Opinion withdrawn.
32 So.—394

been excluded. The other rulings upon admissibility of proposed evidence are free from error.

Reversed and remanded.

(108 La.)

Succession of BELLOW. (No. 14,311.)

(Supreme Court of Louisiana. June 30, 1902.)

SUCCESSION SALE—PURCHASE BY MORTGAGEE.

1. A mortgage creditor, purchasing at a succession sale the property on which his mortgage bears, is entitled to retain in his hands the amount of his bid up to the amount of his mortgage, but must give bond, conditioned that he will pay to the representative of the succession the amount thus retained, in case he is ordered to do so in the course of the settlement of the succession.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. John the Baptist; J. L. Gaudet, Judge.

In the matter of the succession of Thomas Bellow. From a rule compelling the sheriff to accept, on sale of certain property, a mortgage note in payment of his bid, certain creditors appeal. Affirmed.

Hamilton Numa Gautier, for appellants.
Alfred B. Billings and L. H. Marrero, Jr., for appellee.

PROVOSTY, J. The administrator of the succession of Thomas Bellow, setting forth a list of the creditors of the succession, and alleging that the succession was insolvent, and that it was necessary to sell all its property to pay debts, obtained an order accordingly. The real estate, appraised in the inventory at \$1,000, was adjudicated for \$1,000 to Eugene Roussel, a creditor put down on the list of debts as holder of the note of the deceased for a like amount of \$1,000, secured by first mortgage on the property sold. The adjudicatee tendered said mortgage note in payment of his bid, and, upon the refusal of the sheriff to accept the same, took a rule on him and on the administrator to show cause why said tender should not be accepted and title made. In the rule the above facts are alleged, namely, the existence of the mortgage, the recognition thereof by the administrator, the adjudication to the plaintiff in rule, the tender, and the refusal. The defendants in rule made answer, admitting the allegations of the rule, and submitting the matter to the judgment of the court. The court rendered judgment making the rule absolute, and from that judgment the present appeal is taken.

The appellants are some of the unsecured creditors of the succession. In their petition for appeal they allege as follows: That the succession is insolvent; that the note in question and the mortgage purporting to secure its payment are simulations; and that said

note does not belong to the adjudicatee Roussel. They support these allegations by affidavit.

The judgment appealed from, as founded on the allegations of the rule and the answer thereto, is correct, except that it should have required the adjudicatee to furnish bond for the payment of the money, in case he should be called upon to pay it in the course of the settlement of the succession. *Tertrou v. Durand*, 30 La. Ann. 1108.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended as follows: That before the sheriff delivers the deed and possession of said land to Eugene Roussel, and as condition precedent thereto, the said Roussel shall execute, with good and sufficient security, in favor of the administrator of the estate of Thomas Bellow, his bond in the sum of \$1,000, conditioned that he will pay and satisfy such sums as may be fixed and ascertained on settlement of said estate to be payable by preference to him out of the proceeds of the land so purchased by him up to the amount of his bid; said bond to be approved by the judge of the district court of the parish of St. John the Baptist.

It is further ordered that, as thus amended, said judgment be affirmed; the cost of appeal to be paid by appellee, Eugene Roussel, and the costs of the rule in the lower court to be borne by the succession.

TROY FERTILIZER CO. v. STATE

(Supreme Court of Alabama. June 23, 1902.)

CORPORATIONS—PRIVILEGE TAX—STRIKING OUT SPECIAL PLEAS—HARMLESS ERROR.

1. A corporation part of the business of which is manufacturing fertilizers and selling the same, by paying the license tax required by Code, § 379, of any person, firm, or corporation for selling or exchanging fertilizers, or the tax tag required by section 386 for tags to be attached to the packages of fertilizers sold, is not exempted from paying the privilege tax imposed by section 4122, subd. 55, providing that all corporations doing business in the state, not otherwise specifically required to pay a license tax, shall pay a privilege tax.

2. Under Code, § 3286, providing that a pleading, when unnecessarily prolix, irrelevant, or frivolous, may be stricken out on motion, objection that a plea does not set up a valid defense cannot be made by motion to strike out; it should be by demurrer.

3. Error in striking out special pleas on motion cannot be held harmless, on the ground that defendant had the benefit of its pleas under the plea of the general issue, where the court gave the general affirmative charge for plaintiff, and if the special pleas had remained in, and issue had been taken on them, on the undisputed evidence, defendant, having proved its pleas, would have been entitled to the general charge in its favor.

Appeal from circuit court, Pike county; Jno. C. Anderson, Judge.

Action by the state against the Troy Fertilizer Company. Judgment for plaintiff. Defendant appeals. Reversed.

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1512.

This action was brought by the state of Alabama against the Troy Fertilizer Company to recover of the defendant the privilege tax of \$75 for each of the years 1897, 1898, and 1899, which was alleged not to have been paid by the defendant corporation as required by law. The defendant pleaded the general issue and five special pleas. The substance of the second, third, and fourth special pleas is sufficiently stated in the opinion. By the fifth and sixth pleas the defendant set up the unconstitutionality of subdivision 55 of section 4122 of the Code, under which the present suit was brought. The plaintiff moved to strike each of the special pleas upon the grounds that they were frivolous, and upon several other grounds setting up substantially that said special pleas presented no defense to the cause of action set forth in the complaint. The court sustained this motion to strike each of said special pleas, and to this ruling of the court the defendant duly excepted. The other facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the general affirmative charge in its behalf, to the giving of which charge the defendant duly excepted. The defendant also excepted to the court's refusal to give the general affirmative charge requested by it. There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Worthy & Gardner, Foster, Samford & Carroll, and B. L. Harmon, for appellant. Chas. G. Brown, Atty. Gen., and G. J. Hubbard, for the State.

DOWDELL, J. This is an action by the state to recover of the defendant corporation the privilege tax imposed by subdivision 55 of section 4122 of the Code.

The defendant filed six pleas to the complaint; the first being the general issue, and the remaining five setting up special defenses. On plaintiff's motion, the special pleas were stricken from the file, and this ruling of the court constitutes one of the appellant's assignments of error. The defense sought to be set up in the special pleas, which were stricken, is that the defendant is exempt from the privilege tax for which it is sued, for the reason that it was required to pay, and did pay, the license tax required by section 379, of dealers in commercial fertilizers, and that it had also paid the tag tax required by section 386. The defendant corporation, as such, was engaged in the business of manufacturing and selling commercial fertilizers, cotton seed oil, cotton seed meal, and stock food put up in bales, all of which was the product of its plant, and the business so carried on being that for

which the said corporation was organized. The part of subdivision 55 pertinent to the question here raised reads as follows: "All corporations doing business in this state, whether organized in this state or another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes," etc. This provision forms a part of a statute which was enacted for the manifest purpose of raising revenue for the purposes of government by the imposition of a license tax. The tax imposed by subdivision 55 is, as its language imports, a privilege tax required of all corporations, as a class, before doing business in this state, without reference to the character of the business done, excepting, however, from its provisions, "banks and banking institutions regularly organized as such." It is a license to the corporation as such, and as contradistinguished from a natural person. It is a privilege tax required of these artificial persons before they can do business of any character. It is not a tax imposed upon a particular business, and it is of consequence—wholly unimportant—as to the kind or character of business the corporation may engage in, or whether the particular business, as a business, be otherwise taxed or not. It is a license or privilege to enter upon or into business of any character, as distinguished from the doing and carrying on of some particular business, for which a license may or may not be required. The license fee of \$1 imposed by section 379 is clearly not a privilege tax specifically required of corporations as such for doing business. It is only a fee required to be paid for the license authorized to be issued to any person, natural or artificial, wishing to engage in doing the particular thing of selling or exchanging commercial fertilizers. A license to do that, which may be a mere incident to the principal business of a corporation,—a thing that may arise after the principal business has been entered upon. The privilege tax imposed by subdivision 55 is required to be paid before the doing of any business by the corporation. The business of the defendant corporation, among other things, was the manufacture of commercial fertilizers. It sold only its own product; it was doing business in the manufacture of commercial fertilizers before it could have such article to sell or exchange. What we have said applies with equal force and reason to the defense set up by the defendant of having paid for the tags required to be attached to the packages of fertilizers sold under section 386.

Section 3286 provides that pleading, when unnecessarily prolix, irrelevant, or frivolous, may be stricken on motion. If the pleading, however, is not prolix, irrelevant, or frivolous, and the only other ground of objection is that the plea does not set up a valid defense, motion to strike is not the proper remedy. The pleas here were neither

prolix, irrelevant, nor frivolous, and the court erred in sustaining the motion to strike. The plaintiff should have been put to a demurrer. *Brooks v. Insurance Co.*, 125 Ala. 615, 29 South. 13.

It is contended by appellee, however, that, as the special pleas set up no valid defense, the most that can be said of the court's action is that it was error without injury. As a general proposition, this is not a sufficient answer, for, if such were the case, the office of demurrer would be practically dispensed with. It would have been one of the offices of a demurrer to point out such objection in order that the opportunity of amendment might be afforded the pleader. It is further contended that the defendant was permitted, without objection, to offer evidence of every fact stated in the several pleas, and that therefore he had the benefit of his pleas under the plea of the general issue. That he did not have the benefit of his special pleas under the plea of the general issue is patent from the action of the court in giving the general affirmative charge for the plaintiff. Matters set up in the special pleas were such as are required to be specially pleaded, and evidence of these matters, as the complaint was framed, was not competent or relevant under the general issue. If the special pleas had remained in, and issue had been taken on them, on the undisputed evidence, the defendant, having proved its pleas, would have been entitled to the general charge in its favor. So, if it should be considered that what was set up in the special pleas was in fact in issue, under the plea of the general issue, and was so regarded by the court and the parties, then the court should not have given the affirmative charge for the plaintiff. The question of the unconstitutionality of the statute is not insisted on in argument, and we therefore do not consider that question. For the error in striking the pleas, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

HEREFORD v. HEREFORD.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

DEED—DESCRIPTION—LATENT AMBIGUITY—
PAROL EVIDENCE.

1. Latent ambiguity in a deed describing land conveyed as beginning at the "north" corner of a certain lot, caused by its appearing that said lot had two north corners, may be removed by parol evidence that, taking the northeast corner as the commencement point, land owned by the grantor would be included, without altering descriptions, and that, with the northwest corner as the commencement point, land not owned by or in the possession of or claimed by him or the grantee would be included.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Action by Harry Hereford against Lucy Hereford. A new trial was granted defendant, and plaintiff appeals. Affirmed.

This was a statutory action of ejectment, brought by the appellant, Harry Hereford, against the appellee, Lucy Hereford, to recover a certain lot or tract of land specifically described in the complaint. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court at the request of the plaintiff gave the general affirmative charge in his behalf, to the giving of which charge the defendant duly excepted.

There were verdict and judgment for the plaintiff. Thereafter the court on motion of the defendant granted her a new trial, and from this judgment granting such new trial, the present appeal is prosecuted; and the rendition of this judgment is assigned as error.

Harmon, Dent & Well, for appellant. E. P. Morrissett and Hill & Hill, for appellee.

HARALSON, J. The lot sued for is described in the complaint, as "a part of lot No. 5 in square No. 20 in that part of the city of Montgomery, state of Alabama, laid off on the Scott property; said lot beginning at the northeast corner of lot formerly owned by Mary Ann Green, thence, running north, 35 feet, thence, 75 feet west, thence, south, 35 feet, thence, east, 75 feet to the point of beginning, said point of beginning being about 78 feet north of the northwest corner of the intersection of Union and Columbus streets," etc.

The plaintiff claims title under a deed from E. W. Taylor and wife to him, duly executed on the 30th of September, 1884, in which the land is described as a lot of land in the city of Montgomery, Ala., "said lot of land known as a part of lot number 5 in square number 20, in that part of the city of Montgomery laid off on the Scott property, said lot beginning at the north corner of Mary Ann Green's lot, running north, 35 feet, thence, 75 feet west, thence, running south 35 feet, thence, east, 75 feet to the corner or place of beginning."

The defendant holds and claims title to the lot under a deed from the plaintiff to her, duly executed on the 10th of January, 1898, in which the lot is described in substantially the same manner, and in almost the same words as in the deed from Taylor and wife to the plaintiff, copied above. In both the deeds, the beginning of the particular description, is "at the north corner of the Mary Ann Green lot." We have in each deed everything to make the description certain, except that the beginning of the particular description is placed at the north corner of

¹ Rehearing denied June 23, 1902.

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 2117, 2118.

the Green lot, instead of at its northeast corner. If the northeast corner of the said Green lot had been specified in the initial part of description, there would have been no uncertainty of description, when the boundaries of the Green lot were once shown. In construing a deed, where the description is by metes and bounds, "evidence of the situation and locality of the premises, and of their identity is admissible. But such evidence is not admissible to show a mistake in the description, or alter or vary the boundary, or to substitute another and different boundary for the one expressed in the conveyance." *Gulmartin v. Wood*, 76 Ala. 209.

The plaintiff introduced in evidence a diagram of the premises, showing the relative situations of the lot sued for and the Green lot. The latter, by this plat, is a parallelogram fronting on the east and south of Union and Columbus streets respectively, with its longer sides,—about 78 feet long,—running north and south, and its shorter sides,—about 51 feet long,—running east and west. The northeast corner of the Green lot is the beginning of the eastern boundary of the lot sued for, which, like the Green lot, is also a parallelogram, but with its longest sides running east and west, and its shortest ones, north and south, the north boundary of the Green lot being, to the extent of its width, 51 feet, the south boundary of the lot in question. This evidence, on the part of plaintiff, was proper to show the identity and situation of the lot in litigation. The defendant, in connection with her deed, offered to show by parol, that she was in possession of a lot in said square 20 of the Scott plat in Montgomery which would be correctly described by both deeds offered in evidence, if the northeast corner of the Green lot were taken as a point of departure in description; that this was the only lot she owned or occupied in that square or elsewhere; that she was in possession of the same at and before the execution of the deed by plaintiff to her, and has since been in continuous possession, holding the same under said deed; that by beginning the description at the northwest corner of said Green lot and following the courses mentioned in the deed, it would embrace land never owned or in the possession of plaintiff as claimed by him or defendant. The court refused to allow the defendant to introduce the evidence to explain or remove said alleged uncertainty, excluded her deed from the jury, and gave the general charge for the plaintiff. Afterwards, the court, on motion of the defendant granted her a new trial, from which ruling the appeal is prosecuted by plaintiff.

The defendant's deed on its face does not contain a patent ambiguity; it does not equally describe two lots. In such case parol proof

of what was intended by the parties to the deed will not be received. *Chambers v. Ringstaff*, 69 Ala. 143. But by evidence outside this deed, a latent ambiguity in its description does arise, to remove which parol evidence is competent. In order to describe the lot conveyed, the north corner of the lot formerly owned by Mary Ann Green is referred to. This lot, as shown by the diagram introduced in evidence by the plaintiff, has two north corners,—the northeast and the northwest,—said lot being a parallelogram, as is shown, with its short sides running 51 feet each, from east to west, and its long sides, 77.50 feet in length, running north and south. The lot in defendant's deed by the description therein employed, is, as we have seen, also a parallelogram adjoining said Green lot, with its southeast corner at the northeast corner of the Green lot. The evidence offered by defendant to clear the uncertainty in the description of the lot in her deed was competent, and should not have been excluded. Having reference to the situation and locality of the premises, in connection with the Green lot with boundaries well defined, we may arrive with certainty at the meaning of the parties in the use of the words, "north corner." By beginning at the northeast corner of the Green lot, the particular calls and courses described in the defendant's deed are clearly met; and by beginning at its northwest corner, these calls and courses are not appropriate, and cannot be made to describe any lot ever owned by plaintiff or defendant in lot 5, square 20 of the Scott lands. This construction gives force and meaning to the grantor's deed, without altering the description or substituting another and different one, from the description expressed in the conveyance. Without this, his deed is of no force or effect. As has appeared, the deed of Taylor to plaintiff under which he claims the lot, has the identical description as the one from plaintiff to defendant. Whatever of indefiniteness of description there was in plaintiff's deed, he attempted by fuller averment in his complaint and proof to make more certain, in order to show his own title; but this method of curing any uncertainty of description in his deed, and showing the identity of the lot he claimed, while legitimate and proper, was not more so than the effort of defendant by similar proof to show the identity of the property mentioned in her deed from plaintiff. What was good for one in this respect, was good for the other.

The court, recognizing the error into which it had fallen in excluding evidence and giving the general charge for plaintiff, sought very properly to cure it in granting the defendant a new trial.

Affirmed.

TENNESSEE COAL, IRON & R. CO. v. GARDNER.¹

(Supreme Court of Alabama. Feb. 13, 1902.)
**BONA FIDE PURCHASERS—RECORD OF DEED
 —NOTICE—JUDICIAL SALES.**

1. Record of a deed from another than the record owner is not constructive notice to a subsequent purchaser of a prior unrecorded deed.

2. Under a decree of confirmation of a judicial sale, the rights of the purchaser relate back to the date of the sale, so that he is not affected with notice by record of a deed after the sale, but before the decree.

3. Code, § 1005, providing that a conveyance of real estate is void as to subsequent purchasers for value unless recorded, affords the same protection to a purchaser at judicial sale as to a purchaser at private sale.

Appeal from circuit court, Bibb county; John Moore, Judge.

Action by Grace Gardner against the Tennessee Coal, Iron & Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

This was a statutory action of ejectment, brought by the appellee, Grace Gardner, against the appellant, the Tennessee Coal, Iron & Railroad Company, to recover certain lands specifically described in the complaint. The facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the defendant, gave to the jury the general affirmative charge in its behalf, to the giving of which charge the plaintiff duly excepted. There was a verdict in favor of the defendant, and judgment was rendered accordingly. Thereupon the plaintiff filed a motion for a new trial, and assigned as grounds of this motion that there was newly discovered evidence, and that the court erred in giving the general affirmative charge requested by the defendant. Upon the hearing of this motion the court granted the same, and rendered a decree ordering a new trial. To this ruling the defendant duly excepted. The defendant appeals, and assigns as error the judgment of the court granting a new trial.

A. Latady, for appellant. S. D. Logan, for appellee.

DOWDELL, J. The plaintiff and defendant each claimed title to the land in controversy from a common source, one Lee Allen, to whom the government issued a patent. The chain of title relied on by the plaintiff is as follows: Patent from the government to Lee Allen, dated December 1, 1860; deed from Lee Allen to James Hill, executed March 6, 1861, recorded September 1, 1890; deed from James Hill to John W. White, dated October 15, 1870, proved September 8, 1884, recorded September 1, 1890; deed from John White to Jesse Miller, dated March 5, 1890, acknowledged March 5, 1890, filed for record April 3, 1890, and again acknowledged

May 10, 1890, and filed for record May 23, 1890; deed from Jesse Miller to the plaintiff, executed on the 26th day of July, 1895, and filed and recorded on the 11th day of November, 1895. The title relied upon by the defendant is as follows: Cahaba Coal Mining Company, the immediate grantor of the appellant corporation, bought the lands at a sale made under a decree of the chancery court of Bibb county on the 7th day of April, 1890, which said sale was duly reported by the register to the court on the 8th day of April, 1890, and at the September term, 1890, of said court, was duly confirmed by said court, and a deed ordered, which was duly executed to the Cahaba Coal Mining Company; the said decree and sale of said lands being had in proceedings in said chancery court for a sale and partition of said lands among the heirs at law of said Lee Allen, the entryman of said lands. A deed from the Cahaba Coal Mining Company to the defendant, dated December 19, 1892, acknowledged January 25, 1893, was filed and recorded on January 31, 1893. At the time the Cahaba Coal Mining Company purchased the lands at the sale by the register, the lands were unoccupied, and were what are known as "wild lands." They had not been occupied by any one since the residence thereon of the heirs of one Eddie Fuller, about 30 years previous.

There is no question involved in the case of notice, actual or constructive, based upon occupancy. The sole question is as to who has the better title, and this we think is to be determined by our statute relating to the registration of conveyances. At the date of the purchase at the register's sale by the Cahaba Coal Mining Company, April 7, 1890, the deed from Lee Allen, the common source of title, to James Hill, and from James Hill to John W. White, had not been recorded; consequently, there was nothing of record which could operate as constructive notice to a subsequent purchaser from Allen. It is contended, however, that the deed from John White to Jesse Miller, being of record, operated as notice to a subsequent purchaser from Lee Allen. The record of a deed from any other person than the grantor from whom title is claimed will not operate to give constructive notice to a subsequent grantee. The following cases sustain this doctrine: *Winston v. Hodges*, 102 Ala. 304, 15 South. 528; *Chadwick v. Carson*, 78 Ala. 116; *Watt v. Parsons*, 73 Ala. 202; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127; *Wood v. Lake*, 62 Ala. 489; *Glmon v. Davis*, 36 Ala. 589; *Trust Co. v. Ledyard*, 8 Ala. 866; *Mal-lory v. Stodder*, 6 Ala. 801; *Fenno v. Sayre*, 3 Ala. 458; *Avent v. Read*, 2 Stew. 488; Code 1896, § 1005. While the deeds of Lee Allen to James Hill and James Hill to John White, offered in evidence by plaintiff, were put upon record prior to the decree of confirmation of the sale, yet they were subsequent to the sale made by the register at

¹ Rehearing denied June 23, 1902.

¶ 2. See Judicial Sales, vol. 31, Cent. Dig. §§ 66, 90.

which the Cahaba Coal Mining Company, grantor of the defendant, became the purchaser. Under the decree of confirmation, the rights of the purchaser related back to April 7, 1890, the date of the sale. *Haralson v. George's Ex'r*, 56 Ala. 295. Section 1005 of the Code of 1896 affords the same protection to purchasers at judicial sales that it does to purchasers at private or individual sales. The doctrine of *caveat emptor*, as applied to purchasers at judicial sales, is without application in the present case. But for the statute, a subsequent purchaser could derive no title from a grantor who had already parted with his title. It is a statute for the protection of subsequent purchasers for value without notice, and makes no distinction between purchasers at judicial sales and purchasers from the individual.

Under this view of the case, there can be no doubt that the defendant had the better title, and the court erred in setting aside the verdict, and granting a new trial. The statements in the affidavit accompanying the motion for a new trial as to the newly discovered evidence fail to show any statement of facts tending to convey notice, either actual or constructive, to the defendant or its grantor, the Cahaba Coal Mining Company, and, even if admitted in evidence, would not affect or vary the conclusion reached. It follows that the judgment of the court in granting the new trial must be reversed, and a judgment will be here rendered overruling the motion for a new trial.

Reversed and rendered.

SCOTT v. STATE.¹

(Supreme Court of Alabama. May 15, 1902.)

MURDER—JURORS—EXCLUSION—PLACE OF HOLDING COURT—SELF-DEFENSE—GOOD CHARACTER—INSTRUCTIONS.

1. The court may, of its own motion, excuse from sitting on the jury a person who is on defendant's bail for his appearance.

2. Under Code, § 898, providing that the circuit court shall be held at the courthouse, there is no error in holding it in the sheriff's office therein.

3. Charge on trial for murder that, under the evidence, accused cannot be deprived of the right of self-defense, though the proof shows he was in default in bringing on the difficulty, unless it is shown that he intended to bring it on, and to bring it on with felonious intent, is erroneous, because it fails to set forth the constituents of self-defense, because making immaterial any act of his bringing on the difficulty, unless he intended to bring it on with felonious intent, and because it ignores the question of reasonable mode of retreat or escape.

4. A requested charge that, if the jury find defendant is a man of good character, they may consider that character in connection with the other evidence in determining his guilt, and it may generate a reasonable doubt of his guilt, is erroneous; "It" referring to the good character alone.

5. A requested charge to acquit if defendant acted in self-defense in the difficulty at the be-

ginning, though he renewed it after deceased retreated, if defendant did not realize deceased had abandoned the difficulty, is erroneous, as he may have been at fault in not recognizing the fact of abandonment.

Appeal from circuit court, Sumter county; S. H. Sprott, Judge.

Will Scott was convicted of manslaughter, and appeals. Affirmed.

The appellant, Will Scott, was indicted for the murder of Robert H. Seymour by shooting him with a pistol, was convicted of manslaughter in the first degree and sentenced to five years in the penitentiary.

The bill of exceptions contains the following recital in reference to the organization of the jury: "During the organization of the jury Steve Smith was called as a juror. The court having duly examined him as a juror touching his qualification as such decided and so announced that he was a competent juror. The solicitor by leave of the court before passing on said juror, asked said Smith if he was on defendant's bond for his appearance in this cause, and said Smith answered that he was, and the solicitor asked said Smith if he was on the grand jury when an indictment for attempt to murder was found against the defendant for the same act with which defendant is now charged with murder; to which question the said Smith answered that he was. Thereupon the court of its own motion, against the objection of the defendant, excused the said Smith as a juror and directed him to stand aside. To the action of the court in excusing said Smith and directing him to stand aside the defendant then and there duly excepted."

The state introduced evidence tending to show that the defendant was guilty as charged in the indictment. The evidence for the defendant tended to show that the fatal shot was fired in self-defense. There was evidence introduced on the part of the defendant tending to show that he was a man of good character.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(A) The court charges the jury that if they believe from all the evidence that the defendant was reasonably free from fault in bringing on the difficulty, it cannot be said that he was responsible for bringing on the difficulty." "(S) I charge the jury that under the evidence in this case the accused cannot be deprived of the right of self-defense under the charge of murder in the indictment, even though the proof shows that the accused was in fault in bringing on the difficulty, unless it be further shown that he intended to bring it on, and to bring it on with felonious intent." "(W) The court charges the jury that if they find from the evidence that the defendant is a man of good character, they may consider that character in connection with the other evidence in the case in determining his guilt,

¹ Rehearing denied June 23, 1902.

¶ 1 See *Jury*, vol. 21, Cent. Dig. §§ 408, 524, 525.

and it may generate a reasonable doubt of his guilt." "(K) The court charges the jury that if the defendant acted in self-defense in the difficulty at the beginning, and even though he might have renewed it after the deceased retreated, yet if they believe that the defendant did not realize that the deceased had abandoned the difficulty, then they must acquit the defendant."

W. K. Smith and J. J. Altman, for appellant. Chas. G. Brown, Atty. Gen., and Sam'l Will John, for the State.

HARALSON, J. 1. There was no error in the court, of its own motion, excusing the juror, Steve Smith, from sitting on the jury, and in ordering him to stand aside. He showed on his examination, touching his qualifications, that he was on the grand jury when an indictment for an assault with intent to murder deceased, was found against defendant for the same act with which he is now charged with murder, and was on defendant's bail bond for his appearance in this case.

It is well settled, that the enumerated causes for challenge in the Code, are not exclusive of all others, and of the discretionary power of the court to set aside any one summoned as a juror, who, for any cause, appears to be unfit to serve as such. The rule is well stated by this court to be, that "It is the duty of the court, when it shall appear satisfactorily that any person called as a juror has not the requisite qualifications of integrity, impartiality, or intelligence, at any time before he has been elected by the state and defendant, to reject him. The state certainly has no interest, and the defendant has no right to introduce into the jury-box unfit persons. It is the duty of the court to guard against their introduction." *Smith v. State*, 55 Ala. 1, 10; *State v. Marshall*, 8 Ala. 302; *Long v. State*, 86 Ala. 36, 40, 5 South. 443. So it has been held that a person who, as in this case, is bail for the defendant's appearance to answer the charge against him, is not competent to serve as a juror on his trial. *Brazleton v. State*, 66 Ala. 97.

The case of *Bell v. State*, 115 Ala. 25, 22 South. 526, relied on by defendant's counsel, is not opposed to the principle above announced. There, the juror was not an unfit person, for any reason appearing, but was merely a witness in the case for the defendant, which fact did not disqualify, or render him incompetent, to serve. It subjected him to challenge, under the statute, by either party, but for which cause, the court could not, of its own motion, set him aside.

The other cases referred to by counsel are alike inapplicable.

2. There was nothing of which the defendant can complain, that the court with the jury, the defendant, officers of court and attorneys, repaired from the courtroom in the second story of the courthouse, where the

trial was being conducted, to the sheriff's office on the first floor of the courthouse, for the purpose of examining a witness for the state, made known to the court to be suffering from rheumatism, and who could not be brought into the courtroom without considerable pain to him. This fact was testified to by a physician. The statute (Code, § 898) provides, that the circuit courts of the several counties shall be held at the courthouses thereof. The sheriff's office was at the courthouse of the county, and there is nothing in the statute which prevents the court being held temporarily, or even during the term, in the sheriff's office. The action of the court under the circumstances shown, was commendable and not subject to criticism or objection from any point of view.

3. Charge A requested by defendant and refused has been too often condemned by us to require further consideration. *Howard v. State*, 110 Ala. 94, 20 South. 365; *McQueen v. State*, 103 Ala. 13, 15 South. 824; *Johnson v. State*, 102 Ala. 3, 16 South. 99.

4. Charge 8 falls to set forth the constituents of self-defense, and its refusal may be justified on that account. *Miller v. State*, 107 Ala. 42, 19 South. 37; *Roden v. State*, 97 Ala. 55, 12 South. 419. Moreover, it was erroneous in that it postulates in effect, that no act of defendant, even if it had the effect to bring on the difficulty, should be considered against him, unless it be shown, "that he intended to bring it on with a felonious intent." Being wholly free from fault in bringing about a difficulty, cannot be made to consist in defendant's felonious intention. Still further, it ignores the question of reasonable mode of retreat or escape. *Linehan v. State*, 113 Ala. 70, 21 South. 497.

5. Good character of the defendant may be considered in connection with all the other evidence in the case, and when thus considered, may generate a reasonable doubt of his guilt, when the other evidence without it might leave no such doubt; but it is improper to charge the jury that good character alone, without its consideration in connection with the other evidence in the case, may be considered to generate a reasonable doubt of guilt. *Miller v. State*, 107 Ala. 59, 19 South. 37; *Thornton v. State*, 113 Ala. 44, 21 South. 356, 59 Am. St. Rep. 97. Charge W asked by defendant, while it postulated that the jury might consider defendant's good character in connection with the other evidence in the case, postulates that it, the good character, and not good character considered in connection with each other, might generate a reasonable doubt of guilt. When properly construed, the charge means that good character alone may generate a doubt of guilt, and was on this account erroneous. *Johnson v. State*, 102 Ala. 2, 16 South. 99.

6. Charge K was properly refused. It falls to set out the constituents of self-defense; and it contained the instruction, that if defendant renewed the difficulty after de-

ceased abandoned it, as the evidence shows was the case, yet, if defendant did not realize that deceased had retired from the difficulty, then they should acquit. If it was a fact that deceased abandoned the difficulty, as the charge assumes he did, the defendant could not set up his want of realizing that he had done so, as an excuse to commence it again. He may have been greatly at fault in not having recognized the fact of abandonment of it by deceased. Renewal of it by defendant, if deceased abandoned the fight, as the evidence tends to show he did, and the charge admits, made him the aggressor ab initio, as to what followed. *Hughes v. State*, 117 Ala. 28, 23 South. 677; *Stillwell v. State*, 107 Ala. 16, 19 South. 322.

7. We have examined the several charges given at the request of the state, and fail to find any reversible error in them.

There were many exceptions to the introduction and exclusion of evidence, which appear to be without merit.

Finding no reversible error in the record, let the judgment of the court below be affirmed.

DOUTHIT v. NABORS et al. (NELSON, Intervener).¹

(Supreme Court of Alabama. Feb. 13, 1902.)

INTERVENTION—WAIVER OF OBJECTION—PURCHASE BY MORTGAGEE—DISAFFIRMANCE.

1. In a suit by N., the mortgagor, to redeem, D., the mortgagee, having purchased at his own sale, though having a power only to sell, and not to purchase at such sale, F., second mortgagee, filed a petition or bill in intervention, showing a right to redeem. N. answered it, admitting all its averments. D. answered it, incorporating a demurrer, which did not challenge F.'s right to come into the case, but the sufficiency of his petition to present his equity. Thereafter D. moved to dismiss N.'s petition on the ground that its averments made no case for redemption. After the motion and demurrer were overruled, and the evidence had been taken, D. moved to strike F.'s petition, on the ground that he could assert his rights only by independent bill. *Held*, that objection to his coming into the case had been waived, and motion to strike was too late.

2. A mortgagor or second mortgagee, who within two years after an attempted foreclosure of the first mortgage disaffirms it, and makes a tender for redemption, because the mortgagee purchased at his own sale, without authority to do so, is entitled to a decree of redemption, though not bringing the suit till after expiration of the two years.

Sharpe and Dowdell, JJ., dissenting.

Appeal from chancery court, Bibb county; Thos. H. Smith, Chancellor.

Suit by S. E. Nabors, administratrix, and another, against Charles F. Douthit, in which Frank Nelson intervened, praying to be made a party, and to be permitted to redeem from a mortgage sale made by Douthit. From a decree refusing to strike intervenor's petition from the files, and granting the relief prayed for, Douthit appeals. Affirmed.

On June 1, 1897, Sarah E. Nabors, as administratrix, and E. S. Lyman, as administrator, of the estate of French Nabors, deceased, filed an original bill in the chancery court of Bibb county against Charles F. Douthit. It was averred in this bill that on April 21, 1890, Mrs. Amella Hoskins and John Erharker executed a mortgage upon certain property to Charles F. Douthit to secure the payment of certain promissory notes; that on June 9, 1891, after the execution of said mortgage, the said Amella Hoskins and John Erharker conveyed the land included in said mortgage to French Nabors, which property was conveyed subject to said mortgage; that on February 8, 1896, under the power contained in said mortgage, the said Charles F. Douthit sold the property conveyed in said mortgage and became the purchaser thereof, but that no power was given to said Douthit as mortgagee to purchase at his own sale. It was then averred that after the death of said French Nabors the complainants, as his personal representatives, had disaffirmed said sale, and had offered to pay to said Douthit the amount which he had paid, together with interest and all other lawful charges, but that said Douthit had refused to accept said amount so tendered, and declined to allow the complainants to redeem said property. The prayer of the bill was that the complainants be allowed to redeem, and that pending said suit a receiver be appointed of the property conveyed in the mortgage. On March 9, 1898, Frank Nelson, Jr., filed his petition in the chancery court of Shelby county, asking to be allowed to intervene. It was averred in said petition, in addition to the facts averred in the original bill, that after the mortgage was executed by Amella Hoskins and John Erharker to Charles F. Douthit, and after Amella Hoskins and John Erharker transferred the property included in the mortgage to French Nabors, the said French Nabors and his wife, on November 29, 1893, executed to petitioner, Frank Nelson, Jr., a mortgage on said property to secure an indebtedness due from said French Nabors to the petitioner. It was then averred in said petition that the petitioner, Frank Nelson, Jr., had disaffirmed the sale made by Douthit under the mortgage executed to him, and had tendered to said Douthit the amount paid by him on said mortgage indebtedness, together with the interest and all lawful charges, but that said Douthit had refused to accept said amount, and had refused to permit the petitioner to redeem said property. The prayer of the petition was that the said Frank Nelson be made a party to said suit, and that upon the final hearing of the cause a decree be rendered declaring the sale made by said Douthit null and void so far as the petitioner was concerned; that the amount due said Douthit upon the mortgage debt be ascertained; and that upon the petitioner, as junior mortgagee, paying the amount so ascertained to said Douthit, he be permitted to

¹ Rehearing denied June 28, 1902.
32 So.—40

redeem said property from under said mortgage. The other facts of the case are sufficiently stated in the opinion. On the final submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for by Frank Nelson, Jr., in his petition, effectuating Nelson's equity of redemption. The respondent Douthit prosecutes the present appeal, and assigns as error the decree of the chancellor overruling his motion to strike the petition of Frank Nelson for intervention from the file, and also the final decree granting the relief prayed by the petitioner.

Logan & Vande Graaff and A. Latady, for appellant. Knox, Bowle & Blackmon, Browne & Leeper, and W. S. Cary, for appellees.

McGLELLAN, C. J. The pleading of Frank Nelson, whereby he sought to intervene and be made a party to the pending suit of the personal representatives of French Nabors, deceased, against Charles F. Douthit, is indifferently called a "petition" and a "bill" in the case. It is of little moment whether it was the one or the other, since, whether it was a bill or a petition, we shall assume for the purposes of this appeal that Nelson had originally no right to file it in the cause mentioned, and no right to intervene in that cause for any purpose. Yet the parties to that cause had the right and power to waive their objections to his thus coming into the case, to admit and receive him as a party to it, and to litigate the equity set up in his bill, and to have it determined in and as a part of the suit already pending. And this they unquestionably did. The complainants in the original bill, upon the filing of this bill or petition by Nelson, at once answered it, admitting all its averments. And Douthit, the respondent to the original bill, soon afterwards also answered it, incorporating in his answer a demurrer which did not challenge Nelson's right to thus come into the case, but, to the contrary, assumed the right on his part to have the case made by his petition entertained and determined in this litigation, and challenged the sufficiency of his petition to present his alleged abstract equity. And some months later Douthit moved to dismiss Nelson's bill or petition, not because he had no right to file it in the cause, but on the ground that its averments made no case for the equitable relief he sought. This motion was made on September 8, 1898. On that day there was a submission upon it, and on Douthit's demurrer to the petition for intervention, and both the motion and the demurrer were overruled. Some months after this, viz., on March 9, 1899, after Nelson had been recognized as a party to the cause in the way we have indicated for a year, and after the evidence had all been taken, and when the cause was ready for submission for final decree upon the alleged rights of said

Nelson set up in his petition or bill for intervention, the respondent Douthit for the first time objected to Nelson's coming into, or, rather, being in, the cause as a party, and filed a motion "to strike the petition of the said Frank Nelson for the intervention from the file for the reason that, if he has any rights as stated in said petition, he can only assert them by independent bill, and not by petition, as he undertakes in this case, and because there is no fund in this cause being administered by the court in which the said petitioner is interested." In our opinion, this motion came too late, and the chancery court properly proceeded to the adjudication of Nelson's rights just as if he had propounded them in an original bill. *Gibson v. Furniture Co.*, 96 Ala. 357, 11 South. 965; *Smith v. Alexander*, 87 Ala. 337, 6 South. 51.

This petition or bill exhibited by Nelson showed that he held the equity of redemption in the property mortgaged by Erharker et al. to Douthit; that Douthit in attempting a foreclosure of that mortgage had purchased at the sale under the power therein contained; that said Douthit had no authority to purchase at said sale; that, of consequence, Nelson had a right to disaffirm said transaction at any time within two years, and thereupon to treat the mortgage to Douthit as still subsisting, and to redeem the land by paying the mortgage debt, etc.; that within two years after the said sale Nelson did disaffirm said attempted foreclosure, and made a tender to Douthit of the sum necessary for redemption; that the tender was not accepted; that the petitioner has ever since been ready to pay off the mortgage, etc., and the petitioner offers now to pay it off, and to do equity, etc. These facts presented a case of seasonable disaffirmance of the sale and purchase by Douthit, the declaration of disaffirmance accompanied by a tender for redemption having been made within two years from the sale, and for a decree of redemption by the chancery court (*Ezzell v. Watson*, 83 Ala. 120, 123, 3 South. 309); and the demurrer and motion to dismiss interposed by the respondent Douthit were properly overruled.

The case thus made for Nelson was supported by the evidence. It is made to clearly appear that he seasonably announced to Douthit his election to disaffirm the sale and purchase by the latter and to redeem from the mortgage held by him, and that this declaration was accompanied by what was in legal effect a tender of the amount of money due to Douthit and claimed by him under the mortgage. Douthit denied his right to redeem, and declined to accept the tender. His right to redeem at that time as junior mortgagee was undoubted. On this state of averment and proof, the chancery court was entirely justified in the decree rendered effectuating Nelson's equity of redemption.

The evidence relied on before the chancellor to support the exception of respondent to the register's report was noted in the excep-

tion by reference to certain pages of the written testimony then before the court. The paging thus used in reference is not preserved in the transcript before us, and it is not practicable for us to review the conclusion of the chancellor, since we are not certainly advised as to the evidence upon which his conclusion was reached. Taking the statement made in the exception as indicating what the evidence was, we are not prepared to say that the report of the register is plainly and palpably erroneous. *Speakman v. Burleson*, 123 Ala. 678, 682, 27 South. 822.

The decree of the chancery court must be affirmed.

SHARPE, J. (dissenting). As I understand the doctrine announced in *Harris v. Miller*, 71 Ala. 28, *Cooper v. Hornsby*, Id. 62, *Thomas v. Jones*, 84 Ala. 302, 4 South. 270; *McCall v. Mash*, 89 Ala. 487, 7 South. 770, 18 Am. St. Rep. 145, and kindred cases, the disaffirmance treated of in the majority opinion can be made only through a court of chancery, and laches will be imputed to him who seeks to avoid the sale if he thereafter waits longer than two years to sue. The sale binds the purchasing mortgagee, entitles him to possession, and extinguishes the debt to the amount of his bid. It cuts off the equity of redemption, and at law leaves its owner only the statutory right to redeem. *Childress v. Monette*, 54 Ala. 817, and authorities *supra*. His right to disaffirm springs from a doctrine recognized and applied alone in courts of equity, which hold the power to sell as a trust, and an unauthorized purchase by the trustee at his own sale as presumptively unfair and a fraud on the rights of the mortgagor. In my opinion, there is no principle, either legal or equitable, which empowers the mortgagor or his vendee, by his mere personal election and tender, to revive and continue indefinitely the equity of redemption. Therefore I do not concur in this decision.

DOWDELL, J., concurs in the dissenting opinion.

WATKINS v. STATE.¹

(Supreme Court of Alabama. June 5, 1902.)

MANSLAUGHTER—VERDICT—VENIRE—SECONDARY EVIDENCE—INSTRUCTIONS.

1. A verdict of "guilty of manslaughter," and fixing the punishment at five years in the penitentiary, is a sufficient finding of manslaughter in the first degree; the punishment being within the limits fixed for it, while imprisonment of only one year is allowed for manslaughter in the second degree.

2. The venire cannot be quashed because a person whose name appeared thereon was dead when the venire was drawn; it not being known to the court at the time of the drawing, and no fraud by which the name was put on the list appearing.

3. K., an absent witness, is not shown to be permanently absent from the state, or for an indefinite time, so as to allow of secondary evidence, consisting of what K. testified to on the preliminary trial; a witness merely testifying that K. told him he was going out of the state to work at a certain place, and was going to stay there till the case was over, and that some one told him a few days before that K. was at such place.

4. The expression "reasonably without fault" in a requested charge on self-defense does not sufficiently hypothesize freedom from fault in bringing on the difficulty.

5. A requested charge that if the jury believe that defendant did not bring on the difficulty, and that deceased had previously made threats to defendant's knowledge, and deceased advanced on defendant in a threatening manner, and there was apparently no reasonable mode of escape, defendant had a right to shoot first, is erroneous in not submitting to the jury whether the facts were sufficient to show imminent peril to life or limb.

6. A requested charge that defendant was justified in shooting if he did so on the well-grounded belief that it was necessary to save himself from great bodily harm, is erroneous in ignoring freedom from fault in bringing on the difficulty.

7. A requested charge that good character is a good thing to have, and when defendant proves that he had a good character, the jury should look at this fact in connection with all the other evidence, and acquit, if on the whole evidence they do not have an abiding conviction that he is guilty, is properly refused as argumentative, and laying stress on a single fact.

8. Requested charges that if the jury believe the evidence, W. was the guest of K., and they must find W. was free from fault in bringing on the difficulty, invade the province of the jury.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Carter Watkins was convicted of manslaughter, and appeals. Affirmed.

Upon the arraignment of the defendant, the court ordered that 100 jurors including the regular panel be summoned to appear from which the jury was to be drawn for the trial of the defendants. The defendant moved the court to quash the venire upon the ground that Sylvester J. Russell, whose name appears upon the list of jurors served upon the defendant was not living at the time the said jury was drawn, and that, therefore the order of the court requiring 100 jurors to be drawn for the trial of this cause had not been complied with. Upon the hearing of this motion, it was shown that the venire drawn to try said cause contained 100 names, one of which was the name of Sylvester J. Russell; that said Russell died after his name was put in the jury box by the jury commissioners, and that his death occurred between the time of placing his name in the jury box and the drawing of his name as a juror to serve in this case. The motion to quash was overruled, and thereupon the defendant duly accepted.

The evidence for the state tended to show that the killing of Willie Brown by the defendant, Carter Watkins, was not in self-de-

¹ Rehearing denied June 28, 1902.

² See Homicide, vol. 26, Cent. Dig. § 628.

fense, but that Brown was killed by Watkins without provocation.

The evidence for the defendant tended to show that the killing was in self-defense. There was also evidence introduced by the defendant tending to show that he was a man of good character.

The defendant sought to lay a predicate for the introduction of secondary evidence of what Gray Kemp testified to on the preliminary trial of the defendant. For the purpose of laying a predicate one John Simmons was introduced as a witness who testified that he thought he knew where Kemp was, that the last time he saw him was at Citronelle in Mobile county, when he was leaving, and that Kemp told him he was going to work at a certain designated place in Mississippi, and was going to stay until the case was over. On cross-examination, this witness testified that he did not know whether said Kemp was a married man, or whether he intended to live in Mississippi all the time, but that he stated that he was going to stay in Mississippi until after this case was finished. That he could not swear of his own knowledge that he was in Mississippi, but that he thought so, and some person told him a few days before that Kemp was in Mississippi. Upon this testimony the court refused to allow the witness, before whom the preliminary trial was had, to testify to what witness Kemp swore on the preliminary trial. And to this ruling the witness duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that if the defendant was reasonably without fault in bringing on the difficulty and at the time of the homicide there appeared so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious and impending necessity in order to save himself from great bodily harm to kill the deceased, then he had the right to shoot the deceased, and the jury must acquit him on the ground of self-defense. (2) If the jury believe from the evidence that defendant did not bring on, provoke or encourage the difficulty, and that the deceased had previously made threats which had been communicated to the defendant at the time of the difficulty, and the deceased advanced upon the defendant in a threatening manner and started for defendant and at the time there was to all appearance no reasonable mode of escape without increasing defendant's peril, then defendant was authorized to anticipate the deceased and shoot first, having the right to act upon the reasonable appearance of things. (3) The court charges the jury that the appearance of the danger of loss of life or of great bodily harm, which will justify one in taking human life, need not be actual or real, if they are such as to create in the mind of the slayer the rea-

sonable belief that it is necessary to strike or shoot his assailant in order to save himself from great bodily harm or loss of his own life; and acting upon this reasonable belief, if he strikes or shoots and death ensues, this would not be manslaughter, but would be justifiable or excusable homicide; and if you believe from all the evidence in the case now before you, that defendant shot and killed the deceased upon the well-grounded belief that it was necessary to do so in order to save himself from great bodily harm, or from death, then it is your duty to acquit the defendant. (4) A homicide committed under such circumstances surrounding the person charged therewith at the time of the fatal act as to create in his mind a reasonable belief, well founded and honestly entertained of his own present and immediate imminent peril, and of the urgent necessity to take the life of his assailant, as the only alternative of saving his own or of preventing the infliction upon his person of great bodily harm, it is homicide committed in self-defense. (5) The court charges the jury that good character may, when taken in connection with all the other evidence in the case, be sufficient to raise a reasonable doubt of defendant's guilt. (6) The court charges the jury that good character is a good thing to have, and when the defendant proves that he had a good character, the jury should look at this fact in connection with all the other evidence in the case, and if upon the whole evidence they do not have an abiding conviction that the defendant is guilty, they should acquit him. (7) If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to generate a reasonable doubt of his guilt, although no such doubt exists but for such good character. (8) Before the jury can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence, of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty. (9) If you believe from the evidence that Henry Thomas and Carter Watkins were at the dwelling house of Jack Russell by invitation of the owner or occupant of such house, and that Tom Warren and Willie Brown were trespassers at said house at the time of the killing, then what the court has said to you in reference to the duty of the defendant to retreat has no application in this case, and the court now charges you, that if you believe from the evidence that at the time the fatal shot was fired, that Tom Warren and Willie Brown were making an assault upon any of the occupants of said house, then the defendants had a right to strike and

kill if necessary to protect themselves, or either one of them, or any member of the household from the assault. (10) Good character may generate a reasonable doubt in cases where without such proof the jury would be satisfied beyond a doubt of the guilt of the defendant. (11) If the jury believe the evidence in this case, Carter Watkins was the guest of Jack Russell at the time of the fatal difficulty. (12) The court charges the jury that if they believe the evidence in this case they must find that the defendant Carter Watkins was free from fault in bringing on the difficulty. (13) The court charges the jury that if they believe the evidence in this case Carter Watkins was at the time of the shooting the guest of Jack Russell and if free from fault in bringing on the fatal difficulty, and was feloniously assaulted or threatened with a felonious assault, he could stand his ground and repel such assault with such force as to a reasonable mind appeared necessary even to the taking of life."

After considering the case, the jury returned the following verdict: "We the jury find the defendant, Carter Watkins, guilty of manslaughter and fix the punishment at five years in the penitentiary, and we the jury find the defendant Henry Thomas not guilty."

Upon this verdict the court rendered a judgment of conviction of manslaughter, and sentenced the defendant Watkins to imprisonment in the penitentiary for five years.

Bromberg & Hall, for appellant. Chas. G. Browne, Atty. Gen., for the State.

HARALSON, J. The Code (section 4857) provides, that "when the jury finds the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree," etc. This is for the reason, that the statute, for the purpose of adjusting the punishment, makes murders at common law of a certain class, murders in the first degree, and all others murders in the second degree, affixing the penalty of those in the first degree, at death or imprisonment for life in the penitentiary, at the discretion of the jury, and for those falling within the second degree, at not less than 10 years, at the discretion of the jury. So, it has been properly held, that a general verdict of guilty under an indictment for murder, which does not ascertain its degree, will not sustain a judgment of conviction. *Storey v. State*, 71 Ala. 329. But, the statute makes no such requirement, as to manslaughter. It divides that offense into manslaughter in the first and second degree, punishing the first by imprisonment in the penitentiary for not less than one nor more than ten years, and the second, at

imprisonment in the county jail, or to hard labor for the county for not more than one year, and may also be fined, not more than \$500; the imprisonment in each instance, to be fixed by the jury. Code, §§ 4860, 4862. The jury found the defendant "guilty of manslaughter" and fixed "the punishment at five years in the penitentiary." This verdict was sufficient to show that the jury found the defendant guilty of manslaughter in the first degree. It has no application to manslaughter in the second degree. *Davis v. State*, 52 Ala. 357; *Anderson v. State*, 65 Ala. 553; *Wright v. State*, 79 Ala. 262; *Sampson v. State*, 107 Ala. 76, 18 South. 207.

2. There was no merit in the motion to quash the venire, because one of the persons whose names appear thereon was dead at the time the venire was drawn. There was no evidence that this fact was known to the court at the time of the drawing, or of any fraud by which the name was put on the list. *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; *Walker v. State*, 91 Ala. 76, 9 South. 87; *Mobile Jury Law* (Acts 1894-95, p. 481, § 2).

3. Under the evidence, we cannot hold that the court below was in error, in holding that the evidence adduced was not sufficient to allow secondary evidence of the absent witness, Kemp, on the ground that no proper predicate had been laid to show that the witness was permanently absent from the state, or for an indefinite period. *Thompson v. State*, 106 Ala. 67, 17 South. 512; *McMunn v. State*, 113 Ala. 86, 21 South. 418; *Dennis v. State*, 118 Ala. 72, 23 South. 1002.

4. The first charge does not hypothesize freedom from fault in bringing on difficulty. The expression "reasonably without fault," in doing so, is not sufficient.

The second is erroneous in not submitting to, but withholding from, the jury the right to determine whether the facts hypothesized were sufficient to show imminent peril to life or limb. *Gilmore v. State*, 126 Ala. 22, 28 South. 595.

The third and fourth ignore freedom from fault in bringing on difficulty.

The fifth is duplicated in given charges 18 and 20; the sixth is argumentative, and lays stress upon a single fact, as do the seventh and tenth, which also predicate reasonable doubt upon good character alone.

The eighth has more than once been condemned by us. *Rogers v. State*, 117 Ala. 9, 22 South. 666; *Amos v. State*, 123 Ala. 54.

The ninth is duplicated in given charges 14, 15 and 17, and the eleventh, twelfth and thirteenth were correctly refused as invasive of the province of the jury.

No error appearing, the judgment below is affirmed.

Affirmed.

**AMERICAN FREEHOLD LAND MORTG.
CO. OF LONDON, Limited,
v. POLLARD.**

**POLLARD v. AMERICAN FREEHOLD
LAND MORTG. CO. OF LON-
DON, Limited.¹**

(Supreme Court of Alabama. May 13, 1902.)

**MORTGAGEE IN POSSESSION—ACCOUNTING—
RIGHTS AND LIABILITIES—PLEADING—
AMENDMENT—ATTORNEY'S FEES—STATING
ACCOUNT.**

1. A mortgagee in possession, using the property himself, must account to the mortgagor for its reasonable rental value.

2. A mortgagee in possession who rents the lands is accountable to the mortgagor for rents received, though they exceed the value of the use.

3. A mortgagee in possession is accountable to the mortgagor for loss of rents and profits from his willful default or gross negligence, which in such case is failure to use reasonable care and diligence.

4. For waste committed, a mortgagee in possession is liable to the mortgagor to the extent the land's value is thereby diminished.

5. A mortgagee in possession is entitled to credit, as against the mortgagor, for expenditures in repairs and paying taxes; they to be deducted from any charges for rents or losses; but he cannot have credit for improvements as distinguished from repairs.

6. A mortgagee in possession is not chargeable with an increase in rents from improvements made by him.

7. While a mortgagee's status as a mortgagee in possession is not altered, so as to destroy its right to credit as against the mortgagor for its proper expenditures in that capacity, by its sale of the property to others, after its voidable purchase thereof at its own sale under power in the mortgage, it cannot have such credit for repairs made and taxes paid by its vendee, not for it, or at its cost, but for their own supposed benefit.

8. The cutting and taking of timber from mortgaged premises, without the mortgagor's consent, by persons to whom the mortgagee in possession sold the land, after its voidable purchase thereof at its own sale under power in the mortgage, is to be treated, not as profits received by it, but as waste permitted, if not committed, for which such mortgagee is liable.

9. Where a mortgagee's purchase at its own sale under a power in the mortgage was voidable, because without authority, and it brought suit to compel the mortgagor to elect to affirm or disaffirm the sale, and she elected to affirm, but afterwards, on amendment of the bill, imposing more burdensome conditions on her, she, as she had a right, withdrew such election, and disaffirmed such sale, the mortgagee cannot, after such election, be treated as in possession under a bona fide but mistaken claim of ownership, so as to be entitled to credit for improvements, or to the protection of Code, § 1540, providing that persons holding possession under color of title, in good faith, are not responsible for damages or rent for more than a year before commencement of the suit.

10. While a mortgagee's action in selling and transferring possession of the property, after its voidable purchase thereof at its own sale under power in the mortgage, amounts to a voluntary abdication of its duty to direct the profits towards a reduction of the mortgage debt, so that it is chargeable as for willful default in obtaining profits during its grantee's occupation, yet it cannot be held liable as hav-

ing received the amount of rents made and retained by its grantee on his own account.

11. A mortgagee in possession, while entitled to credit, as against the mortgagor, for such cost, whether of time or money, as the owner in possession, acting providently, would necessarily be subject to in making and collecting profits, is not entitled to greater credit because, being a nonresident, it was compelled to pay agents for attention to the rents.

12. The mortgagee having elected, under the terms of the mortgage, to declare the whole debt due, there should be carried into the account between him as mortgagee in possession, and the mortgagor, as part of the mortgage debt, as of the time of such declaration, all interest then accrued, and interest on past-due interest.

13. Under Code, § 706, allowing amendment of bill before final decree, it may be amended before such time in respect of amount claimed as attorney's fees.

14. Under stipulation in mortgage for an attorney's fee in case of foreclosure, services in resisting redemption are not to be allowed for except so far as necessary to collect the sum really due on the mortgage.

15. Though a chancellor might recommit a matter to the register for an account, because the account was stated, and the evidence taken by him, under wrong directions, and because he reported the facts by appending the testimony, it is in the court's discretion to state the account itself.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Bill by the American Freehold Land Mortgage Company against Rebecca M. Pollard. From the decree, both parties appeal. Reversed.

Knox & Bowie and Watts, Troy & Caffey, for appellant. John G. Winter, Geo. F. Moore, R. S. Teague, and E. F. Jones, for appellee.

SHARPE, J. Several questions arising in this suit have been passed on by this court on former appeals. See reports of the case in 108 Ala. 289, 16 South. 801; 120 Ala. 1, 24 South. 736; 127 Ala. 227, 20 South. 508. As a result of those adjudications, and after the last remandment, the case stood in the chancery court for an accounting between complainant as a mortgagee in possession of mortgaged lands and the defendant, Rebecca M. Pollard, as a redemptioner. An account was stated by a special register to whom the matter was referred, and to whose report both parties filed exceptions. One item reported on consisted of attorney's fees allowed, as part of the mortgage debt, under stipulations in the mortgage, and made the subject of evidence taken on the reference. On the hearing in the chancery court, the original bill was against objection amended, so as to increase complainant's claim for attorney's fees. Thereupon, after submission, the court, after overruling some exceptions to the report, and sustaining others, restated the account, and rendered a decree accordingly. From that decree, both parties have appealed.

The case involves rules usually governing as between a mortgagee rightfully in posses-

¹ Rehearing denied June 23, 1902.

¶ 15. See Equity, vol. 19, Cent. Dig. §§ 324, 327.

sion of lands before foreclosure, and a mortgagor seeking to redeem, which we state so far as they seem to be applicable here. In the absence of stipulations to the contrary, the mortgagee, if he has used the property himself, must account to the mortgagor for its reasonable rental value. If he rents the land, he is accountable for the rents received, though they exceed the value of the use, since he is not allowed to profit from rents beyond their application to the mortgage debt. For loss of rents and profits, he is liable to the extent the loss results from his willful default or gross negligence, which in such cases is defined as a failure to use reasonable care and diligence. *Gresham v. Ware*, 79 Ala. 192; *Sloan v. Frothingham*, 72 Ala. 589; *Daniel v. Coker*, 70 Ala. 280; *Butts v. Broughton*, 72 Ala. 294. For waste committed, the mortgagee's liability is measured by the extent to which the land's value is thereby diminished. *Perdue v. Brooks*, 85 Ala. 459, 5 South. 126. The mortgagee is entitled to credit for expenditures in making repairs and paying taxes, and, where there are charges for rents or losses, such expenditures should be deducted from those charges. *Blum v. Mitchell*, 59 Ala. 535. The mortgagee is not allowed to increase the cost of redeeming by reason of improvements as distinguished from repairs, or to be charged with rents or rental values in so far as they represent an increase from such improvements. These rules are deductible from the decisions of this court above cited, together with the following, among other authorities: *Adams v. Sayre*, 76 Ala. 509; *Doxler v. Mitchell*, 65 Ala. 511; *Barron v. Pauling*, 38 Ala. 292; *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39.

Recurring to this case, we state at the outset our conclusion that errors have entered into the accounting to an extent that renders necessary a reversal of the decree and a remandment for a restatement of the account. Fruitful of error prejudicial to the respondent Mrs. Pollard was the theory, adopted by the trial court, that the complainant mortgage company was entitled to credits for repairs of the mortgage property and taxes paid thereon by its vendee, E. S. Armistead, and his vendee, R. L. Armistead, while they respectively held possession as such vendees. While complainant's sale of the lands after its voidable purchase did not alter its status as a mortgagee in possession so as to destroy its right to credit for its expenditures properly made in that capacity, there is no rule of law or equity whereby it can be given the benefit of expenditures by others. Apparently, the Armisteads, after their respective purchases, made repairs, and paid taxes, not for complainant, but for their own supposed benefit and, so far as appears, complainant has been at no cost therefor. Its claim for credits therefor stands on no better footing than would a claim for like expenditures by a trespasser.

As against the complainant mortgage com-

pany, there was error in charging it with items, amounting to \$561, as money received by the Armisteads from the sale of timber cut from the lands. The cutting and taking of timber from the premises without the mortgagor's consent should have been treated as waste permitted, if not committed, for which the mortgage company was responsible, but not as profits received by it. Its responsibility for waste is measurable, not by what was received from sales of the timber, but by the depreciation caused in the value of the land by its having been denuded of the timber. *Perdue v. Brooks*, 85 Ala. 459, 5 South. 126. What such depreciation amounts to the evidence in this record fails to show.

As shown in *Doxler v. Mitchell*, *Gresham v. Ware*, and *Sloan v. Frothingham*, supra, rules differing from those we have stated are applicable where the possession has been held, and improvements made, by a mortgagee or a third person under a bona fide, but mistaken, claim of ownership. It is here contended that after the mortgagor, Mrs. Pollard, first answered the bill, expressing her election to affirm the purchase made by complainant at its own sale, it had a right to assume that election was final, and that, therefore, it ought to be treated as a bona fide claimant of ownership, and as being entitled to the benefit, in the accounting, of improvements since made, and also to have protection under section 1540 of the Code, which provides that "persons holding possession under color of title in good faith, are not responsible for damages or rent for more than one year before the commencement of the suit." That contention cannot be sustained. As was held on the first appeal, Mrs. Pollard had a right to withdraw that election, and disaffirm the foreclosure sale after the terms upon which the bill first invoked her action were changed by the bill's amendment, to others more burdensome. This, the mortgage company was bound to have known, and therefore it cannot escape accountability, as a mortgagee in possession, upon the theory that its purchase had been affirmed, or by reason of its having sold the lands to Armistead. Its action in transferring possession to Armistead as vendee carried to him the right, as between them, to collect rents for himself, and amounted to a voluntary abdication of the duty imposed by its relation to the mortgagor in respect of directing profits of the lands towards a reduction of the mortgage debt. It is therefore justly chargeable as for willful default in obtaining profits during Armistead's occupation, and is not entitled to credit for improvements. On the other hand, the company's liability for rents is not enhanced by reason of improvements, or by rents made and retained by the Armisteads on their own account, whether in excess of the rental value or not. To hold it liable as having received those rents would be to indulge an unnecessary fiction. What might be proper if the controversy were between the redemptioner

and the Armisteads is not a matter to influence the decision of this case, since their rights are not here involved.

By whatever method such an account is stated, profit charges are to be fixed at their net value, or what remains after deducting the mortgagee's proper expenditures for taxes and repairs, and such cost, whether of time or money, as the owner in possession acting providently, would necessarily be subjected to in making and collecting profits, whether renting the land in one body or by parcels. Such charges are not measured strictly by what may be received as the result of factitious means, such as advancing supplies to tenants, or by what remains as the result of expenses the owner need not incur. Mrs. Pollard is not to be prejudiced because the mortgagee was a nonresident corporation, and was compelled by that fact to pay agents for attention to rents.

When, for default in paying installments on the mortgage debt, the mortgagee elected, under terms of the mortgage, to declare the whole debt due, all interest which had then accrued under the contract became due also. It was proper to carry into the account, as part of the mortgage debt, interest on the past-due interest note from its maturity to the time of that declaration. There was nothing in the company's subsequent dealings with the mortgagor, or the land, to stop the running of interest in its favor on the debt it secured. By deducting sums paid on taxes by the company from the rents and profits chargeable against it, the question raised as to whether it should be credited with interest on such sums will be properly disposed of.

No final decree having been rendered settling the matter of attorney's fees, amendment of the bill in respect of the amount claimed was allowable under section 706 of the Code. Services of counsel are to be allowed according to stipulations of the mortgage as construed on former appeals. We add to what was then said that services in resisting redemption are not to be allowed for except in so far as they may have been necessary to collect the sum really due on the mortgage.

The chancellor might well have granted the motion to recommit the matter to the register because the account was stated, and the evidence was taken, by him under wrong directions contained in the decree of reference, and also because the register ought to have reported the facts as upon a special finding, instead of by appending what purports to be a stenographic report containing several hundred pages of questions and answers commingled with much mere colloquy. The requisites of a proper report in cases like the present are laid down in *Mahone v. Williams*, 39 Ala. 202. But whether to grant the motion to recommit, or to state the account itself, was within the court's discretion.

This decision will result in eliminating

from the case several questions of fact presented by this record, and as to several others we express no opinion, since they will remain for consideration on another reference, and, it may be, on new evidence.

The decree will be reversed on the appeal of the complainant mortgage company, and also on the appeal of Rebecca M. Pollard, and the cause will be remanded for further proceedings.

CARTER v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Alabama. June 28, 1902.)

PUBLIC OFFICERS—BONDS—SURETIES—CONTRIBUTION—PLEADING—TIME OF DEFAULT—DEFENSE—CONTRIBUTION FOR COSTS—STATUTORY BONDS—DISMISSAL.

1. A bill for contribution by a surety on the bond of a public officer, against the sureties on other bonds given April 10th, alleging that the officer defaulted on July 12th, was not demurrable for failure to allege that the officer had converted money subsequent to April 10th, but, if the default occurred before the execution of defendant's bond, that was matter of defense only.

2. Where a surety on the bond of a public officer has been held liable thereon, his right to contribution from the sureties on other bonds is not limited to the actual default of the officer, to the exclusion of costs of defending the suit on the bond; the defense not being frivolous or unnecessary.

3. Where a surety on the bond of a public officer has been held liable in a suit on the bond, and sued the sureties on another bond for contribution, alleging that such other bond was required by statute, and that the bond was acted under by the officer, a demurrer on the ground that it was not a statutory bond was without merit. under Code, § 3083, declaring that whenever any officer required by law to give an official bond acts under a bond which is not in the penalty payable, and conditioned, or without sureties of requisite qualifications as prescribed by law, such bond is valid, and binding on the obligor.

4. Where the surety on the bond of a public officer was held liable thereon, and brought suit against the sureties on other bonds for contribution, and a part of such sureties paid defendant their proportion, a dismissal as to them could not be objected to by other defendants, as their liability was not thereby increased.

Appeal from chancery court, Mobile county; Thos. H. Smith, Chancellor.

Bill by the Fidelity & Deposit Company of Maryland against Cecil Carter and others for contribution for loss incurred as surety. From a decree overruling demurrers to the complaint, defendant Cecil Carter appeals. Affirmed.

In addition to the demurrers interposed by the other defendants, the defendant Carter demurred to the bill upon several grounds which may be summarized as follows: (1) Because it fails to show that said Lott had in his possession any part of the moneys collected by him, as tax collector of Mobile county, on and after April 10, 1897. (2) Because it fails to show what portion of said \$12,309.54 is for moneys collected by said Lott, as such tax collector, since April 10.

1897, and not paid over by him to the county. (3) Because it fails to show what portion of said \$12,309.54 is for moneys said Lott, as tax collector, should have collected, and failed to collect. (4) Because it shows the amount in default by said Lott as said tax collector was \$12,309.54, whereas appellant is sued for contribution toward the payment of \$18,623.57. (5) Because it shows that the bond given by appellant was not given in accordance with any requirement of law, and that said Lott was acting as said tax collector under a bond for \$100,000, as described in the second paragraph of the bill as amended, and so continued to act under the said \$100,000 bond continuously, up to and subsequent to the giving of the bond by the appellee, and shows that said bond given by appellant was not the bond under which Lott acted as tax collector, but is only a common-law bond, and is not subject to any statutory provisions of law, and there is no provision of law authorizing appellee to assert any claims against appellant, as party to said bond, under any statute. (6) Because it does not show that the bond given by this appellant was ever delivered and accepted, as required by law, and that Lott acted under said bond. (7) Because it shows that said \$25,000 bond, to which this appellant is alleged to be a party, was given as subsidiary to and security for the \$100,000 bond described in the second paragraph of the bill, and does not show that the appellee has exhausted its remedies unsuccessfully against the sureties of said Lott on said \$100,000 bond. (8) Because it shows that appellee has released two alleged co-sureties of the appellant, and, notwithstanding such release, said appellee does not offer to release this appellant to the extent said released sureties would have been liable to contribute to this appellant. (9) Because it shows that appellee, without this appellant's consent, has released two alleged co-sureties of this appellant, and that, notwithstanding said release, the appellee does not offer to credit this appellant with the full amount said released sureties are legally and equitably bound for.

Fred'k G. Bromberg, for appellant. Bestor, Gray & Bestor, for appellee.

TYSON, J. The bill in this cause was filed by a surety upon one of a series of bonds executed by E. B. Lott, as tax collector of Mobile county, against certain of the sureties upon other bonds for contribution.

It appears from the bill as amended that on the 22d day of August, 1896, Lott executed a bond, as tax collector of Mobile county, in the penalty of \$100,000, with certain of the respondents, as sureties thereon; that this bond was approved by the judge of probate, and Lott entered upon the duties of the office as such tax collector, and continued

therein until the 15th day of September, 1897, when he resigned his office. It further appears that in 1896, in compliance with the recommendations of the grand jury of Mobile county, Lott was required to give additional security, in the sum of \$50,000, as such tax collector, and on the 14th day of January, 1897, he gave bond in said sum, with sureties, which was approved by the judge of probate. It also further appears that, upon the application of one of the sureties upon the last-mentioned bond for his discharge as surety, "notice was issued to Lott, ordering him to file a new additional bond, as said tax collector of Mobile county, on or before March 31, 1897; that, in compliance therewith, said Lott, as such tax collector," gave four bonds with different sureties, aggregating in amount \$50,000, which were taken, and approved by the judge of probate of said county, on the 10th day of April, 1897. The bill as amended further avers "that said Lott continued to act under said bonds as such tax collector, and that the sureties upon said bonds were not thereafter in any manner discharged as sureties upon said bonds." On the 15th day of June, 1897, the complainant in the bill became sole surety upon another bond of Lott as tax collector. It is also further averred that Lott, as tax collector, on the 1st day of July, 1897, defaulted, in failing to pay over to the county of Mobile, as required by law, the sum of \$12,309.54, the amount of the taxes which he had collected, or which he should have collected, for the county, which he failed to pay over, and that there was in force, at the time of such default, the six bonds above stated, aggregating \$200,000. It is further averred that the county of Mobile brought suit against the complainant, as surety of said Lott, on the 27th day of September, 1897, for the sum of \$23,062.51, claiming said sum to be the amount which Lott as tax collector should have accounted for and paid over to the said county of Mobile on the 1st day of July, 1897; that it became necessary for complainant to defend said suit, and by reason of such defense said amount so claimed was reduced to \$13,797.69, for which the county obtained judgment against complainant, together with the costs of court; that complainant appealed, and the judgment was thereafter affirmed for the above amount, with interest, damages, and costs amounting to \$16,547.47, which complainant paid to the clerk of the circuit court of Mobile county on the 20th day of February, 1900. It is further averred that complainant paid, in addition, the sum of \$76.10 costs of said appeal, amounting in the aggregate to \$16,623.57. The bill also avers that defenses were interposed by the complainant, in the suit against it by the county, that went to its entire claim, and that the adverse ruling upon one of the defenses stated in the bill was the ground of appeal to this court. The prayer of the bill is that the

defendants, sureties upon the other bonds given by Lott as tax collector, be required to contribute to the payment of the amount paid by complainant for his default, inclusive of costs of court and damages upon appeal, in proportion to the penalties of their respective bonds.

The bill as amended was demurred to, and, the demurrers being overruled, this appeal is prosecuted to review that decree. The only demurrer insisted upon in argument here was interposed by Carter, one of the sureties upon one of the four bonds given on the 10th day of April, 1897, the penalty of which is \$25,000. It is insisted by this demurrer, consisting of many grounds, that the bill is defective in failing to allege that tax collector Lott converted money of the county subsequent to the 10th day of April, 1897, the date of the execution of demurrant's bond. The averment in the bill, in this respect, to repeat, is that said "Lott, as tax collector, on the 1st day of July, 1897, defaulted, in failing to pay over to the county of Mobile, as required by law, the sum of \$12,309.54," etc. Proof of this fact, we held in *Fidelity & Deposit Co. v. Mobile Co.*, 124 Ala. 146, 27 South. 886, was sufficient to authorize a judgment in favor of the county against the surety upon the tax collector's bond, and that the claim by the surety that the default had in fact occurred prior to the execution of the bond was, if sufficient excuse, defensive matter. The allegation of the default of the principal, alleged in the bill, would have been sufficient if appellant had been sued by the county, and no good reason can be given why it should not be sufficient when sued by a surety, who has paid such default, for contribution. If the default of the principal occurred prior to the execution of the bond by appellant, that is matter of defense for him to invoke.

It is next insisted that the right to contribution is limited to the actual default of the principal, and should not and can not embrace the costs of the suit against the surety in which such default was established. It is doubtless true that, when the defense of a suit by the creditor against a surety was needless or frivolous, the costs of such suit cannot be included in the claim of the surety for contribution. He cannot, of course, claim for the consequences of his own wrong. Such was the case of *John v. Jones*, 16 Ala. 454, relied upon by appellant. The surety there was secured by a deed of trust, to which he could have resorted for the payment of the principal's default. It was needless for him to have suffered suit, having funds in his own hands out of which he could have discharged the debt. While authorities are cited, and expressions used, in the opinion of the court in that case, indicating that the surety can never claim contribution as to the costs and damages of a suit against him by the creditor, the decision to this extent was unnecessary, and the reasons given therefor are not sound. It was said that the surety has the

right to stand upon the terms of his contract, which is limited to the payment of the principal's default, and that it was the duty of the surety to pay the debt, if just, when demanded by the creditor. It has been repeatedly held that the right to contribution does not depend on contract. "It is a principle of equity, having its foundation in natural justice, that, when one discharges more than his just portion of a common burden, another who has received the benefit ought to refund to him a ratable proportion." *Owen v. McGehee*, 61 Ala. 440. And while it was the duty of the surety to pay the debt, if just, when demanded by the creditor, the duty rested equally upon the co-surety who was not sued. While it is true a surety is not bound to await the bringing of suit by the creditor in order to entitle him to contribution; we know of no rule which compels him to accept the amount claimed by the creditor as just and correct, nor of any rule which makes his determination of its validity or amount conclusive upon his co-surety. If the creditor, having a claim against several sureties, may select the one he wishes to sue, and the one sued is limited in his right of contribution to the actual default of the principal, exclusive of costs of suit, he can by his selection, to the extent of the costs of the suit, make a victim of the surety sued, and thus make the common burden personal oppression. We think the true rule is that where the surety obtains any advantage from the suit, or where, although the resistance of the suit was unsuccessful, there was reasonable ground of defense, if he acted as a prudent man would, in the light of facts and circumstances showing a probability of success in whole or in part, the surety sued should be entitled to include the costs and damages of the suit in his claim for contribution against his co-sureties. His co-sureties ought not and can not complain, for the burden of paying the debt rested equally upon them, and they could have prevented suit, or even stopped it after its commencement, by paying the demand of the creditor. The extra liability for the costs and damages of suit, not frivolously nor needlessly defended, should not be imposed upon one of several equally bound, at the caprice of the common creditor, any more than the payment of the debt itself. Particularly is this true where, as in the case in hand, the amount of the common liability is not necessarily the amount named in the bond or instrument, but must have been ascertained by matter extraneous thereto. 3 Am. & Eng. Dec. in Equity, 171; 7 Am. & Eng. Enc. Law (2d Ed.) 844; 1 Brandt, Sur. § 283. According to the averments of the bill, in consequence of the defense of the suit by complainant, the demand of the common creditor was reduced in the lower court from \$23,062.51 to \$13,797.69. The defense of the suit, therefore, was not only reasonable, but was a manifest advantage to the

other sureties, and we are not prepared to hold that the prosecution of the appeal to this court was unreasonable.

The contention that the bond upon which appellant, Carter, was surety, was not a statutory bond, is without merit. The bill clearly avers that Lott, as tax collector, was required, under the statutes, to give the bond, and that it was acted under by him. Therefore, although it may be subject to objection as to penalty, time of approval, etc., it stands, by virtue of the statute, in the place of the official bond, subject to all the remedies of a bond executed, approved, and filed according to law (Code 1896, § 3089; Code 1886, § 275), including those conferred by sections 300 and 286, of the Code of 1886 (sections 3132, 3118, Code 1896) upon sureties among themselves.

Nor is the objection to the dismissal of the bill as to two of the sureties who paid to complainant their proportion of the debt well taken. The liability of appellant, Carter, was not thereby increased.

We have considered the objections, raised by the demurrer to the bill, which have been argued, and find no error in the decree. **Affirmed.**

CAMPBELL v. STATE.¹

(Supreme Court of Alabama. June 5, 1902.)

ADULTERY—WITNESSES—COMPETENCY—EVIDENCE—RELEVANCY—OBJECTION TO EVIDENCE.

1. Where a man and a woman were separately indicted for living in adultery, the woman's husband was a competent witness against the male defendant, on his separate trial, as the husband's testimony on such trial could not tend to prove the guilt of the wife under the indictment against her.

2. Where a man and a woman were separately indicted and tried for living in adultery with each other, the conviction of the man would not be res judicata, or any evidence of the woman's guilt.

3. Admission of testimony objectionable because involving the disclosure, by a husband, of privileged communications from his wife, is not reversible error when objected to only on untenable grounds.

4. On a prosecution of a man for living in adultery, the husband testified that defendant lived in the house with himself and wife, and on one occasion, after witness and his wife had retired, and defendant was lying on his bed in an adjoining room, separated only by a thin partition, witness' wife refused to let him touch her, or have anything to do with her, and defendant laughed aloud. *Held*, that the testimony as to defendant's laughing was relevant under the circumstances.

5. Where exceptions to refusal to give patently bad charges are not insisted on in the brief of appellant in a criminal case, they will not be discussed.

Appeal from city court of Montgomery; William H. Thomas, Judge.

Joe Campbell was convicted of living in adultery, and appeals. **Affirmed.**

In addition to the facts set out in the opinion, Island Calvin, the husband of the wo-

man Mary Calvin, testified that he permitted the defendant to live in his house with him and his wife, and that he had seen illicit relations between the defendant and his wife; that the defendant slept in an adjoining room to his, with a thin partition between them; that one night, after the defendant had lived in his house for about two weeks, and after the witness and his wife had retired, and while the defendant was lying in his bed in the adjoining room, upon the witness' wife declining to let him touch her, or have anything to do with her, the defendant laughed out loud. The defendant moved the court to exclude this testimony upon the ground that it was immaterial, and had no relevancy to the issues involved in the case.

Robt. G. Arrington, for appellant. Chas. G. Brown, Atty. Gen., for the State.

MCOLLELLAN, C. J. Joe Campbell, a white man, was indicted, tried, and convicted for living in a state of adultery or fornication with Mary Calvin, a negro. The said Mary was separately indicted for living in a state of adultery with him; she being a married woman. On the trial of Campbell, the state was allowed, against his objection, to introduce, and examine as a witness, Island Calvin, the husband of the said Mary, to prove its charge against him; and defendant's exception to this action of the court is relied on here to work a reversal of the judgment. The witness' wife, Mary Calvin, though also indicted for living in adultery with this defendant, was not, as we have seen, indicted jointly with him, but separately, and she, of course, was not on trial with him. Testimony of the husband, going to prove the unlawful cohabitation between his wife and the defendant, against the latter, on this trial, could not, therefore, in any way tend to prove the guilt of the wife under the indictment against her. Nor would the conviction of this defendant be res adjudicata, or any evidence of the wife's guilt. *State v. Cutshall* (N. C.) 14 S. E. 107, 26 Am. St. Rep. 599. It is settled in this state that, in such case, the husband may testify on the trial of the party separately tried for an offense alleged to have been committed jointly by him and the wife. *Woods v. State*, 76 Ala. 35, 52 Am. Rep. 315. See, also, *Birge v. State*, 78 Ala. 435.

A part of the testimony of this witness involved the disclosure of privileged communications between him and his wife, Mary Calvin; but it was not objected to on that ground, but expressly upon other grounds which were wholly untenable.

The testimony of this witness as to the defendant laughing aloud anent the conversation between the witness and his wife cannot, we think, be said to have been immaterial, under all the circumstances detailed by the witness.

The charges refused to defendant were, severally, patently bad; and we will not dis-

¹ Rehearing denied June 23, 1902.

cuss them, as appellant's counsel does not insist upon them in his brief.

Affirmed.

ALBRITTON v. WILLIAMS.

(Supreme Court of Alabama. June 28, 1902.)

EXECUTION—CLAIMS BY THIRD PERSONS—AFFIDAVIT—SIGNING—JUSTICES OF THE PEACE.

1. As Code, § 4141, relating to affidavits by claimants of property levied on under execution, does not in terms require them to be signed by the party making them, an affidavit not signed, but properly certified by the officer before whom it was made, was sufficient.

2. Code, § 1883, declaring executions from the circuit court illegal unless the clerk has issued therewith an itemized bill of costs, is not made applicable to executions issued from a justice court, by Code, § 2673, providing that as to parties, regulation of suits, and the time within which suits may be brought, suits before justices of the peace shall be governed by the same provisions, so far as they may be applicable, as suits in the circuit court.

Appeal from circuit court, Wilcox county; John Moore, Judge.

Action by E. W. Albritton against Henry Ellis, in which J. C. Williams claims property levied on under an execution in favor of plaintiff. From a judgment in favor of the claimant, plaintiff appeals. Reversed.

The appellant, E. W. Albritton, brought an action in the justice of the peace court against Henry Ellis and recovered a judgment against said Ellis. Upon this judgment an execution was issued and was levied upon two mules and a horse, the property of said Ellis. Thereupon the appellee, J. C. Williams, interposed a claim to the property so levied upon by making affidavit and giving claim bond. The affidavit, however, was not signed by him or any one else, but the officer before whom it was made certified that it was made by said J. C. Williams. Issue was made up for the trial of the right of property so levied upon, and the trial was had before the justice of the peace issuing the execution. In this trial a judgment was rendered in favor of the plaintiff, and from this judgment the claimant appealed to the circuit court. In the circuit court issue was again joined between the plaintiff and the claimant. In that court the plaintiff moved to quash the affidavit upon which the claim suit was based, because said affidavit was not signed by the claimant or his agent or any one else. The affidavit was introduced in evidence and showed that it was not signed by the claimant, but that the justice of the peace before whom it was made certified that it was executed and sworn to by the claimant. This motion was overruled, and to this ruling the plaintiff duly excepted. The claimant moved the court to be allowed to amend the affidavit by then signing it. The court granted this motion, and to this ruling the plaintiff duly excepted. The claimant then moved the

court to quash the execution which was levied upon the property involved in the controversy, upon the ground that no itemized bill of costs was attached to said execution or made a part thereof. The execution, which was introduced in evidence, showed that there was attached to it or made a part of it the itemized bill of costs in the justice of the peace court. The court granted this motion to quash the execution and dismissed the plaintiff's suit and rendered judgment in favor of the claimant. To each of these rulings the plaintiff separately excepted. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Miller & Miller, for appellant. Bonner & Bonner and Howard Jones, for appellee.

HARALSON, J. 1. The plaintiff moved the court to quash the affidavit of the claimant because it was not signed by him or his agent, or by any one. The court overruled the motion, and at the instance of claimant, he was allowed to amend his affidavit by signing the same. The affidavit needed no amendment. It was good without claimant's signature, since it had the jurat of the justice of the peace, before whom it was made, that it was sworn to before him on the date it bears date. This clearly appears from the affidavit itself, introduced in evidence. The statute (Code, § 4141) does not in terms require the affidavit to be signed by the party making it; and when it clearly appears as here, that the claimant made the affidavit, and the fact of his swearing to it is also properly certified by the officer before whom it was made, it is sufficient, although not subscribed by the party making it. *Watts v. Womack*, 44 Ala. 605; *Hyde v. Adams*, 80 Ala. 118; 1 *Cycl. Law & Proc.* 26.

2. To the execution that issued from the justice of the peace court, on the judgment therein rendered in favor of plaintiff, against the defendant in execution, no itemized bill of costs was attached at its foot or on any part of it, as is required in cases where executions issue from the circuit court under section 1883 of the Code, and on this ground, the claimant, in the circuit court, moved the court to quash the execution. That section does require clerks (of the circuit court) to state in intelligible words and figures, the several items composing the bill of costs, and provides, that without such copy of the bill of costs, the execution is illegal and shall not be levied. In *Maxwell v. Pounds*, 116 Ala. 551, 23 South. 730, the court, construing that section held, that an execution which issued from a circuit court without a copy of the bill of costs, as by the section required, was void. It is well settled, that mere irregularities or defects in the original proceedings, are not available to claimant, but when void on their face from any cause, the claimant may avail himself of it. *Carter v. O'Bryan*,

¶ 1. See Affidavits, vol. 2, Cent. Dig. § 42.

105 Ala. 814, 16 South. 894; Schamagel v. Whitehurst, 103 Ala. 263, 15 South. 611.

3. The contention of the plaintiff is, that the requirements of said section 1883, have no application to executions issued from a justice of the peace court, and apply only to such as issue from circuit courts; and the claimant's contention is, that it applies alike to such process issuing from either of these courts. This contention of the claimant is sought to be based, among other grounds, on section 2673 of the Code, which provides, that "as to parties, trial, competency of witnesses, admissibility of evidence, regulation of suits, and the time within which suits may be brought, unless otherwise provided, suits before justices of the peace shall be governed by the same rules and provisions, so far as they are applicable, as suits in the circuit court." But, manifestly, this section does not apply to the issuance, return and levy of executions from justice's courts. The rules of the circuit court, as to parties, trial, competency of witnesses, admissibility of evidence, regulation of suits, and the time in which they may be brought therein, have no application to the issuance of executions from justices' courts. Issuance of execution from these courts does not fall within either of the specified categories. *Chaney v. Lumber Co.* (Ala.) 31 South. 869; *Mitchell v. Corbin*, 91 Ala. 599-601, 8 South. 810.

Without said section 1883, it could not be well contended that executions issuing from circuit courts without an itemized bill of costs at their foot or on some part of them, would be void. Their illegality when thus issued arises alone from the positive terms of the statute. This illegality, except inferentially, cannot be applied to executions from justices' courts. A full answer to the contention is found in the fact, that the statute has made the requirement as to one class of executions and not to the other; and having reference to the writs themselves, their issuance, periods of return, levy, sales thereunder, etc., it is not difficult to understand, why the rule should, in the legislative mind, be proper to be made in the one case and not in the other. *Griffin v. Dauphin* (Ala.) 81 South. 849.

The court erred in quashing the execution and dismissing the suit.

Reversed and remanded.

STATE v. BLEVINS.

(Supreme Court of Alabama. June 28, 1902.)

**FORMER JEOPARDY—ASSAULT AND BATTERY
—TRIAL—ASSAULT WITH INTENT
TO RAPE.**

1. Where, on a trial for assault and battery in a court having jurisdiction to finally determine the charge, it appears that the offense was an assault with intent to rape, the accused having been in jeopardy under the charge of assault and battery, he could not be bound over to answer the charge of assault with intent to rape.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Application of Willie Blevins for a writ of habeas corpus to secure petitioner's release from custody. From an order discharging the petitioner, the state appeals. Affirmed.

Chas. G. Brown, Atty. Gen., and James E. Webb, for the State. Leslie B. Shelden, for appellee.

DOWDELL, J. This appeal is prosecuted by the state from an order of the judge of the city court of Mobile discharging the petitioner on habeas corpus.

The prisoner was arrested on a warrant issued by the judge of the inferior criminal court of Mobile county, on an affidavit, made by one Mary Junius, charging the defendant with an assault and battery on the affiant. The warrant was made returnable before the judge of said inferior criminal court. A day was set for the trial, and at which time the trial was entered upon; the defendant interposing the plea of not guilty. After the introduction of evidence by the state and defense, and upon the conclusion of the argument of counsel, the judge of the inferior court made and entered upon the docket the following order: "State v. Willie Blevins. Assault and Battery. On hearing the evidence in this case, it appears to the court that the offense of an assault with intent to ravish has been committed, and that there is probable cause to believe that the defendant is guilty thereof, wherefore it is ordered and adjudged that unless the defendant enter into a bond in the sum of five hundred dollars, with good and sufficient surety for his appearance to answer said charge at the next term of the city court of Mobile, Alabama, and from term to term thereafter until legally discharged, he be detained in the Mobile county jail until legally discharged. April 26th, 1902." Pursuant to this order, a mittimus in due form was issued, committing the defendant to jail, and under and by virtue of which he is not held in custody.

It is conceded that but one assault was committed, and that the assault and battery for which he was arrested and tried on the affidavit and warrant, and the assault with intent to ravish, for which he was committed, were the same offense. It is also admitted that there was no fraud or collusion in the suing out of the affidavit and warrant of arrest for the assault and battery. The case presented is whether or not the defendant was put in jeopardy in the proceeding against him for an assault and battery. That the inferior criminal court of Mobile county has final jurisdiction in cases of assault and battery is not questioned. This court, under the act amendatory of the act of its creation, is given final jurisdiction of all misdemeanors concurrent with that of the city court of Mobile. Acts 1900-1901, p. 2575. In the trial of misdemeanors before

the judge of the inferior criminal court, the proceedings are commenced on affidavit and warrant as in the county court, under the provisions of chapter 142 of the Criminal Code. The proceeding against the defendant for an assault and battery was commenced under the provisions of this chapter. The affidavit upon which the warrant of arrest issued was the complaint, and on this complaint the judge of the inferior court had jurisdiction to try the case, and render final judgment. The felonious assault for which the defendant was bound over embraced the minor offense of assault and battery, for which he was arrested and put on trial. If the defendant had been convicted for the assault and battery, it would not for a moment be contended that he could again be tried and punished for the assault with intent to ravish. To do so would be in violation of an organic law,—that no person shall for the same offense be twice put in jeopardy of life or limb. While cases are to be found in other jurisdictions which hold that on an acquittal or conviction for a minor offense, and the defendant is afterwards put on trial for the greater offense, which embraced the former, no jeopardy arises, this court is thoroughly committed to the contrary doctrine. The state cannot elect to prosecute and try a person for a lower grade, and then put him on trial for a higher grade, of the same offense. *Moore v. State*, 71 Ala. 307; *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17; *Storrs v. State*, 129 Ala. 101, 29 South. 778.

At what stage in the particular case jeopardy arises has in some instances been of serious and doubtful question, but there exists no room for doubt or question in the present case. The trial of the defendant here, upon issue joined on the plea of not guilty, before a tribunal of competent and final jurisdiction, had proceeded to the conclusion of the evidence, and reached the stage calling for a judgment of the court on the issue as made. There can be no doubt that the defendant was thus placed in jeopardy, and it follows that the order of the judge of the city court of Mobile appealed from, discharging the prisoner, must be affirmed.

PRUETT et al. v. PRUETT.¹

(Supreme Court of Alabama. Feb. 4, 1902.)
EXECUTORS—APPLICATION FOR LETTERS TESTAMENTARY—TIME—PETITION TO REVOKE LETTERS—JURISDICTION.

1. Code, § 52, provides that if any person named in a will as executor fails to apply for letters testamentary within 30 days after probate of the will, and any others named therein as executors apply for such letters, they must issue to such persons; and section 53 provides that, if all the executors named fail to apply for letters within the 30 days, certain other persons shall be entitled to administration.

Held that, where one of several executors failed to apply for letters within 30 days after probate, the exclusive right to administration was vested in the executors who applied within such period, and the court had no jurisdiction to grant letters to the executor who failed to apply within the 30 days.

2. The probate court, having inherent jurisdiction to make its records speak the truth, has a right to hear and determine a petition for the revocation of letters testamentary previously granted by it, notwithstanding that a city court has assumed jurisdiction of the administration of the estate.

Appeal from probate court, Montgomery county; John B. Gaston, Judge.

Suit by S. T. Pruett and others against Ada B. Pruett. From a decree in favor of defendant, petitioners appeal. Reversed.

The appellants S. T. Pruett and O. J. Pruett filed a petition in the probate court of Montgomery county, asking that letters testamentary issued out of said court to Ada B. Pruett in the matter of the last will and testament of Seth G. Pruett, deceased, be revoked. The facts as shown by the pleading and proof were that S. G. Pruett died leaving a last will and testament, in which he named S. T. Pruett, O. J. Pruett, and George Feagin as executors, and Ada B. Pruett as executrix. The will was admitted to probate in the probate court of Montgomery county on April 8, 1901. On May 8, 1901, the appellants S. T. Pruett and O. J. Pruett applied for, and had granted to them, letters testamentary under said will. On May 9, 1901, Ada B. Pruett applied for letters testamentary, and the same were granted and issued to her. George Feagin never applied for the issuance of letters testamentary to him. After the grant of letters testamentary, Ada B. Pruett, S. T. Pruett and O. J. Pruett filed the present petition in the probate court, from which the letters were issued praying that the letters testamentary issued to Ada B. Pruett be revoked upon the ground that more than 30 days had elapsed between the probate of the will and the application for letters, and that, therefore, the right to have letters issued to Ada B. Pruett had been waived or abandoned by her. Ada B. Pruett filed two pleas, in which she sought to set up reasons why the petition to revoke the letters testamentary to her should not be granted. In the first plea, she averred that, by not applying for letters testamentary until after the lapse of 30 days, she did not forfeit her right to said appointment, or relinquish her right to said appointment, under the provisions of any statute. In the second plea, she set up that the probate court had no jurisdiction of the petition, because a bill had been filed in the city court of Montgomery, in equity, to remove the administration into that court, and, although no decree or order of removal had been entered, the petition should have been filed in the city court of Montgomery, and

¹ Rehearing denied June 28, 1902.

² See *Executors and Administrators*, vol. 22, Cent. Dig. § 202.

the probate court was without jurisdiction thereof. Demurrers and motions to strike these pleas were overruled. Upon the hearing of the petition, the probate court rendered a decree denying the same, and dismissed the petition. From this decree, the petitioners appeal, and assign the rendition thereof as error.

Harmon, Dent & Well, for appellants, Watts, Troy & Coffey and Edwin F. Jones, for appellee.

TYSON, J. This appeal is prosecuted from a decree of the probate court denying the petition of appellants seeking a revocation of letters testamentary issued to Mrs. Pruett. The will named appellants as executors, and Mrs. Pruett as executrix. It was probated on the 8th day of April, 1901, and, on the thirtieth day after probate, letters testamentary were issued to the petitioners. On the thirty-first day after probate, the letters sought to be revoked in this proceeding were issued to Mrs. Pruett.

"The common law traced the title and authority of an executor to the will. Without regard to the time of its probate, his title and authority were by relation referred to the death of the testator. The executor was regarded, not as an officer of the court of probate, but rather as a private trustee, nominated and appointed by the testator, and charged with such duties as the testator declared. Probate was essential only to establish, by judicial sentence, his right and authority. Before probate he could do nearly all the acts he could rightfully do after probate, except the institution and prosecution of suits, in which proof of probate and letters testamentary was necessary." Brock's Adm'r v. Frank, 51 Ala. 91, 92. So, also, in some jurisdictions it is a rule of the common law that where there are several executors, and one renounces, and the others prove, the will, the renunciation is not binding on him so long as one or more of his co-executors continue in office, but he who renounced may at any time afterwards come in and administer. 11 Am. & Eng. Enc. Law (2d Ed.) 757. In others, the rule seems to be this: In the absence of statutory regulation to the contrary, an executor named in a will is not bound to take probate when his co-executors do; he may come in at any time afterwards, and take letters testamentary; and even should he renounce, though he cannot in that case take letters testamentary during the life of such as prove the will, yet, should he survive them, he is entitled to administration of the estate and to letters testamentary. Judson v. Gibbins, 5 Wend. 224; 1 Woerner, Adm'n, § 234. These rules clearly have application only in those jurisdictions where the common law prevails that an executor derives his authority exclusively from the will, and not from his letters testamentary, and have no appli-

cation in this jurisdiction, where the settled rule is that letters testamentary must be granted before an executor is legally invested with any authority over the assets of the testator's estate (Wood v. Cosby, 76 Ala. 557); and the statutes regulating the issuance of letters testamentary and administration create preferences which must be exercised by the party preferred within the time fixed by the statutes. Keith v. Proctor, 114 Ala. 676, 21 South. 502; Wheat v. Fuller, 82 Ala. 572, 2 South. 628; Forrester v. Forrester's Adm'rs, 37 Ala. 398; Curtis v. Williams, 33 Ala. 570.

Sections 52 and 53 of the Code required Mrs. Pruett to apply for letters within 30 days after probate of the will, and her failure to do so lost to her the right to have letters as against her co-executors who did make their application within the time prescribed. In other words, her failure to exercise the right conferred by the provisions of these statutes, and the exercise of that right by the petitioners, conferred upon the latter the exclusive right to letters testamentary; and, so long as the letters issued to the petitioners remained unrevoked, the court was without jurisdiction to grant the letters to Mrs. Pruett. Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; Bean v. Chapman, 73 Ala. 140; Nelson v. Boynton, 54 Ala. 368; Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757; Gray's Adm'r v. Orulse, 36 Ala. 560. This being true, the grant of letters to her was void, and the petition should have been granted, and her letters revoked.

The grant of letters being void, it was the duty of the probate court to revoke them. Having the inherent jurisdiction to make the records speak the truth, it unquestionably had the right to hear and determine and grant the petition in this case, although it be conceded (a question we do not here decide) that the city court had assumed jurisdiction of the administration of the estate. A decree will be here entered, revoking the letters testamentary to Mrs. Pruett, and reversing the decree of the probate court denying the petition.

Reversed and rendered.

POLLAK et al. v. BILLING.¹

(Supreme Court of Alabama. Feb. 13, 1902.)
CREDITORS' SUIT—DISCOVERY OF ASSETS—PLEADING—SUFFICIENCY OF BILL—LIMITATIONS—REMOVAL OF BAR—PROMISE TO PAY—SPECIFICATION OF AMOUNT—CONSIDERATION—NOTES—INDORSER'S LIABILITY—PROMISE TO PAY AFTER FAILURE TO PROTEST—CONSIDERATION.

1. Under Code, §§ 819, 821, providing that a creditor may file a bill against his debtor for the discovery of assets owned by the debtor, and for the application of such assets to the creditor's claim, it is not necessary for the bill to allege any fraudulent conveyance or attempt to transfer property, but it is sufficient if it allege the insufficiency of visible assets

¹ Rehearing denied June 23, 1902.

subject to legal process, and the existence of assets which are concealed and hidden out.

2. Under Code, § 819, authorizing a creditor to file a bill against his debtor for a discovery of assets, and providing that the debtor shall answer under oath, a waiver, in such a bill, of answer under oath, as to all except the interrogatories directed to the character and location of the debtor's assets alleged to be concealed, does not prevent the bill from being a bill of discovery.

3. An agreement by a debtor promising to pay all the notes and bills held by the creditor against him at the date of the agreement, "as shown by the same, and in the manner shown by same," and admitting that all such bills are just and unpaid, furnishes the means by which the amount of the indebtedness can be ascertained with sufficient definiteness to render the agreement effectual as a removal of the bar of limitations.

4. Where a complaint sets out an agreement, made a year before the suit was instituted, whereby defendant promised to pay all the bills and notes held by plaintiff against him on that date, a demurrer on the ground that the cause of action founded on such notes was barred by six years' limitations will be overruled, regardless of whether the complaint showed that the bills and notes were outstanding at the date of the agreement, since, if the bill does not show this, it necessarily does not show that the bills and notes were of six years' standing, and, if it does show that they were outstanding at such date, then they are designated by the promise to pay with sufficient definiteness to remove the bar.

5. An agreement waiving the bar of limitations, which acknowledges the justness of all bills and notes held by the creditor on which the debtor is drawer, acceptor, indorser, or maker, and waiving the debtor's right to be discharged from any obligation on any of such bills and notes indorsed or accepted by him, by reason of any failure to have them protested, is sufficiently broad to cover bills and notes which, at the date of the agreement, were not subsisting obligations on account of failure to give the debtor notice of nonpayment when they fell due.

6. An agreement by a creditor not presently to sue his debtor is sufficient consideration for a waiver of limitations by the debtor.

7. An agreement by a creditor not to sue his debtor on notes on which the debtor was liable partly as maker and partly as indorser is sufficient consideration, granting that one is necessary, for a promise, by the debtor, to pay his obligations as indorser from which he has been released by failure to protest.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Suit by F. M. Billing against Ignatius Pollak and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

In addition to the averments of the bill as set forth in the opinion, it was further averred that Pollak had an interest in certain named corporations, and that certain named persons held in trust lands and property in which he had an equitable interest; that he had a vendor's lien for the purchase money of certain described real estate sold to certain persons or corporations; that Pollak was the equitable owner of a vast amount of property held by certain named persons or corporations, but that the same were not visible to complainant, and were not accessible to process; that the complainant did not know, and could not know, the particu-

lars and extent of all the property owned by said Pollak, and the title thereto, without discovery of the same. There were also the following additional averments contained in said bill: "Orator is informed and believes, and upon such information and belief avers and states, that if the said Ignatius Pollak should dispose of his property and assets, which are equitable in nature, and not subject to legal process, orator would be wholly remediless in his effort to collect the debts of said Pollak justly due and owing to him, and without an injunction against the said Ignatius Pollak, restraining and enjoining him by himself or through his agents or attorneys, from selling, disposing of, or incumbering such assets and property, orator will be in great danger of losing the fruits of a decree in his favor in this cause, and of failing to subject such property and assets to the payment of the just debts of said Pollak to orator." Ignatius Pollak and the certain persons and corporations averred in the bill to be the holders in trust of the property alleged to belong to said Ignatius Pollak were made parties defendant. There were included, in the bill, interrogatories addressed to Ignatius Pollak and other parties defendant. The purpose of these interrogatories was to disclose the character and location of the assets which it was averred Pollak had hidden out and concealed. The prayer of the bill was as follows: "And, upon the hearing, orator prays that your honor will refer it to the register to ascertain and report in what sum the said Ignatius Pollak is indebted to complainant, and that your honor will render a decree in favor of complainant, against the said Ignatius Pollak, therefor; and that your honor will, by proper orders and decrees, discover and ascertain what property real or personal, or interest in property real or personal, subject to the payment of the debts, the said Ignatius Pollak has, and what moneys, effects, and choses in action, and interest in moneys, effects, and choses in action, subject to the payment of debts, the said Ignatius Pollak has, and whether such money, property, effects, and choses in action are within or without the state of Alabama; and that your honor will make all such orders and decrees as may be necessary and proper to reach and subject such property, moneys, effects, and choses in action to the payment of the debts due and owing by said Ignatius Pollak to complainant; that, for the purpose, your honor will appoint a receiver, who shall be authorized under the orders and decrees of this court to demand, sue for, and recover, or otherwise to reduce to possession, all such property, moneys, effects, and choses in action; and that your honor will require the said Ignatius Pollak, and all other defendants to this cause, to make such receiver all conveyances, assignments, and transfers which may be necessary and proper to enable such receiver to receive or to sue for and recover such property. That your honor will

grant unto complainant a writ of injunction restraining the said Ignatius Pollak, by himself or through his agents or attorneys, or otherwise, from selling, disposing of, or encumbering his property or assets or any of them, whether legal or equitable in their nature, pending the determination of this cause. That your honor will adjudge and decree that neither the said Helene nor Robert Pollak has any interest or claim in and to any of the obligations of The Fair, purporting to be payable to S. Roman individually or as trustee for them, or, if the said Helene or Robert Pollak has any interest in the same, that such interest is subject to the claim of complainant thereto, for the satisfaction of the debts of said Pollak." The bill was amended by adding thereto the agreement entered into by Ignatius Pollak as to his obligations to Josiah Morris & Co., which was the style of the firm under which F. M. Billing did business. This agreement is copied in the opinion.

The defendant Pollak made a motion to dismiss the bill for the want of equity, and also demurred to the bill upon the following grounds: "(1) That it appears in and by said bill that the cause of action of the plaintiff accrued more than six years prior to the commencement of this suit, and that it is barred by the statute of limitations of six years. (2) That the said bill is not a bill of discovery, the oath thereto being waived, and the plaintiff does not show that his remedy at law has been exhausted by return of no property on an execution on a judgment against this respondent, and the bill is not filed to subject any specified property, and is a fishing bill, by a simple contract creditor, for the collection of a legal demand, whereby it appears that this court is without jurisdiction of said cause. (3) That said bill is not for discovery, nor for the condemnation of specified property, and it does not allege sufficiently the fraudulent conveyance or transfer, or attempted fraudulent conveyance or transfer, of any specific property." The defendant Pollak also filed several pleas; the first of these pleas set up that the cause of action set forth in the bill accrued more than six years prior to the institution of the suit, to wit, in the year 1893, and that the same was barred by the statute of limitations of six years. The substance of the other pleas is sufficiently stated in the opinion.

Upon the submission of the cause upon the motion to dismiss, upon the demurrer to the bill, and the exceptions to the sufficiency of the pleas, the court rendered a decree overruling the motion and the demurrer, and sustaining the exceptions to the pleas. From this decree the defendants appeal, and assign the rendition thereof as error.

Gunter & Gunter, for appellants. Ray Rushton and Watts, Troy & Caffey, for appellee.

TYSON, J. This bill was filed by a simple contract creditor for discovery of assets under

section 819 of the Code, and to subject them to the payment of debts alleged to be due by Pollak to complainant. Section 821 of the Code. It is averred that respondent Pollak is indebted to complainant in the sum of \$20,000, or other large sum, by his bills of exchange and promissory notes, and other accounts in a large amount, which is due and unpaid; that the said Pollak has not visible property or means subject to legal process of value sufficient to pay complainant; and "that orator is informed and believes, and upon such information and belief states, that the said Ignatius Pollak has property, means, or assets not accessible under legal process, or an interest in property real or personal or money or effects or choses in action which are not accessible under legal process, which are liable to the satisfaction of his debts to orator, but that the kind and description of such property, and how it is held, is kept concealed and hidden out, and is unknown to orator, and that a discovery of the same by defendants hereinafter named is necessary to enable orator to reach and subject the same to the satisfaction of said demands owing to orator by said Pollak." The bill contains interrogatories addressed to Pollak and the other respondents, for the discovery of said assets, and prays for such decrees as may be necessary to subject such assets to the indebtedness of complainant; for a receiver; and for an injunction to prevent Pollak from disposing of the assets pending a determination of the cause.

In *Cook v. Schmidt*, 100 Ala. 582, 13 South. 686, speaking of the right of a simple contract creditor to maintain a bill under the statute, it was said: "The constitutionality of the act and the right of a creditor to relief under its provisions have been thoroughly considered by this court, and should be regarded as settled law in this state." We see no ground for differentiating this case from the others where the jurisdiction of the court has been repeatedly sustained. The bill sufficiently avers the insufficiency of visible assets for the payment of the indebtedness, and the existence of other assets, not subject to legal process, which are kept concealed or hidden out. It is not necessary that the bill should show any fraudulent conveyance or attempt to fraudulently transfer property. It is sufficient if it avers the insufficiency of visible assets subject to legal process, and the existence of assets which are concealed and hidden out. This the bill under consideration does. *Sweetzer v. Buchanan*, 94 Ala. 574, 10 South. 552; *Lawson v. Warren*, 89 Ala. 584, 8 South. 141; *Sorrell v. Vance*, 102 Ala. 207, 14 South. 738.

The bill was also demurred to upon the ground that it is not a bill of discovery because answer under oath is waived as to all of it except the interrogatories incorporated therein. These interrogatories are directed to the ascertainment of the character and location of the assets which it avers the debtor

has hidden out and concealed. This is the purpose of the discovery under the statute, and, answer under oath as to the character, location, and interest of Pollak in the assets being required as contemplated by it (the statute), it cannot be said that the bill is not a bill of discovery thereunder.

The defense of the statute of limitations of six years was interposed by demurrer and by pleas. The bill as amended, to which the demurrer and pleas were interposed, contained the following agreement, signed by Pollak, of date July 12, 1899: "Whereas I, Ignatius Pollak, of said county and state, am justly indebted to Josiah Morris & Co. in several and divers bills of exchange and promissory notes as drawer, acceptor, indorser, or maker, and desire to extend my liability thereon and therefore, so that the statute of limitations will not bar the same, and in consideration that said Josiah Morris & Co. do not presently bring suit on my said obligations to them, I, the said Ignatius Pollak, do hereby acknowledge my obligation on all of said notes and bills as shown by the same, and in the manner shown by the same, and that my indebtedness as shown thereby is just, correct, due, and unpaid; and for such consideration aforesaid I hereby expressly and unequivocally renew such obligations, and promise to pay the same, this promise and agreement being intended to renew and extend my obligations on such paper to the extent and as fully as if I had renewed each of such papers. And I also hereby waive my right to be discharged from any obligation on any of said notes or bills as indorsed or accepted by reason of any failure to have them protested at the time they fall due, and all protests on them are hereby waived." The essentials of a promise to remove the bar of the statute of limitations is thus stated in *Chapman v. Barnes*, 93 Ala. 435, 9 South. 590: "There must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay." The agreement above quoted does not specify any debts other than all bills of exchange and promissory notes upon which Pollak was then justly indebted to Josiah Morris & Co. He acknowledges his obligation on "all of said notes and bills as shown by the same, and in the manner shown by the same;" that his indebtedness, as shown thereby, is just and unpaid, and he "unequivocally" promises to pay them. It is manifest that, by embracing all the bills of exchange and promissory notes outstanding in the hands of complainant on the 12th of July, 1899, upon which Pollak was acceptor, indorser, or maker, the agreement furnishes the means by which the amount of the indebtedness covered by it could be definitely and certainly ascertained. This would appear upon the face of the bills and notes outstanding.

The agreement was also an acknowledgment of the amounts of the bills and notes then outstanding as due, and an unequivocal promise to pay the same. If the bill of complaint did not show that the notes and bills of exchange sought to be collected were outstanding at the date of the agreement, the demurrer and pleas interposing the defense of the statute of limitations necessarily do. The demurrer involves the assertion that the bill shows that the cause of action upon the notes and bills of exchange accrued six years prior to the commencement of this suit, which was on the 31st day of May, 1901. If the bill of complaint does not show that the cause of action upon them accrued six years before the commencement of the suit, the demurrer is bad; if, on the other hand, the bill does show such fact, the demurrer is equally bad, for the reason that the bill in such case would also show that the notes and bills of exchange were outstanding on the 12th day of July, 1899, the date of the agreement. The same may be said of the pleas. They aver that the obligation sued upon accrued six years prior to the commencement of the suit. If this be so, the bills of exchange and notes were necessarily outstanding at the date of the agreement, which was not two years before this bill was filed. This fact is all that is necessary for the definite ascertainment of the amount of the indebtedness as to which the statute of limitations was waived.

In plea numbered 3 it is averred that the bills of exchange and notes were not covered by the waiver of the statute contained in the agreement, because they were not then subsisting obligations by reason of failure to give Pollak notice of nonpayment when they fell due. This construction of the agreement of waiver is too narrow. The agreement did not leave the question open as to whether Pollak was justly liable upon any of the bills and notes then outstanding, or whether he had a defense thereto for future ascertainment. It was an acknowledgment that he was justly indebted upon all of them "as shown by the same, and in the manner shown by the same." That this was the intention of the parties is further manifest from the fact that Pollak, in and by the agreement, waived his right to be discharged from his obligation on any of said notes or bills by reason of failure to have them protested at the time they fell due. The fact that Pollak was not then liable upon some of the bills and notes outstanding was in the minds of the parties, and the intention is clear that the agreement was to cover them and all others.

Plea No. 2 asserts that the waiver of protest was without consideration, and, being made after the bill and notes had become due, was of no effect. If a consideration were necessary to sustain a promise to pay after failure to give notice of nonpayment (*Bolling v. McKenzie*; 89 Ala. 470, 7 South. 658), the agreement furnishes such considera-

tion for the promise. It shows that the waiver of failure to protest and give notice, as well as the waiver of the bar of the statute of limitations, was in consideration of the agreement of Josiah Morris & Co. not to presently sue upon Pollak's obligations, upon some of which, we may add, he was liable as maker, and not entitled to notice.

Affirmed.

Ex parte JONES.¹

(Supreme Court of Alabama. May 22, 1902.)

EQUITY—VOLUNTARY DISMISSAL AFTER ANSWER FILED—LEGAL SET-OFF—PREJUDICE TO DEFENDANT—REINSTATEMENT—MANDAMUS.

1. Where the answer to a bill made a cross bill contains a set-off not purely of equitable cognizance, or such as would support an original bill, dismissal of the bill carries with it the cross bill.

2. An order of the chancellor vacating an order dismissing a bill made by the register in vacation being purely interlocutory, and not appealable, the only remedy left to complainant is by mandamus to compel the chancellor to vacate the order made by him.

3. Under Code, § 703, providing that, after answer or cross bill filed, the complainant may, on application to the register in vacation, dismiss the suit, but the defendant may at the next term of court show cause against the dismissal, and procure a vacation of the order, a dismissal cannot be made which is prejudicial to defendant, and where the answer avers a set-off growing out of the subject-matter of the original bill, and is of such character that an independent action thereon would be barred by limitations at the time the complaint was dismissed, but was not so barred at the time the bill was filed, the bill cannot be dismissed, though such set-off was legal, and not equitable, in nature.

Mandamus by Winston Jones to compel the chancellor of the chancery court of Marengo county to vacate an order made by him, setting aside an order dismissing a bill in equity brought by petitioner. Writ denied.

Pettus, Jeffries & Partridge, for petitioner. Wm. Cuninghame, for respondent.

DOWDELL, J. This is a petition for a mandamus to compel the chancellor to vacate an order made by him in the cause of Winston Jones v. L. D. Hardy, pending in the chancery court of Marengo county, in which the chancellor, on the application of Hardy, set aside and annulled an order, made by the register of said court in vacation, dismissing the complainant's bill, on the motion of the complainant, Winston Jones.

The facts, as stated in the petition, show that the petitioner, Winston Jones, filed his bill in the chancery court of Marengo county against L. D. Hardy and others, seeking a discovery and an accounting. Demurrers were interposed by the several defendants, which were sustained as to all of the defend-

ants except the defendant Hardy, and were overruled as to him. This decree on the demurrers was affirmed on appeal to this court. Jones v. Hardy, 127 Ala. 221, 28 South. 564. The defendant, Hardy, also filed an answer, which was made a cross bill. In his answer, after admitting certain averments of the bill, and denying others, he claimed a set-off against the demand of the complainant, which was germane to, and arose out of, the matters alleged in the bill.

The defense of set-off pleaded in the answer, and upon which affirmative relief is sought by way of cross-bill, is purely legal, as contradistinguished from equitable. It is matter as to which the cross-complainant has a complete and adequate remedy at law. And while it is proper subject for a cross bill, where affirmative relief is prayed, it is not an independent equity, or matter of purely equitable cognizance, such as would support an original bill in the first instance. In such a case, the dismissal of the original bill carries with it the cross bill. Abels v. Insurance Co., 92 Ala. 382, 9 South. 423; Wilkinson v. Roper, 74 Ala. 140.

The order of the chancellor vacating the order of dismissal made by the register in vacation, and restoring the cause to the docket, was purely interlocutory, and from it no appeal would lie. Not being an interlocutory decree, from which the statute authorizes an appeal, the only remedy left to the complainant is by mandamus. It is true that ordinarily it is not the office of this writ to review and revise judicial action, but generally to compel such action; yet, as has been decided by this court, the writ will lie to correct the erroneous ruling of a court where injury results, and there exists no right of appeal or other adequate means of redress. Ex parte Woodruff, 123 Ala. 99, 26 South. 509; Wilson v. Duncan, 114 Ala. 659, 21 South. 1017; Ex parte Tower Mfg. Co., 103 Ala. 415, 15 South. 836; Ex parte Hayes, 92 Ala. 120, 9 South. 156.

To determine whether the ruling of the court be erroneous, and such as entitles the petitioner to this remedy, of necessity involves a consideration and review of the action of the court complained of in the petition. And if it be concluded upon such review and consideration that there is no error, the writ, as a matter of course, would be denied. The complainant had his bill dismissed, on application to the register in vacation, under the provisions of section 703 of the Code, which reads as follows: "Before an answer or cross bill is filed, the complainant may, on application to the register in vacation, dismiss the suit. On such application, the register must enter on the minutes an order of dismissal; and may issue execution against the complainant for all costs which have accrued. After answer or cross bill filed, the complainant may, on application to the register in vacation, dismiss the suit; and the register must enter an

¹ Rehearing denied June 23, 1902.

¶ 1. See Equity, vol. 19, Cent. Dig. § 755.

order of dismissal on the minutes. But the defendant, at the next succeeding term of the court, may show cause against the dismissal, and procure a vacation of the order. If cause is not shown at the next succeeding term, the order is final; and execution may issue against the complainant for all costs which have accrued." It was under the second clause of this statute that the dismissal was had. It is plain that, by the terms of the statute, the dismissal before the register does not become final until upon failure of the defendant at the next succeeding term of the court to show cause against such dismissal. It is equally plain that, upon cause shown by the defendant against the dismissal at the next succeeding term of the court, the order of dismissal made by the register will be vacated. The cause shown against dismissal must, of course, be a sufficient and good cause. The question is not whether the cross bill contains independent equity, for, if such were the case, the dismissal of the original would not affect the cross bill. Besides, by the terms of the statute, cause may be shown against the dismissal, after the filing of cross bill or answer. It was evidently the purpose of the legislature in authorizing the complainant to dismiss his suit in vacation, after answer or cross bill had been filed, to guard against the dismissal of any suit that might operate prejudicially to the defendant, by providing for vacating the order of dismissal for cause shown at the next succeeding term. The present case affords a fair illustration of the wisdom of the provision in the statute. The original bill, answer, and cross bill are made a part of this petition for a mandamus as exhibits. The answer and cross bill of the respondent show a set-off pleaded, growing out of the subject-matter contained in the original bill, and affirmative relief is prayed as to such set-off. The facts as averred in the answer and cross bill further show that the demand sought to be set off is of such nature and character that any right of action on the same at law at the time of the dismissal of the suit before the register would be barred by the statute of limitations, whereas the set-off claimed was not barred when complainant began his suit against the respondent. It would result then, that, if the suit of the complainant were permitted to stand dismissed under the order of the register, the defendant would be barred of any action against the complainant, by the statute of limitations, for his demand claimed as a set-off in his answer and cross bill. If there is any merit in his set-off, undoubtedly, then, the dismissal by the complainant of his suit would operate prejudicially to the rights of the defendant. As a general rule, a plaintiff has a right to dismiss his suit whenever he elects to do so. But this rule has its exceptions. It seems that a plaintiff may not, as a matter of right, dismiss his suit when the respondent has

acquired rights in the proceedings by answer or cross bill, and would be prejudiced by such dismissal. See *City of Detroit v. Detroit City R. Co.* (C. C.) 55 Fed. 569; *Bank v. Rose*, 1 Rich. Eq. 294; 6 Enc. Pl. & Prac. p. 843, § 6, and notes, where cases are collated. Although the chancellor based his ruling, in ordering the cause reinstated on the docket, on the erroneous theory that the cross bill contained independent equity, we are of the opinion that there was good cause shown for vacating the order of the register, and the order of the chancellor that the cause be reinstated was, in effect, the equivalent of such order. We do not think that the petitioner here is entitled to the mandamus on the facts shown, and the same will be denied.

Mandamus denied.

OAKLEY et al. v. HOWISON.¹

(Supreme Court of Alabama. Feb. 13, 1902.)

JUDICIAL SALE—PURCHASERS—FAILURE TO COMPLY WITH CONDITIONS—RESALE—ACTION FOR DEFICIENCY—NOTICE—PLEADING.

1. A purchaser of land at a judicial sale failed to furnish satisfactory sureties on the purchase-money notes, necessitating a resale. The complaint, in an action against the purchaser at the first sale to recover the deficiency between his bid and the amount received at the resale, alleged that "defendant was notified that the administrators would report his sureties as insufficient and worthless," and that "the court would not accept said worthless sureties," but there was no allegation that defendant had notice of any definite time and place when and where the question of the sufficiency of his sureties would be passed upon. *Held*, that the allegation of notice was insufficient.

2. Though a purchaser of land at a judicial sale who wholly defaults, making no effort to comply with the terms of the sale and his bid, is liable for a deficiency caused by a resale, without any notice of the court's action in setting aside the sale and ordering a resale, yet, if such purchaser has fulfilled the conditions of the sale to the extent of giving the required purchase-money notes, but with insufficient sureties, he is entitled to notice.

3. Plaintiffs alleged that defendant had purchased land at a judicial sale, and had made an ineffectual attempt to comply with the terms of the sale, whereby a resale was necessitated, and sought to recover the deficiency between the price obtained on resale and defendant's bid. It was not sufficiently alleged that defendant had notice of proceedings to set aside the original sale to him and order a resale, but, on motion, the allegation of defendant's ineffectual attempt to comply with the conditions of the sale, and the defective allegation of notice, were stricken out. *Held* that, in the absence of the allegation that defendant attempted to comply with the terms of the sale, the complaint stated a cause of action without any allegation of notice.

4. Where the successful bidder at a judicial sale, the terms of which required the purchaser's notes for the purchase price with sufficient sureties, knowingly and intentionally offers worthless sureties with the fraudulent intention of thereby forcing a resale, at which he might purchase the same land at a reduced

¹ Rehearing denied June 23, 1902.

¶ 2. See *Judicial Sales*, vol. 31, Cent. Dig. § 59.

price, he stands on the footing of a purchaser who has made no effort to comply with the terms of the sale, and is not entitled to notice of the court's action in setting aside the sale and ordering a resale.

Appeal from circuit court, Bibb county: John Moore, Judge.

Action by Nellie Oakley and others against Allen P. Howison. From a judgment for defendant, plaintiffs appeal. Reversed.

William Oakley died intestate, seised of certain lands situate in Bibb county. On application of the administrators of the estate of William Oakley, said lands were, by order of the probate court, sold for distribution among the heirs of said William Oakley. The terms of sale were one-half of the purchase money payable in one year from the date of sale, and the other one-half payable in two years; the purchase money to be secured by notes with sureties as required by law. At the sale under the order of the probate court, one Allen P. Howison bid off the lands at the price of \$8.75 per acre, and executed his notes for the purchase price, but refused to give sufficient sureties as required. The administrators of the estate of William Oakley, deceased, reported the facts back to the court, and also reported the defendant's failure to give the notes with the required sureties. Upon the consideration of said report, the probate court held the bid sufficient, accepted it, and confirmed the sale, but, on account of Howison's refusal to give the note with the required sureties, the sale was vacated, annulled, and set aside, and the court ordered said lands resold. The lands were again sold by order of the court, and the said Allen P. Howison again became the purchaser of said lands at the second sale, but at a much less price, to wit, \$5.35 per acre, and he gave his notes with proper security as required by the order of the court, and received the conveyance to said land. Thereupon the appellants in the present case, Nellie Oakley and others, who were the heirs at law of William Oakley, deceased, brought the present suit against Allen P. Howison to recover the difference between the price bid by said Howison at sale of lands for division under the order of the probate court and the expenses of the resale. This is the second appeal in this case. On the first trial of the case, there was a verdict for the plaintiffs, and the defendant appealed. After the remandment of the cause, the complaint was amended. As amended the complaint contained 17 counts. The first and second counts sought to recover only the amount due upon the notes executed by the defendant on the first sale. The third count sought to recover the full purchase price bid at the first sale, without averring a resale. The other counts of the complaint sought to recover the difference between the price bid at the first and second sales, together with the costs. On the present appeal it is only necessary to set out the

eight and seventeenth counts of the complaint.

The eighth count of the complaint, as amended, was as follows: "Eighth Count. The plaintiffs claim of the defendants the sum of seven thousand, four hundred and thirty six (\$7,436) dollars, with interest thereon from the 31st day of January, 1887, as damages by reason of the breach of the following contract, to wit: Plaintiffs aver that they are the heirs at law of William Oakley, deceased, who died intestate in the year 1883; that said William Oakley was, at the time of his death, a resident citizen of Bibb county, Ala., and that during his life he was seised and possessed of a large estate of lands situated in said state and county. That on the 10th day of July, 1883, N. P. Oakley and Fielding Oakley were duly and legally appointed administrators of said William Oakley's estate by the probate court of Bibb county, and that they immediately qualified, and entered upon their duties. That, after they had been duly qualified, they filed, in the probate court of said county, their petitions praying for a sale of the lands of said estate for the purpose of division among the heirs of said estate. That, on the hearing of said petition by said court, the lands were decreed to be sold for the purpose of division as aforesaid, in accordance with the prayer of the petitions, and it was ordered and decreed that said lands be sold at public outcry to the highest bidder, on a credit, one half due in one year, and the other half two years, after date of the sale, and that said amounts be secured by notes with securities as required by law. That due and legal notice of said sale was given on, to wit, the 31st day of January, 1887, said administrators, under and by virtue of the orders and decrees of the court for said purposes, did offer and expose said lands for sale to the highest, best, and last bidder, and that the defendant, A. P. Howison, bid off a portion of said lands, to wit, two thousand and forty (2040) acres, at the price of eight dollars and seventy five cents (\$8.75) per acre, amounting in all to seventeen thousand, eight hundred and fifty (\$17,850) dollars; and that said lands were knocked off to defendant at that price, he being the highest, best, and last bidder, and on terms of sale as aforesaid; and that defendant well knew the terms of sale at the time he bid off said lands, and had the same knocked off to him as aforesaid. That the defendant did then, and does yet, refuse and fail to perform his part of said contract of purchase; and did then, and has ever since, failed and refused to comply with the terms of his said bid. That the said administrator, as required by law, reported back to the court the proceedings of said sale as aforesaid; that the said administrator duly reported to the court the proceeding of said sale, and also reported that the said defendant, although the highest and best bidder at

the said sale, had failed and refused to carry out the terms of his said contract of purchase. That the said court accepted the said bid, but, on account of the defendant's failure to comply with the terms of the said purchase, the said court vacated and set aside the said sale, and ordered the said lands resold on account of the defendant's failure so to comply with the terms of his said bid. (And plaintiffs aver that after said sale was made, and before it was set aside because of defendant's failure to give notes with sureties, as required by law, for the said purchase price of said lands, ample time was allowed defendant to furnish sufficient sureties on said notes, but he wholly failed so to do. And plaintiffs aver that at the time said notes were given the defendant knew that the sureties thereon were insufficient and worthless. And defendant had notice that the administrators would report to the court that said sureties were insufficient.) That said lands were again offered for sale by said administrators, by virtue and under the orders and decrees of the court for the purposes as aforesaid. That due and legal notice of said sale was given as required by law for such purposes; and that defendant had notice of all such orders, decrees, and notices, and that at the next sale of said lands as aforesaid, to wit, on the 4th day of November, 1889, the said defendant again became the best, last, and highest bidder for said lands, which were knocked off to him as the purchaser, but at a much less price than before, to wit, at the price of five dollars and thirty-five cents (\$5.35) per acre, amounting in all to ten thousand, nine hundred and fourteen (\$10,914) dollars, being six thousand nine hundred and thirty-six dollars (\$6,936) less than his bid at the first sale. The defendant having complied with the terms of the last sale, the same was reported back to the court by the administrators as aforesaid, and a deed ordered to be made to the defendant conveying said lands, which were accordingly done as required by law. And plaintiffs aver that the lands were not resold after the first sale, namely, the sale made on the 31st day of January, 1887, until the 4th day of November, 1889, by and with the consent of the defendant; that, in consequence of defendant's failure to comply with his said bid, expenses and costs were incurred, necessarily, in making resales of the said property, to the amount of, to wit, \$500. Wherefore the plaintiffs claim of the defendant the said sum of \$7,436, composed of the sum of \$6,936, difference in price at which the said lands sold at the first sale and the price at which the lands sold at the resale, and the sum of \$500 as expenses and costs of such resale, together with the interest on each of said several sums from, to wit, the thirty-first day of January, 1887."

The seventeenth count was as follows: "(17) Plaintiffs further claim of the defend-

ant the sum of, to wit, \$7,436, with interest thereon from, to wit, the 31st day of January, 1887, as damages for the breach by defendant of the following contract, to wit: Plaintiffs aver that they are the heirs at law of William Oakley, deceased, who died intestate in the year 1883, and was at the time of his death a resident citizen of Bibb county, Alabama; that during his life, and at the time of his death, the said William Oakley was seised and possessed of a large estate in lands situated in said county and in Chilton county, Alabama; that after the death of the said William Oakley, as aforesaid, and on, to wit, the tenth day of July, 1883, N. P. Oakley and Fielding Oakley were duly and legally appointed administrators of the estate of the said William Oakley, by the probate court of said Bibb county, and that they immediately qualified, and entered upon their duties as said administrators; that after they had so qualified, and entered upon their duties, the said administrators filed, in the probate court of said Bibb county, their petition praying for a sale of the lands of said estate for the purpose of a division among the heirs of said estate, and that the said petition was due and regular, and in accordance with the statutes in such cases made and provided; that, on the hearing of said petition by the said probate court, the said lands were decreed to be sold for the purpose of division, as aforesaid, in accordance with the prayer of said petition by said administrators, and it was ordered and decreed that said lands be sold by said administrators, at public outcry, to the highest bidder, on a credit, one half due in one year, and the other half due in two years, after the date of the sale, and that said amounts be secured by notes with sureties, as required by law; that due and legal notice was given as required by law; and that on, to wit, the thirty-first day of January, 1887, said administrators, under and by virtue of the order and decree of said court for said purpose, did offer and expose said land for sale to the highest and best bidder, and that defendant bid off a portion of said lands at said sale, to wit, two thousand and forty acres, at the price of, to wit, eight dollars and seventy-five cents per acre, amounting in all to, to wit, seventeen thousand, eight hundred and fifty dollars, and that said lands were thereupon knocked off to defendant at that price, he being the highest, last, and best bidder, and were so sold to defendant on the terms of sale as aforesaid, and that defendant well knew the said terms of sale at the time he bid off said lands and had the same knocked off to him as aforesaid; that the defendant did then, and does yet, and has ever since, refused and failed to perform his part of said contract of purchase, and did then refuse and fail, and has ever since said sale refused and failed, to comply with the terms of his said bid, in this: that he has always refused and failed,

and does now refuse and fail, to give the notes with sureties as required by law, in accordance with the terms of said decree and order of said court, and in accordance with the terms of the said bid for said lands, for the amount of his said bid, and as, according to his promise when he became said highest bidder for said lands at said sale, he bound himself to do; that the said administrator, as required by law, reported back to the said probate court the proceedings of said sale as aforesaid, and also reported, at the same time, that the said defendant, although the highest, last, and best bidder at said sales, had failed and refused to carry out the terms of his said contract of purchase, or to comply with the terms of his said bid; that the said defendant, after the said bid was made by him, and prior to the making of the said report by the said administrators to the said probate court, offered to the said administrators two notes, one for one-half of the amount of said bid, payable one year after the date of said sale, and the other for one-half of said amount, and payable two years after the date of said sale, but that neither of said notes, at the time it was offered, nor ever afterwards, had a surety or sureties as required by law, but each of them had signed thereto, as sureties for defendant, the names of only two persons, who were worthless and insufficient as sureties, and each wholly insolvent, and worth less than the amount of his exemptions allowed to them by law (all of which was, at the time they were offered, well known to said administrators, and to the defendant, and to the judge of the probate court of Bibb county, and defendant well knew it was well known both to said administrators and to said judge of probate; and thereupon said administrators declined to accept said sureties as sufficient upon said notes, and informed defendant, prior to making their said report of sale to said probate court, that they would, in said report, report and make known to said probate court that the said sureties were wholly insufficient and insolvent, and not such as required by law); that said administrators did so report said sureties as insufficient, and not such as required by law, when they made their said report of sale, and on the hearing of said report the said administrator made proof before said court of the said insufficiency of said sureties (and it was well known to the defendant that the said sureties would be and were, as aforesaid, reported to said probate court as insufficient, and not such as required by law, and that proof of the same would be and was made before the said probate court, and that the said probate court had, on the hearing of the said report, so found and decreed said sureties to be insufficient. And the hearing of said report of said administrators by said court, and its determination and decree that said sureties were insufficient, were each due and regular, and in all things as required by

law. And plaintiffs further aver that defendant procured and offered said insufficient, worthless, and insolvent sureties on said notes for the purpose of preventing the court from approving them, and for the purpose of procuring said court thereby to annul and set aside said sale; and that defendant, at the time he made the said bid for said lands, did not intend to comply with the terms of his said bid, but did intend to prevent and avoid a confirmation of said sale at which he bid in said lands as aforesaid, he offering said insufficient sureties, and procuring the court to declare them insufficient and to set aside said sale; and plaintiffs further aver that it was the purpose of defendant, at the time he made said bid, to procure a resale of said lands, so that at such resale he might purchase the same at a greatly less price, and that to accomplish the said purpose the defendant so offered said insufficient sureties; and plaintiffs further allege that the report of sale of said lands to defendant which was made by said administrators to the said probate court came on regularly to be heard in said probate court after the same had been regularly filed and ordered to live over, and set for hearing, and that, upon the hearing of said report, the said court accepted the said bid of defendant, but declared that the said sureties upon said notes offered by defendant were insufficient, and on account of defendant's failure to comply with the terms of said purchase, and on account of his failure to offer sufficient sureties on said notes as required by law, and because said sureties were decreed and found by said court to be insufficient, the said court vacated and set aside the said sale to the defendant, and ordered the said lands to be resold (all of which was done and procured by and with the consent, and at the instance, of the defendant as aforesaid); and plaintiffs aver that due and legal notice of the said resale of the said lands was given as required by law for such purposes; that said lands were again offered for sale, by said administrators, by virtue of and under the order and decree of the probate court as aforesaid, and that defendant had notice of all such orders, decrees, and notices; and at the next sale of said lands as aforesaid, on, to wit, the fourth day of November, 1889, the defendant again became the highest, best, and last bidder for said lands for which he had bid as heretofore alleged at said first sale, and the said lands were knocked off to him as the purchaser thereof, but at a much less price therefor than at said first sale, to wit, at the price of five dollars and thirty-five cents per acre, amounting in all to fourteen dollars, being, to wit, six thousand, nine hundred and thirty-six dollars less than the amount of the bid of defendant at said first sale; and plaintiffs allege that defendant complied with the terms of said last sale, that the same was reported back to the said probate

court by the administrators, and that a deed was ordered by said court to be made to the defendant, conveying to him said lands, which was accordingly done, as required by law, after the confirmation of said last sale by the said probate court, and due and regular proceedings therein, in reference thereto, as required by law. Plaintiffs further aver that the said lands were not resold after the first sale, namely, the sale made on the thirty-first day of January, 1887, until the fourth day of November, 1889, by and with the consent of the defendant; and that they aver that in consequence of defendant's failure to comply with the said bid at said first sale, as heretofore alleged, expenses and costs were incurred necessarily, in and about the making and conduct of resales of said property under the order of said probate court as aforesaid, to the amount of, to wit, five hundred dollars. Wherefore plaintiffs claim of defendant the said sum of \$7,436, composed of the sum of \$6,936, which is the difference in price at which the said lands sold at the first sale, and the price at which they sold at the said last sale, and the sum of \$500, which was the expense of making and conducting such resale, together with the interest on each of said several sums from, to wit, the thirty-first day of January, 1887."

The defendants moved to strike out the portions of the eighth and seventeenth counts which are within the parenthesis, upon the ground that they were irrelevant and immaterial to the cause as made by the other portions of the complaint. Each of these motions was granted, and to each of these rulings the plaintiffs separately excepted.

After such portions of the eighth and seventeenth counts were stricken out, the defendants demurred to each of said counts upon the following grounds: (1) That it is averred, as a conclusion of the pleader, that there was a failure by the purchaser at the first sale to give sureties as required by law, and the facts in reference thereto are not set out. (2) It is not averred that the purchaser had notice that the court held the sureties insufficient, or that the purchaser had an opportunity, by proper notice given, to litigate the question as to whether or not the sureties furnished by him were sufficient. The court sustained the demurrers to each of these counts, and to each of these rulings the plaintiffs separately excepted. Upon issue joined on the counts of the complaint to which demurrers were not sustained, there were verdict and judgment for the defendant.

Watts, Troy & Caffey, Ellison & Thompson, and Pettus & Pettus, for appellants. Logan & Vandegraaff, for appellee.

DOWDELL, J. Some of the questions presented on the present appeal were determined and settled, on a former appeal in this case, in a well-considered opinion by Brickell, C.

J. Howison v. Oakley, 118 Ala. 215, 23 South. 810. We see no reason for departing from what was there decided, and therefore adhere to the principles laid down in that opinion. In what we may have to say on the present appeal, we do not wish or intend to repeat what was said on the former appeal further than is proper and necessary owing to the changes made in the present record by amendments of the pleading since the remandment of the cause under the first appeal. All that was said in regard to the necessary averments of notice on the former appeal, we here approve, and reiterate. Since the remandment of the cause, the complainants have attempted, by amendments of the various counts of the complaint, to conform to what was heretofore said as to the necessary averments of notice, to the purchaser at the sale, of the subsequent proceedings of the court in ordering a resale of the lands. The question now is whether the counts, as amended, sufficiently aver notice. These amendments are substantially to the effect that "defendant was notified that the administrators would report his sureties, as insufficient and worthless, to the court"; that "defendant was notified that the court would not accept said worthless sureties." The object and purpose of notice to defendant is to give him his day in court, and to that end the opportunity of a hearing upon any and all questions affecting his rights and interests, and to this end he should be apprised of a definite time and place of such hearing. It needs no argument to demonstrate that the notice averred in the amended counts was wholly insufficient to this end. A mere declaration, by the administrators, of what they intended to report to the court, is not sufficient notice to the defendant of a day for a hearing in court, and construing the pleading, under the familiar rule, against the pleader, the averment that the defendant was notified that the court would not accept the sureties given by him was nothing more than a speculation as to the future decree of the court. We feel, therefore, constrained to hold that the averments of notice as contained in the amended counts are still insufficient.

Counsel for appellants seem to think that the doctrine laid down in the opinion on the former appeal in this case is in conflict with the decision in the case of Grell v. Randolph, 108 Ala. 604, 18 South. 609. Upon a careful review of the two cases, we cannot agree that there exists any conflict between them. The facts in the two cases are essentially different. The principles laid down in Grell v. Randolph were approved and reaffirmed on the former appeal in this case. In the former case, the purchaser made no attempt whatever to comply with the terms of the sale and his bid, and wholly defaulted. In such case it was held that, by the failure and the default, he sent his dereliction into court, to be dealt with as legally might be, and was therefore not entitled to notice of the court's

action in setting aside the sale and ordering a resale. In the present case, however, the facts disclosed by the averments in some of the counts of the amended complaint show that the purchaser did not wholly fail and default, but, on the contrary, executed his notes with sureties, which the administrators refused to accept, as being in compliance with the terms of the sale, because of the insolvency of the sureties; and the question upon the report and hearing was as to the sufficiency of the surety, with the consequent right of the purchaser, after a determination by the court of their insufficiency, to comply with the terms of the sale and his bid by giving other and sufficient surety.

There are other questions, however, presented on this appeal which were not presented and considered on the former appeal. After the remandment of the cause, as stated above, amendments of the various counts were made, to which the defendant filed motions to strike certain parts, and also demurrers. A motion was made to strike portions of the eighth count relating to the ineffectual attempt of the defendant to comply with the terms of the sale and his bid, in that he gave his notes with insufficient sureties, and also as to that part relating to averments of notice of the intention of the administrators to report the insufficiency of such sureties, which said motion was sustained by the court. And after sustaining the motion, a demurrer by the defendant was filed to the count as it then stood. Eliminating from the eighth count the portions stricken on motion of the defendant, as this count then stood, when the demurrer was interposed, the averments were not of an ineffectual attempt to comply with the terms of the sale, but a total failure and default on the part of the defendant, without any effort whatever to comply; thus leaving the count with averments of a substantial cause of action under the principles laid down in Grell v. Randolph, supra. As the count then stood, no averment of notice was necessary to the defendant, and the court erred in sustaining the demurrer.

Again, in addition to the amendments above referred to, which were made to the several counts since the remandment of the cause, the complaint was likewise amended by the addition of several other counts, among which we need only consider the seventeenth count, to which the argument of counsel for appellant is specially directed. This count presents the case in a wholly different phase from that which was presented on the former appeal. This count contains averments of fraud on the part of the defendant in bidding at said sale. It is averred that he never intended to comply with the terms of the sale and his bid when he made the same; that he well knew that the sureties on the notes which he offered were wholly insolvent; and that he procured and gave the same with a purpose and intention, on

his part, of preventing the confirmation by the court of the sale; and that all of this was done, and such means were so employed, by the defendant, in order to compel a resale, whereby he might be enabled to purchase these identical lands for a greatly less price. If these averments be true, then it is clear that the defendant could not stand upon any higher or better ground than one who makes no effort to comply with his bid, but wholly defaults. If guilty of fraud, as averred in the complaint, he has no rights in the premises to be protected. The service of notice to appear in court to show cause why his purchase should not be confirmed, and a resale should not be ordered, under such state of facts, would be wholly unavailing, since the fraud averred was made up in part of a purpose and intention on the part of the bidder to defeat a confirmation of the sale. The intervening fraud dispensed with the necessity of notice, and it became the duty of the court to order a resale at the risk of such bidder. The court, we think, erred in striking from the seventeenth count these averments as to fraud, and in sustaining the demurrer to said count. What we have said above, in connection with what was said on the former appeal, we deem sufficient for the purpose of another trial, without consideration of the assignments of error in detail, especially since some of them raise questions which are practically nothing more than an application for a rehearing upon some of the questions decided upon the former appeal.

For the errors pointed out, the judgment of the court below will be reversed, and the cause remanded.

BARNEMANN v. MORRISON et al.

(Supreme Court of Alabama. June 28, 1902.)

APPEAL—JUDGMENT.

1. There is no judgment which will support an appeal, where, on trial of a contest of a claim of exemption against execution, the court made a special finding of the facts, and at the conclusion stated: "On the facts, the court is of the opinion that defendant did not acquire a homestead, * * * and that the same was not exempt to him. * * * Judgment is accordingly rendered in favor of plaintiff, against defendant, for the costs, * * * and the property levied on * * * is hereby condemned to sale." This is but part of the findings.

Appeal from circuit court, Colbert county; Joseph H. Nathan, Special Judge.

Contest of claim of exemption from execution between Morrison & Woodward, plaintiffs in execution, and William Barnemann, defendant in execution. Judgment for plaintiffs. Defendant appeals. Affirmed.

The appellees Morrison & Woodward recovered a judgment against the appellant, William Barnemann upon which judgment was sought, and this execution was levied upon a certain lot in the town of Tusculmbia. There was a claim of exemptions of said lot,

and the proceedings in the said case were had upon the contest of a claim of exceptions interposed by the defendant in execution.

The cause was tried by the court without the intervention of a jury, and under the opinion on the present appeal, it is unnecessary to set out the facts of the case in detail.

From a judgment in favor of the plaintiffs, the defendant in execution appealed.

W. H. Sawtelle and Jas. Jackson, for appellant. Kirk & Rather, for appellees.

HARALSON, J. The case was tried by the court,—a jury having been waived,—under the act to regulate the practice and proceedings in civil causes in Colbert and Lauderdale counties. Acts 1894-95, p. 763. The act provides, that either party may by bill of exceptions present for review the conclusions and judgments of the court on the evidence. There was no agreement in writing signed by the parties, waiving a jury, or requesting a special finding by the court, so as to bring the trial under sections 3319, or 3320 of the Code.

The presiding judge made a special finding of the facts, which signed by him is set out in the bill of exceptions, at the conclusion of which he stated, "On the facts, the court is of the opinion that the defendant did not acquire a homestead in lot 45, and that the same was not exempt to him under the laws of Alabama. Judgment is accordingly rendered in favor of the plaintiff against the defendant for the costs of this proceeding, and the property levied on under the execution, to-wit, part of lot 45 in the town of Tusculumbia is hereby condemned to sale." Besides this, we find no semblance of a judgment rendered in the cause. It is manifest, that under our rulings, this is not a judgment such as will support an appeal. It is nothing more than the declaration of the finding of the judge, and constitutes a part thereof, on which a proper judgment might have been rendered. It contains none of the elements of a final adjudication of the matter tried, and was probably not so intended. However that may be, it cannot be so treated on appeal. *Bell v. Otts*, 101 Ala. 187, 13 South. 43, 46 Am. St. Rep. 117; *Wright v. State*, 103 Ala. 95, 15 South. 506; *Mercantile Co. v. O'Rear*, 112 Ala. 247, 20 South. 583.

Appeal dismissed.

RAMBO v. STATE.

(Supreme Court of Alabama. June 28, 1902.)
CAPITAL CASES—SPECIAL VENIRE—INDICTMENT FOR ROBBERY—CONVICTION OF MINOR OFFENSE—CHARGE.

1. Under Cr. Code, § 5004, providing for a special venire for each capital case, it is error to order but one special venire for trial of several such cases.

2. Under an indictment for robbery, there may be a conviction for assault with intent to rob, for larceny, for attempt to rob, for assault, or for an assault and battery.

3. A requested charge that a certain witness has not been impeached invades the province of the jury.

Appeal from circuit court, Geneva county; John P. Hubbard, Judge.

Marshall Rambo was convicted of assault with intent to rob, and appeals. Reversed.

Before entering upon the trial of the case, the defendant moved the court to quash the venire of this cause, for the reason that no special venire had been drawn by the court from the jury box, and summoned by the sheriff, for the trial of the defendant; but that the court had drawn, and the sheriff had summoned, only one special venire for the trial of three capital cases. On the hearing of this motion, it was shown that the case against the defendant, Marshall Rambo, and the case against his codefendant, Sewell Cook, and a case against another defendant, Will Thomas, on a charge of murder, were all set for the same day, upon the arraignment of each of said three defendants, and that the court had drawn from the jury box 50 names as a special venire, which, together with the regular jurors, he ordered to be served upon each of said defendants in the three several cases. The motion to quash was overruled, and the defendant duly excepted. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the defendant requested the court, among others, to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(E) If the jury believe the evidence in this case, they will find the defendant not guilty." "(11) The court charges the jury that Mrs. Rambo, the mother of defendant, has not been impeached." "(10) There is no evidence in this case that the defendants, or either of them, picked up the money after it had been dropped or thrown to the ground by Huttman." "(8) If the jury believe the evidence, they will find the defendant not guilty of an assault with the intent to rob." "(6) The court charges the jury that in this case there can be no conviction for an assault or an assault and battery." "(5) The court charges the jury that in this case there can be no conviction for an attempt to rob." "(4) The court charges the jury that there is no evidence in this case that the defendant ever had in his possession the money alleged in the indictment to have been taken." "(2) If the jury believe the evidence, they will find the defendant not guilty of robbery."

Mulkey & Carmichael, for appellant. Chas. G. Brown, Atty. Gen., for the State.

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. §§ 596, 604, 619.

TYSON, J. The presiding judge evidently overlooked the difference in the phraseology of the act of 1884-85, under which Chamberlee's Case, 78 Ala. 466, was decided, and which phraseology was carried into the act of February, 1887, and the section of the Code (Cr. Code, § 5004) under which the special venire in this case was drawn. The difference was pointed out in *Adams v. State* (Ala.) 31 South. 851. The same error was committed in that case that was committed upon the trial of this, with respect to ordering one special venire for the trial of two or more capital cases. Indeed, with respect to this matter, there is no substantial difference between the facts of the two cases. For this error, the judgment of conviction must be reversed.

Since the judgment must be reversed, and as a conviction was had only for "an assault with the intent to rob," and not for robbery, it is unnecessary to review the action of the court in refusing charges bearing solely upon the guilt or innocence of defendant as to the crime of robbery. We shall, therefore, confine our discussion to those that relate to the offense for which he was convicted, and for which he may again be tried. Robbery being an offense against the person, as well as against the property, it cannot be seriously doubted that a charge of robbery involves the charge of an assault with the intent to rob, and that a conviction may be had for the lesser offense under an indictment charging the greater. And, for that matter, a conviction may be had for larceny, or for an attempt to rob, or for an assault, or for an assault and battery, if committed; a charge of all of these offenses being included in the charge of the greater. Section 5306, Cr. Code; *Morris v. State*, 97 Ala. 82, 12 South. 276; *Allen v. State*, 58 Ala. 98; *Thomas v. State*, 91 Ala. 34, 9 South. 81; *Brown v. State*, 120 Ala. 342, 25 South. 182. There was evidence tending to support the conviction, as well as tending to support each of the minor offenses designated above, the weight and sufficiency of which was for the jury. It follows, therefore, that charges E, 10, 8, 6, 5, 4, and 2 were correctly refused. Charge 11 invaded the province of the jury, and for that reason was properly refused. We have examined the various exceptions reserved to the rulings upon the admission of evidence, and find no error in any of them.

Reversed and remanded.

HEREFORD v. HEREFORD.

(Supreme Court of Alabama. June 28, 1902.)

RECEIVERS—DISCHARGE—INTERLOCUTORY DECREE—REVIEW—DEMURRER.

1. Where an appeal was not taken from an order appointing a receiver within 30 days as allowed by Code, § 429, an order denying a motion subsequently made to discharge the receiver, and increase the penalty of his bond, cannot be assigned as error.

2. On an appeal from an order denying a motion to discharge a receiver, a former interlocutory decree overruling a motion to dismiss the bill for want of equity cannot be reviewed.

3. An owner of realty is entitled to the appointment of a receiver to preserve the rents, pending an action of ejectment against an insolvent.

4. Where a bill for the appointment of a receiver to preserve rents pending an action of ejectment alleged the invalidity of a deed because of uncertainty and indefiniteness in the description, a demurrer thereto on the ground that it stated no facts showing that the deed was procured by fraud, duress, or undue influence, or that the grantor was incapacitated from executing it, was properly overruled.

Appeal from chancery court, Montgomery county; W. L. Parks, Chancellor.

Bill in equity by Harry Hereford against Lucy Hereford for the appointment of a receiver to preserve rents pending an action of ejectment. From an order denying defendant's motion to discharge the receiver, she appeals. Affirmed.

The bill in this case was filed on September 16, 1901, by the appellee, Harry Hereford, against Lucy Hereford. It was averred in the bill: That the complainant was the owner of a certain lot in the city of Montgomery, which was described in the bill as follows: "A part of lot five (5) in square twenty (20) in that part of the city of Montgomery, state of Alabama, laid off on the Scott property, said lot beginning at the northeast corner of the lot formerly owned by Mary Ann Green, and now owned by Dr. Scott, thence running north thirty-five (35) feet, thence seventy-five (75) feet west, thence south thirty-five (35) feet, thence east thirty-five (35) feet to the point of beginning; said point of beginning being about seventy-eight (78) feet north of the northwest corner of the intersection of Union and Columbus streets in said city of Montgomery. Said lot fronts on the west side of Union street, and lies between Columbus and Randolph streets, and was formerly occupied by your orator. That orator with his labor and means erected, upon said lot, a house, in which he and the said Lucy resided." In the year 1898, the said Lucy Hereford, who was then the complainant's wife, "by continuous persuasion and harassment so overcome the free agency of orator as to induce him to sign a paper writing which purported to be a deed to the property above mentioned"; that in said deed the property attempted to be conveyed was described as follows: "A part of lot five (5) in square twenty (20), laid off on the Scott property in the city of Montgomery, state of Alabama, said lot beginning at the north corner of the lot of Mary Ann Green, thence running north thirty-five (35) feet, thence seventy-five (75) feet west, thence south thirty-five (35) feet, thence east seventy-five (75) feet to the point of beginning. That

¶ 4. See Equity, vol. 19, Cent. Dig. § 508.

said Lucy paid to orator no valuable consideration whatever for said paper writing, and that the property described in paragraph three (3) of the bill constituted substantially all of the property, of any and all kinds whatsoever, owned by your orator, and that orator is now unable to support and maintain himself by his labor, which is the only source of income to him." That in February, 1901, the said Lucy Hereford procured a divorce from complainant, and thereafter refused to surrender possession of said house and lot to the complainant, or allow him to enter or remain therein. That, subsequent to these acts on the part of the defendant, the complainant instituted an action of ejectment, in the city of Montgomery, against Lucy Hereford, to recover possession of the property described in the bill. It was then averred in the bill that the deed obtained from the complainant by Lucy Hereford conveyed no title to the defendant, because of uncertainty and indefinite description of the property; that said action of ejectment is still pending and undetermined; that, since the institution of said suit, Lucy Hereford has rented the property, and its rental value is \$10 a month; that said Lucy Hereford is insolvent, and unable to respond in damages for the rents and profits of said property, and refuses to deliver possession of said property to complainant, and is collecting the rents therefrom and appropriating the same to her use. The bill also averred in its fourth paragraph that the complainant "received a fall which resulted in serious injury to his physical and mental condition, thereby incapacitating him from pursuing his avocation as a carpenter, to a large extent, and also thereby considerably reducing his income." The prayer of the bill was for the appointment of "a receiver to collect and hold the rents of said property, pending the determination of said ejectment suit in said city court of Montgomery, in accordance with the rules and practice of this honorable court; and, upon final hearing, may it please your honor to order, adjudge, and decree that your orator is entitled to the rents, incomes, and profits of said property, and direct that the same be paid over to him; and orator prays for such other, further, or different relief as to your honor may seem meet and proper in the premises." In response to the petition of the complainant, the chancellor on September 18, 1901, appointed a receiver without notice. On October 16th, the defendant moved to dismiss the bill for the want of equity. On October 26th, the motion to dismiss was overruled. On November 11, 1901, the respondent filed her answer, in which she denied that the deed from the complainant to her was procured by continuous persecution and harassment; averring that it was executed by the complainant voluntarily, and of his own free will and accord. The complainant also denied that said deed was void for uncertainty, and fur-

ther denied her insolvency. The defendant included in her answer the demurrer to the bill, which was upon the following grounds: "(1) Complainant has a complete and adequate remedy at law. (2) It states no facts which show that said deed was procured by fraud, duress or undue influence. (3) It states no facts showing that complainant had not sufficient understanding and capacity to execute a deed, or enter into a contract." On December 5, 1901, the defendant moved the court to discharge the receiver, and, in the event the receiver was not discharged, that the complainant be required to give additional security, and that the penalty of the bond be increased. On January 22, 1902, the chancellor rendered a decree overruling the motion to discharge the receiver and the motion to increase the penalty of the bond, and also overruling the demurrers assigned in the bill. The defendant appeals, and assigns as error the decree overruling the demurrer and refusing to discharge the receiver or to increase the penalty of the bond.

Gunter & Gunter, for appellant. Harmon, Dent & Well, for appellee.

TYSON, J. It is entirely clear that we cannot, on this appeal, review the rulings of the chancellor in denying the motion to discharge the receiver, and in refusing to increase the penalty of his bond. It is true an appeal lies, when taken within 30 days, from the order appointing the receiver. Code, § 429. But this was not done. After the expiration of the 30 days from the filing of the order appointing the receiver, the respondent made the motion sought by this appeal to have reviewed. This we have no power to do. *Miller v. Lehman, Durr & Co.*, 87 Ala. 517, 6 South. 361. Nor can we review, on this appeal, the former interlocutory decree overruling the motion to dismiss the bill for want of equity. So, then, the only matter for consideration is the decree overruling the special grounds of demurrer assigned to the bill.

The manifest purpose of the bill is to preserve, through a receivership, the rents issuing out of the lot, pending the action of ejectment brought by complainant against the respondent, who, it is alleged, is insolvent, predicated upon the theory that complainant is the owner of it. Whether the allegations of the bill sufficiently show that he is the owner of the lot sought to be recovered in the action of ejectment brought by him is not, as we will show, raised by any of the grounds of the demurrer. The first of these assigns, as an objection to the bill, that complainant has an adequate remedy at law. Confessedly, if the bill was to cancel the deed as a cloud upon complainant's title to the lot, or otherwise sought a recovery of it, the ground would be well taken, if the averments of the bill disclosed he had the legal title, or if he had title but was out of possession. But the bill is not in any sense a

bill to cancel the deed made by complainant to respondent, nor does it in anywise seek to recover the lot in this suit. Complainant admits by its averments the adequacy of the legal remedy which is being pursued by him to recover possession of the lot, but this is far from having an adequate remedy to protect himself against loss of the rents to which he will be entitled in the event of recovery in the action of ejectment. While it is true in his action of ejectment, if he recovers the lot, he will also be entitled to recover rents or mesne profits, yet, in view of the insolvency of the defendant, the law furnishes no adequate protection and remedy to him to prevent the loss in the meantime. *Mortgage Co. v. Turner*, 95 Ala. 272, 11 South. 211.

The invalidity of the deed executed by complainant to respondent to the lot in controversy, in the action at law now pending, is asserted in the bill to be because of the uncertainty and indefiniteness in description of the lot described in it, and not on account of fraud in its execution, or incapacity to make it. It is true that it is averred in the fourth paragraph that complainant received a fall which resulted in serious injury to his physical and mental condition, incapacitating him from pursuing his avocation, but it is not averred whether this occurred before or after the deed was executed. But, whether before or after, it is not relied upon as a ground for invalidating the deed. So, too, it is averred in the fifth paragraph that respondent, by continuous persuasion and harassment, so overcame the free agency of complainant as to induce him to sign the deed. But this averment is not relied upon as avoiding the deed. And it may be conceded, and for that matter it must be, that both of the averments are wholly insufficient. And had the second and third grounds of the demurrer been interposed to these paragraphs, instead of to the whole bill, they would doubtless have been sustained, but as they go to the whole bill, and as the averments are not relied upon to support the equity of the bill, they were properly overruled. The sufficiency of the averment upon which the equity of the bill rests not being raised by the demurrer, we must decline to consider it. For the same reason, we must decline to enter upon a discussion of the question as to whether the bill shows any right in complainant to maintain the action of ejectment.

Affirmed.

MILTON v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

HOMICIDE—MINISTERIAL ORDERS—PRESENCE OF DEFENDANT—DYING DECLARATIONS.

1. The order of the court to the clerk in a criminal case to issue a mandate to the sheriff to summon the special jurors to attend the trial is not judicial, but involves mere ministerial preparation, in which defendant can have no

voice, so that it need not be made when he is present.

2. Deceased having been in extremis, and said several times that he was dying, and that his bowels had been cut out, and that he would die before morning, this is sufficient predicate for admission, as dying declarations, of what he then said as to defendant's actions, though he also said he wanted a doctor.

Appeal from circuit court, Crenshaw county; J. C. Richardson, Judge.

Lee Milton was convicted of manslaughter, and appeals. Affirmed.

The minute entry of the court as to the arraignment, etc., of the defendant, which was had upon March 12, 1902, was in words and figures as follows: "Comes the solicitor for the state, and the defendant being in open court, and attended by his counsel, Sentell, Hamilton & Powell, is duly and legally arraigned upon the indictment, and for his plea thereto sayeth he is not guilty. The defendant being in open court, and attended by his counsel, the 19th day of March, 1902, it being the Wednesday of the second week of this term, is fixed for the date of the trial of this cause, and fifty is fixed as the number of special jurors to be drawn in this case, and the court ordered the legal jury box of Crenshaw county, Alabama, to be brought into open court, and said order being obeyed, and the box being well shaken, the presiding judge in open court publicly drew from said jury box the names of twenty-five persons to serve as special jurors in this case. After the presiding judge had drawn said twenty-five names from said jury box, and before the completion of the drawing of the said fifty special jurors ordered in this case, the names in the said jury box were exhausted; that is, there were not names in said jury box after said twenty-five names had been drawn therefrom. The court then and there directed the sheriff of Crenshaw county, Alabama, to summon from the qualified citizens of this county twenty-five persons necessary to complete the number of special jurors ordered in this case by the court. The sheriff thereupon then and there obeyed said order of the court, and duly and legally summoned twenty-five qualified citizens of the county to complete the number of special jurors, the names of whom are as follows, to wit: * * *. The clerk, immediately, in open court and in the presence of the presiding judge, made a list of the said fifty special jurors; and the court ordered the clerk to issue a mandate to the sheriff to summon said fifty special jurors to appear as special jurors in this case at the court house in this county, in Luverne, Alabama, at nine o'clock on Wednesday morning of second week of this term of this court, the same being the 19th day of March, 1902. The court ordered the sheriff of said county to summon said fifty special jurors to appear at said time and place. The court ordered the sheriff to serve on the defendant, one entire day before the day set for trial, a copy of the indictment." etc. On

¶ 2. See Homicide, vol. 26, Cent. Dig. §§ 432-436.

the trial of the cause there was evidence introduced for the state tending to show that the defendant was guilty as charged in the indictment, while the evidence for the defendant tended to show that he cut the deceased in self-defense, and while the said deceased was about to strike him with a saw. During the examination of one Maddox as a witness for the state he testified that he arrived at the place where the deceased was cut a short time after the difficulty, and found the deceased lying on the ground. Thereupon the witness, in answer to a question as to whether Tom Acreman, the deceased, said anything about his condition while he was lying on the ground, testified that Acreman made the following statement: "I am going to die before morning. Send for a doctor. My bowels are out on the ground now. I am going to die before morning." He also said to his father that the cut would kill him, and he would die before morning." The witness was then asked to state "what Tom Acreman said about who cut him, if anything." Defendant objected to this question upon the ground that a sufficient predicate had not been laid to admit the statements of Acreman as dying declarations. The court overruled the objection, and the defendant duly excepted. The witness testified that Acreman said that Lee Milton had cut him, and that he had cut him for nothing. Defendant moved to exclude this testimony as to what Acreman said, upon the ground that no sufficient predicate had been laid to admit such statements as a dying declaration. The court overruled the motion, and the defendant duly excepted. There were similar rulings upon the testimony of other witnesses as to the statements made by the deceased.

The bill of exceptions contains the following recital as to the giving of the charge requested by the state: "After the oral charge was given, the court, at the written request of the defendant, gave several written charges, which were read to the jury by defendant's attorney. Thereupon, at the request in writing of the state's solicitor, the court gave the jury the following charge, which was in writing, and marked the same 'Given' in writing over the signature of the judge, viz.: 'The court charges the jury that the written charges read to the jury by the defendant's counsel in this case are not in conflict with the general oral charge of the court, but simply a different manner of stating the law in this case.'" The defendant requested the court to give to the jury the following written charge, and duly excepted to the court's refusal to give said charge as asked: "The court charges the jury that there is no evidence on the part of the state to show that this defendant brought on the difficulty."

Sentell, Hamilton & Powell, for appellant.
Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. The trial court's minute entry of March 12, 1902, shows affirmatively

that defendant was present in court when the orders were made which appointed the day for trial and fixed the number of special jurors therefor at 50, and when names of special jurors were drawn until the jury box was exhausted, and also when the order was made for summoning additional special jurors from which to obtain the 50. It is immaterial whether that entry be construed as showing he was present when the court ordered the clerk to issue a mandate to the sheriff commanding him to summon the 50 special jurors to attend the trial. The latter order was not judicial, and involving, as it did, mere ministerial preparation in which the defendant could not have had voice or participation, his presence at the making thereof was not required.

In determining whether dying declarations were made under the conviction of impending death, so as to make them receivable in evidence as such, requests made by the deceased for a physician's aid may, in connection with his other expressions and the circumstances, be regarded as indicating a hope of cure. *Justice v. State*, 99 Ala. 180, 13 South. 658. But not necessarily so, since a physician may be desired merely to alleviate pain or other purpose than to prolong life. *McQueen v. State*, 103 Ala. 12, 15 South. 824.

Here it was proved that shortly after receiving the fatal knife thrust the deceased, while lying down, said several times he was dying, that his bowels had been cut out, that he would die before morning, and that he "wanted a doctor." Taken in connection with the proof that the deceased was in fact in extremis while speaking them, the expressions of belief as to his condition are not controlled by his request for a doctor, and were ample as a predicate for admitting the declaration made at the same time by the deceased to effect that defendant had killed him for nothing, and other like declarations made on the same occasion. *McQueen's Case*, supra; *Sullivan v. State*, 102 Ala. 185, 15 South. 264, 48 Am. St. Rep. 22.

What instruction the court gave the jury orally, and what written charges were given for defendant, are not disclosed by the record; hence it does not appear that the charge given at the solicitor's request in any way qualified any charge given for defendant.

Defendant's refused charge was properly refused. Affirmed.

SANDERS v. STATE.

(Supreme Court of Alabama. June 23, 1902.)
MURDER—JURY—SELECTING JURORS—QUASHING VENIRE—SELF-DEFENSE—INSTRUCTIONS—EXPERT EVIDENCE.

1. Code, § 5009, provides that on trial of a capital offense the names of the jurors summoned for the trial, as well as the names of the regular jurors in attendance, must be placed in a box, and that the officer shall draw such slips one by one until the jury is completed. *Held*, on a prosecution for murder, that there were not put into the box the names of those jurors

drawn on the special venire who could not be found, and were not summoned, which fact was also shown by the officer's return, was no ground for quashing the venire.

2. On a prosecution for homicide, a physician having described the wounds on defendant, inflicted in the altercation between him and deceased, it was proper to admit evidence as to the height of deceased.

3. On a prosecution for homicide, a witness having been asked as to the character of a wound seen by him, it was competent for him to describe the wound, though not an expert.

4. Where the evidence of the state relative to the death, and to the connection of defendant with the killing, was circumstantial, it was permissible for the state to show motive by evidence that the deceased had had a difficulty with defendant's brother on the day previous to the killing.

5. It appeared that, at the time of the killing, defendant was working as a hand on a public road, under deceased as overseer, and defendant's evidence showed the killing to have resulted from an altercation between defendant and deceased because defendant left his work, and brought drinking water to the other hands. On cross-examination of a witness for defendant, he was asked if deceased had not given orders forbidding the hands' going after water, and over objection the witness answered, not that he knew of. *Held*, that, if it were error to have overruled the objection, the same was not prejudicial to accused.

6. Where it was shown that the altercation between deceased and defendant arose while the latter was working as a hand, on a public road, under deceased, who was the overseer, it was proper to refuse to allow the introduction in evidence of an act of the legislature providing ways and means to open and improve the roads, etc.

7. It appeared that, at the time of the killing, the brother of defendant shot several times at deceased. *Held*, that it was permissible for the state to show that, after a difficulty on the day previous between defendant and deceased, defendant and his brother had returned to the place where deceased was shot, armed with pistols.

8. It appeared that at the time of the killing the brother of defendant shot several times at deceased. *Held*, that it was permissible to show any statements by defendant tending to show conspiracy.

9. One of the witnesses for defendant was asked, on cross-examination for impeaching purposes, if on the day before the killing the defendant had not taken the horse of deceased by the bridle, and said, "We will settle with you to-morrow," and if he had not so stated; and another witness was asked, on cross-examination, if he had heard defendant or his brother say he would die before he would take any more of deceased's foolishness, and if he had not so testified before the coroner. *Held*, that objections to the questions on the ground that they were illegal, irrelevant, and incompetent were of no merit.

10. Where the defense is self-defense, it is proper to charge that if the defendant entered into the fight willingly, and fought willingly, not for his protection, but to gratify his passion by inflicting injuries, he could not be acquitted on the plea of self-defense, even if he did not provoke or encourage the difficulty.

11. The defense was self-defense, and there was evidence that when the fatal shot was fired deceased was advancing on defendant, and that deceased had shot defendant down. *Held* proper to charge that if defendant unlawfully, and with malice aforethought, killed deceased, defendant was guilty.

12. It was proper to refuse to charge that, if

a witness had been successfully impeached, his testimony should be disregarded.

13. The defense was self-defense, and the defendant requested the court to charge that if defendant retreated from the assaults of deceased as far as he safely could, and while retreating deceased injured him so he could no longer carry on the fight, and then defendant's brother shot deceased, defendant would not be guilty. *Held*, that the instruction was faulty in that it failed to hypothesize an imperious necessity for defendant to take life at the time he also fired on deceased.

14. The charge was faulty in that the facts hypothesized did not exclude the idea that deceased died from the wounds given by defendant.

15. The charge was faulty in that it called for an acquittal, when on the facts postulated defendant might have been convicted of an assault with intent to murder.

16. The defendant requested the court to charge that, in order to convict, the jury must be satisfied to a moral certainty that the proof was consistent with guilt, and that it was wholly inconsistent with any other rational conclusion, and that, unless they were so convinced of his guilt that they would each act on that decision in matters of high concern to themselves, they should acquit. *Held* properly refused.

17. The court was requested to charge that the only foundation for a verdict of guilty was that the entire jury should believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant was guilty as charged in the indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt; and, if the prosecution failed to furnish such measure of proof, the jury should find him not guilty. *Held*, that the instruction was faulty in that it restricted the measure of proof required to that furnished by the prosecution.

18. It was proper to refuse to charge that if the jury believed that defendant and deceased were fighting, and that he had inflicted a serious wound on deceased, and defendant's brother then came up, and, without knowledge or connivance on part of defendant, inflicted a mortal wound on deceased, defendant was not guilty.

19. Where, on a prosecution for murder, there was some evidence to show a conspiracy between defendant and his brother to kill deceased. It was proper to refuse to charge that no conspiracy was shown.

Appeal from circuit court, Perry county; John Moore, Judge.

John Green Sanders was convicted of murder, and he appeals. Affirmed.

The bill of exceptions contains the following recital as to the organization of the jury for the trial of the defendant, the motions of the defendant to quash the venire, and the ruling of the court thereon: "Both sides having announced ready for trial, the court proceeded with the selection of the jury as required by the statutes. The sheriff was directed to draw one name at a time from the hat, which he did. Before the jury had been completed, and when only nine (9) jurors had been selected, the sheriff announced to the court that all the names in the hat had been drawn out of the hat. Defendant's counsel then stated to the court that the following persons, to wit, Crum Stanley, W. E. Samples, John Huff, W. Lawler, and Noll Burnett, were on the copy of the venire which was served on the defendant, and had

not been drawn from the hat; and also moved the court to quash the venire because said five names had not been put in the hat and drawn therefrom. On the hearing of said motion, it was shown that each of the said five named persons were drawn by the presiding judge as special jurors in this case, and the sheriff stated to the court that neither of said five named persons were summoned to appear as jurors; that they were not found. His return on the venire also showed they were not summoned. The sheriff also stated he did not put said names in the hat to be drawn because they had not been summoned to appear as jurors. The court then refused to quash the venire, to which ruling of the court the defendant duly excepted. Three jurors being necessary to complete the jury, the court ordered the sheriff to summon from the qualified citizens of the court six persons [that being twice the number required to complete the jury] to appear instanter as jurors. Two of the persons so summoned were accepted as jurors, the other four being challenged. This left one juror to be selected to complete the jury. The court then ordered the sheriff to summon from the qualified citizens of the county two persons, that being twice the number to complete the jury, to appear instanter as jurors; one of these was selected as a juror, thereby completing the jury. The defendant objected to the completion of the jury as above stated, and duly excepted to the action of the court in completing said jury."

The evidence showed that, at the time of the killing, William Mullen was road overseer in the county of Perry, and the defendant, John Green Sanders, and his brother, Luke Sanders, were hands working upon said road; that on the day prior to the killing there was a difficulty between William Mullen and Luke Sanders. There was evidence on the part of the state tending to show that there was a conspiracy between the defendant, John Green Sanders, and his brother, Luke Sanders, to kill William Mullen; that on the day of the killing there was a dispute between the defendant and said Mullen as to the defendant having brought water; and said dispute resulted in the defendant and Luke Sanders firing upon and killing the said Mullen. There was some conflict in the evidence as to whether the defendant, John Green Sanders, or his codefendant, Luke Sanders, fired the fatal shot. The evidence for the defendant tended to show that, at the time the shot which killed Mullen was fired, Mullen was advancing upon the defendant, and had shot him down, and that the defendant fired in self-defense. Upon the cross examination of Jack Hartley, one of the witnesses for the defendant, he was asked the following question: "Did not the defendant, on the evening of the day before the killing, go up to Mullen, and take Mullen's horse by the bridle, and say to him, 'We will settle with you to-morrow'?" The de-

fendant objected to this question upon the ground that it called for illegal, irrelevant, and incompetent evidence, and because there was no evidence of any conspiracy between the defendant and his brother, Luke Sanders. The court overruled the objection, and the defendant duly excepted. The witness answered he did not. The state then, upon further cross-examination of said witness, asked him the following question: "Did you not so state to John Blackburn [naming the time and place]?" Witness answered he did not. Upon the introduction of John Blackburn as a witness, he testified that the witness Hartley did make such statement to him at the time and place designated. Upon the cross-examination of Charley McLaughlin, he testified that he never heard the defendant and Luke Sanders, or either of them, say that he or they would die and go to hell before they would take any more of Mullen's foolishness, and that he did not know whether he so testified as a witness on the trial before the coroner. Upon the introduction of one of the persons who was on the coroner's jury, he was asked if Charley McLaughlin, when he was examined as a witness before the coroner's jury which was impaneled to investigate the killing of Mullen, did not testify that he heard both Luke Sanders and the defendant say that they would die and go to hell before they would take any of Mullen's foolishness. The defendant objected to this question because it called for illegal and immaterial testimony, and was an attempt to impeach said witness, Charley McLaughlin, on an immaterial matter. The court overruled the objection, and the defendant duly excepted. The witness testified that the said Charley McLaughlin did make such statement upon his examination before the coroner's jury. The other rulings of the court upon the evidence, to which exceptions were reserved, are sufficiently stated in the opinion.

The court in its general charge instructed the jury as follows: "If the defendant did not provoke or commence the difficulty between Mullen and himself, and the defendant was in imminent danger of losing his life, or of suffering grievous bodily harm by Mullen, and if there was no reasonable way by which he could avoid that danger, then he would have the right to kill Mullen. But if the defendant entered into the fight willingly, and fought willingly, not for his protection, but to gratify his passion by inflicting injuries on Mullen, he could not be acquitted on the plea of self-defense, even if he did not provoke or encourage the difficulty." The defendant separately excepted to this portion of the court's general charge, and also separately excepted to the court's giving, at the request of the state, the following written charge: "The court charges the jury that if they believe from the evidence, beyond all reasonable doubt, that in Perry county, Alabama, and before the finding of this indict-

ment, John Green Sanders and Luke Sanders did unlawfully and with malice aforethought kill William Mullen by shooting him with pistols, then the defendant John Green Sanders is guilty as charged in the indictment." The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(A) I charge you that, if the witness Jack Hartley has been successfully impeached by the state, it is your duty to disregard the testimony of said witness Hartley." "(5) If the jury believe the evidence in this case, they must find the defendant not guilty. (6) If the jury believe from the evidence that the defendant and deceased were fighting, and there is no evidence to show that the defendant was in fault in bringing on the difficulty, and that the defendant retreated from the assaults of the deceased as far as he safely could, and that while the defendant was retreating, and defending himself the best he could from the assaults of the deceased, the deceased knocked the defendant down, or shot him, so that he could not longer carry on the fight, and when the defendant was so disabled, and unable longer to injure the deceased, Luke Sanders came up to the scene of the conflict, and without the consent, knowledge, or concurrence of defendant shot the deceased, from the effects of which shot the deceased died, then the jury will find the defendant not guilty. (7) Before the jury can convict the defendant, they must be satisfied, to a moral certainty, not only that the proof is consistent with the guilt of the defendant, but that it is wholly inconsistent with any other rational conclusion, and, unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, they must find the defendant not guilty." "(10) The only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt. And if the prosecution has failed to furnish such measure of proof, and so impress the minds of the jury of his guilt, they should find him not guilty." "(14) I charge you that there is no evidence in this case tending to show a conspiracy between the defendant and Luke Sanders to do an unlawful act. (15) I charge you that the evidence in this case does not show prima facie that there was a conspiracy between the defendant and Luke Sanders to do an unlawful act, or to kill Mr. William Mullen, the deceased." "(23) If the jury believe, from the evidence, that John Green Sanders and the deceased were fighting, and he had inflicted a serious wound on the deceased,

and that Luke Sanders came up, and without the knowledge, consent, or connivance of the defendant inflicted a mortal wound on the deceased, then they should find the defendant not guilty."

B. M. Allen, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The drawing of the names of the jurors who should constitute the jury of 12 for the trial of the defendant was in conformity with the requirement of the statute. Code, § 5000. The failure to put into the box, or substitute therefor, from which the drawing was to be had, the names of those jurors drawn on the special venire who could not be found, and therefore were not summoned, and which fact was also shown by the sheriff's return on the writ, was no ground for quashing the venire, and the court committed no error in overruling the motion to quash for that cause.

After testimony by Dr. C. A. Wilkerson, a practicing physician, describing the wounds inflicted on the defendant, and showing the course and direction of the balls making the wounds, it was not error to admit evidence of the height of the deceased, it being shown that the wounds on the defendant were received in the difficulty that resulted in the death of Mullen, for whose killing the defendant was on trial.

It is competent for a witness, though a non-expert, to describe a wound which he has seen. The witness, being asked by the state, "What was the character of that wound?" answered the question by describing the wound. This involved no opinion of the witness as to its character, but a simple description of what he had seen. There was no error in overruling the motion to exclude this evidence.

The evidence in chief, on the part of the state, relating to the death of Mullen, the person charged in the indictment to have been murdered, and the connection of the defendant with the killing, was circumstantial. In such cases, motive for the deed is a material inquiry, and evidence of motive, though sometimes weak and inconclusive, if not too remote, is relevant and admissible. In connection with the other circumstances shown by the state, tending to connect the defendant with the killing, it was permissible for the state to show that the deceased had a difficulty with the defendant's brother on the day previous to the day of the killing. *Kelsoe v. State*, 47 Ala. 573.

The evidence showed that at the time of the killing the deceased was overseer of a public road, and the defendant was at work as a road hand on the public road, under the deceased as such overseer; and the evidence on the part of the defendant tended to show that the killing resulted from an altercation between the defendant and the deceased about the former's leaving his work, and bringing water in a bucket to the other hands, where they were at work, to drink. On the cross-

examination by the state of the defendant's witness McLaughlin, the solicitor asked the question: "Had not Mullen given the hands orders not to go after water without his orders?" This question was objected to by the defendant, and, the objection being overruled, the witness answered: "Not that I know of; I never heard of such an order." Even if the court erred in overruling the objection to the question, the answer was favorable to the defendant, and consequently no injury resulted to the defendant.

The court properly sustained the state's objection to the introduction in evidence of an act of the legislature entitled, "An act, to provide the ways and means to establish, open and improve, work and keep in good condition the public roads in Perry county," approved February 11, 1890, offered by the defendant. Such evidence was immaterial, and wholly irrelevant to the issues involved.

It was developed upon the cross-examination by the state of some of the defendant's witnesses that Luke Sanders, the brother of the defendant, took part in the difficulty that resulted in the death of Mullen, and that he, Luke, shot several times at the deceased, emptying his revolver. This being shown by the evidence, it was permissible for the state to show that, after the difficulty on the day previous, the defendant and his brother, Luke, came back to the road, both armed with pistols, as tending to show a conspiracy. So, too, it was permissible to show, in this connection, any statement made by the defendant which tended to prove a conspiracy.

The objections to questions and answers in laying the predicates for the impeachment of defendant's witnesses were without merit, and the court committed no error in overruling the same.

There was no error in that portion of the oral charge of the court excepted to by the defendant. That a person cannot invoke the doctrine of self-defense when he enters willingly into the combat, and fights willingly, not for his protection, but to gratify his passion by inflicting injury on his adversary, even though he did not provoke the difficulty, as a proposition of law in this state is beyond question; and that is what the charge asserts. The written charge given at the request of the state correctly states the law, and the giving of it was free from error.

The successful impeachment of the witness Jack Hartley did not withdraw his testimony from the consideration of the jury, and for that reason charge A requested by the defendant was bad, and the court properly refused to give it.

Charge No. 6 requested by the defendant, as an instruction to the jury upon the theory of self-defense, is faulty in that it omits to hypothesize an imperious necessity for the defendant to take life at the time he fired upon the deceased. The charge, in postulating an acquittal of the defendant on the facts hypothesized as to the shooting of the deceased by

Luke Sanders, is also faulty. The jury might have believed that the deceased died from the effects of the shots made by both Luke and the defendant. The facts as hypothesized do not exclude the idea that the deceased died from the effects of the wound given by the defendant, as well as from the shot by Luke. Moreover, the charge calls for an acquittal of the defendant, when on the facts as postulated the defendant might have been convicted of an assault with intent to murder.

We need only say of charge 7, requested by the defendant, that like charges have several times recently been condemned by this court.

Charge No. 10 is faulty in restricting the measure of proof required to convict to that furnished by the prosecution, instead of to the whole evidence in the case. In this case much of the criminating evidence was furnished by the defense. In the case of *Brown v. State*, 118 Ala. 111, 23 South. 81, a charge of which charge 10 is a substantial, if not an exact, copy, was pronounced good. But in that case it is not shown that any evidence at all was furnished by the defense, and for that reason the charge, when referred to the evidence,—the only evidence being what was furnished by the prosecution,—was pronounced a proper charge.

Charge No. 23 refused to the defendant is too plainly erroneous to call for comment. There was evidence, though inconclusive, tending to show a conspiracy between the defendant and Luke Sanders, and for this reason other charges refused to the defendant invaded the province of the jury, and were therefore properly refused.

We find no error in the record, and the judgment of the circuit court must be affirmed.

SPEER v. CROWDER.

(Supreme Court of Alabama. June 28, 1902.)

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION—INSTRUCTIONS—OBJECTIONS TO EVIDENCE—PLEA—SUFFICIENCY—MOTION TO STRIKE—DEMURRER—APPEAL—ASSIGNMENT OF ERROR—RECORD RECITAL—SUFFICIENCY.

1. Contracts within Code, § 2152, requiring special promises to answer for the debt of another to be in writing, and supported by an expressed consideration, are not relieved from the requirements of this section by section 1800, providing that a written contract upon which a suit is founded is prima facie evidence that it was upon sufficient consideration.

2. A record recital that "defendant's demurrers to the complaint were overruled" is not in form or substance a judgment on the demurrer, and will not support an assignment of error based thereon.

3. Where a contract sued on, and set out in the declaration, recited that, on account of the indebtedness of a certain third party, defendant owed plaintiff a certain sum, a plea that the instrument sued on was void, because it was a promise to answer for the debt of another, and did not express the consideration moving to defendant, presented a material issue, and should not have been stricken, though it informally blended an averment of fact with a conclusion of law.

4. Neither objections to evidence nor instructions to the jury are available to give a defendant the benefit of a defense under the statute of frauds.

Appeal from circuit court, Clarke county; Jno. C. Anderson, Judge.

Action by J. M. Crowder against Arthur R. Speer. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought by the appellee, J. M. Crowder, against the appellant, Arthur R. Speer, in which the plaintiff sought to recover of the defendant the sum of \$212, alleged to be due under the following agreement: "On account of the indebtedness of the Bigbee River Lumber Company to him, I am due J. M. Crowder the sum of eight hundred and fifty dollars, which I agree to pay to him or his order as follows, to wit: On March 6, 1900, \$212.50; on June 6, 1900, \$212.50; on September 6, 1900, \$212.50; and on December 6, 1900, \$212.50." This agreement was dated March 2, 1900, and signed by A. R. Speer, and was duly attested. The defendant demurred to the complaint, upon the ground that the instrument sued on shows on its face that it was a promise to answer to the debt, default, or miscarriage of another, and does not express any consideration to support the promise. The ruling of the court upon this demurrer, as shown by the minute entry, was as follows: "The defendant's demurrers to the complaint were overruled by the court." The defendant pleaded the general issue, want of consideration, and the following special plea: "(3) For further answer to the complaint, the defendant says that the instrument sued upon is void, because it is a promise to answer for the debt of another, and does not express the consideration moving to defendant." The plaintiff moved to strike plea No. 3 from the file, upon the ground that it was frivolous. The court granted said motion to strike said plea from the file, and to this ruling the defendant duly excepted. The defendant then filed another plea numbered 3, reciting the failure of consideration, and issue was joined on the pleas interposed by the defendant. There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Lackland & Wilson, for appellant. Wm. D. Dunn and McIntosh & Rich, for appellee.

SHARPE, J. Not only does the statute of frauds (Code, § 2152) require that every special promise to answer for the debt of another shall be in writing, but another provision by the statute made essential to the validity of such promise is that a consideration therefor shall be expressed in writing. *Strouse v. Elting*, 110 Ala. 132, 20 South. 123; *Bolling v. Munchus*, 65 Ala. 558; *Rigby v. Norwood*, 34 Ala. 129. From this requirement contracts

within the influence of the statute of frauds are not relieved by section 1800 of the Code, which provides, in substance, among other things, that a written contract, the foundation of a suit, is prima facie evidence that it was made on sufficient consideration. *Rigby v. Norwood*, supra.

The record recital that "defendant's demurrers to the complaint were overruled" is not, in form or substance, a judgment on the demurrers, and therefore does not support the assignment of error based on that recital. *Improvement Co. v. Dubose*, 125 Ala. 442, 28 South. 380; *Mercantile Co. v. O'Rear*, 112 Ala. 247, 20 South. 583; *Hereford v. Combs*, 126 Ala. 369, 28 South. 582; *Dantzler v. Mill Co.*, 128 Ala. 410, 30 South. 674. But the defendant was at liberty to defend under the statute of frauds by plea. His first plea numbered 3 embodies the averment of fact, informally blended with an averred conclusion of law, that the instrument sued on "is a promise to pay the debt of another," which, in view of the absence of any expression of consideration in the instrument as exhibited in the complaint, presented a material issue. A plea having merit, but having amendable defects, should not be stricken, but the plaintiff, if objecting, should do so by demurrer, so that the defendant may be apprised of the ground on which the objection is placed, and may have opportunity to amend. *Brooks v. Insurance Co. (Ala.)* 29 South. 13; *Murphy v. Farley*, 124 Ala. 279, 27 South. 442; *Williamson v. Mayer*, 117 Ala. 253, 23 South. 3; *Powell v. Crawford*, 110 Ala. 294, 18 South. 302. The plea in question was not frivolous, and in striking it error was committed, for which the judgment must be reversed. Neither objections to evidence nor instructions to the jury are available to give a defendant the benefit of a defense under the statute of frauds. *Espalla v. Wilson*, 86 Ala. 487, 5 South. 867.

Reversed and remanded.

NEVILLE v. REED.

(Supreme Court of Alabama. June 28, 1902.)

CUSTODY OF CHILD—HABEAS CORPUS.

1. The court, on habeas corpus by a father for possession of a child, on death of the mother, to whom custody of the child was awarded on her obtaining a divorce, may exercise a discretion, and leave him in the custody of the woman to whose care the mother intrusted him, on consideration of her superior qualifications, and the expressed preference of the child, though he is only nine years old.

Appeal from probate court, Mobile county; Price Williams, Jr., Judge.

Henry Neville filed a petition for habeas corpus, wherein he sought to have Henry Edward Neville, a minor under the age of 14 years, removed from the custody of Josephine Reed and placed in the custody of the petitioner.

It was averred in the petition that Henry

* 4. See *Frauds*, Statute of, vol. 23, Cent. Dig. §§ 363, 365, 371, 379.

† 1. See *Habeas Corpus*, vol. 25, Cent. Dig. § 84.

Neville was the father of Henry Edward Neville, a minor under the age of 14 years; that the petitioner was the natural guardian of said minor, and was entitled to his custody and control, and that said minor was unlawfully detained by said Josephine Reed.

In response to the writ of habeas corpus which was issued, Josephine Reed answered that while the petitioner was the father of said minor, the mother of said minor obtained a divorce from said petitioner, and in the decree of said divorce the sole care and custody of said minor was given to its mother, who alone maintained and supported said minor up to the time of her death; that just before she died, and realizing the approach of death, the mother of the minor requested the petitioner to take said minor and care for him and this the petitioner refused to do; that the mother of said minor in her last will and testament appointed the respondent to be the sole guardian of said minor and requested and entreated the respondent to take and care for the child, which the respondent solemnly promised to do, and that the respondent was able and willing to carry out the wishes of the minor's dead mother, and the minor was desirous of remaining with her.

The petitioner introduced evidence tending to show that he was financially able to care for said child, and that he was in the habit of liberally providing for his family and was kind to them. That the minor Henry Edward Neville had repeatedly been to the petitioner's place of business, and the petitioner always treated him kindly and gave him spending money, although he had never done anything towards supporting him, except in one instance when he purchased a hat for him. That after having been divorced from the minor's mother, he had married a second time, and if the child was put in his custody he would be well cared for and provided for.

The evidence for the respondent tended to prove the facts stated in her answer, and also tended to show that the petitioner was a man of violent and uncontrollable temper and that on one occasion when Henry Edward Neville was at his place of business, he became irritated at something the child did, lost his temper, and brutally treated him. There was further evidence introduced by the respondent tending to show that she treated said minor as a member of her family, was very kind and thoughtful of him, that she liberally provided for him, and that the child was happy and contented.

At the request of the respondent, the judge presiding at the trial examined the minor, Henry Edward Neville. He asked the child many questions bearing upon his schooling, his standing in his classes, if he attended Sunday school, and how he was treated by the respondent, who was shown to be his godmother. To each of these questions the child replied promptly and with intelligence, stating that he was being sent to school, that

his standing in day and Sunday school was good, that he was treated kindly and affectionately by his godmother, the respondent, and was receiving proper attention from her. Thereupon the judge asked the child: "Whom do you wish to live with, your father or your godmother, Mrs. Reed?" To this question the child replied that he "wished to live with Mrs. Reed." To the question as to why he preferred Mrs. Reed, he replied that his father beat him.

Upon the hearing of the cause, the court rendered judgment in favor of the respondent, and adjudged that the child be retained in the custody of the respondent. To the rendition of this judgment the petitioner duly excepted. The petitioner appeals, and assigns as error the rendition of said judgment. Affirmed.

Chas. W. Tompkins, for appellant. Fitts, Stoutz & Ambrecht, for appellee.

HARALSON, J. The father is regarded as the head of the family, and the law commits the children to his charge, in preference to the claims of the mother, or any other person, and his right to their custody may be forfeited by misconduct, or lost by his misfortunes; and as has been heretofore held, when he asserts his right to their custody, by habeas corpus, the court may exercise a discretion for the present and future welfare and interests of the infants, and leave them in the custody of the mother or some other person, in preference to the father. *Ex parte Boaz*, 31 Ala. 427.

This discretion is not to be exercised arbitrarily, but always with a view to the best interests of the children. The character, calling and condition of the father will be considered, to ascertain if he is suitable or unsuitable, or able or unable to properly care for his children, and in determining the question, the court may very properly consult the children, having sufficient judgment, whether they prefer, for any good reasons, to return or not to him. Their feelings, attachments, preferences and contentment, are, within proper limitations, proper subjects of inquiry. Mental capacity, and not age, is the criterion as to whether the infant has sufficient judgment to choose for itself. *Brinster v. Compton*, 68 Ala. 300; 9 Am. & Eng. Ency. Law (1st Ed.) 245, 246.

Having reference to the calling, capacity, disposition and character of the petitioner, as tending to show his unfitness to take charge of the child, as shown by the legal evidence introduced on the trial, the capacity and superior qualifications of the defendant, Mrs. Reed, in custody of the child, the care, attention, and advantages she is bestowing on him, and is anxious to continue to furnish, as well as to the preference of the child,—nine years old,—as made known by him to the judge of probate, who examined him in reference to the matter, we are unable to conclude that the probate court erred in denying

the application of the petitioner, and in remanding the infant to the custody of the defendant.

Affirmed.

LAGOMARSINO v. CROWE et al.

(Supreme Court of Alabama. June 28, 1902.)

PARTY WALL AGREEMENT—CONSTRUCTION.

1. One purchasing a lot agreed with the vendor, who owned an adjoining lot, to erect a three-story building and wall on the boundary, with apertures for joists to be used by the vendor at any time he might choose to erect "a building of like dimensions." On an application by the vendee for an injunction to restrain the vendor from erecting a two-story building, it appeared that such a building would not weaken the wall or entail greater danger from fire than one of three stories. *Held* that, in view of the facts and phraseology of the agreement, the phrase "for a building of like dimensions" must be construed as referring only to the extent to which joist apertures should be let into the wall, and did not limit the dimensions of the building the vendee might erect.

Appeal from chancery court, Colbert county; Wm. H. Simpson, Chancellor.

Suit by John P. Lagomarsino against Belle T. Crowe and another. From a decree for defendants, complainant appeals. Affirmed.

It was averred in the bill that the plaintiff had, by purchase, become the owner of lot 13, in block 71, in the city of Sheffield, which had been sold to Davega Bros. by Horace Ware, and that the respondent Belle T. Crowe had become the owner by purchase from Horace Ware of lot 14, in block 71. An agreement entered into by Davega Bros. at the time of the purchase of lot 13, and which is copied in the opinion, is made the basis of the ground of relief prayed for. On the filing of the bill a temporary injunction was issued. The respondents answered the bill, and moved to dismiss the bill for the want of equity. They also moved to dissolve the injunction upon the denials of the answer.

Thos. R. Roulhac, for appellant. Joseph H. Nathan, for appellees.

MCCLELLAN, C. J. Horace Ware, owning two adjoining lots in Sheffield numbered 13 and 14, respectively, in block 71, sold one of them, that numbered 13, which lay north of lot 14, to Davega Bros. In connection with the sale and as a part, indeed, of the transaction, Davega Bros. entered into an agreement in the following language: "This agreement witnesses that whereas, Horace Ware, of the county of Jefferson and state of Alabama, has this day sold to Davega Bros., a firm composed of Isaac Davega, Jr., and Solomon B. Davega, of the city and state of New York, a certain lot of land in the city of Sheffield, county of Colbert, and state of Alabama, known and designated as lot numbered (13) thirteen, in block numbered (71) seventy-one: Now, therefore, for and in consideration of the above sale, we, Davega Bros., agree and bind

ourselves to erect on the premises aforesaid a three-story brick metal-roofed building, to be at least one hundred feet long, and we further agree and bind ourselves to erect the wall on the southern boundary of said lot, with apertures for joists to be used by the owner of lot numbered (14) fourteen, in block numbered (71) seventy-one, at any time the owner of lot numbered (14) fourteen, in block numbered (71) seventy-one, may choose to erect a building thereon, without cost to the owner of said lot for said wall, for a building of like dimensions. In testimony whereof we have hereunto set our hands and seals this the 24th day of September, 1887. [Signed] Davega Bros."—and duly attested.

The exigencies of this appeal require of us a construction of this agreement in so far as it bears upon the asserted right of Davega Bros., who have erected the building stipulated for on lot 13, and its southern wall in accordance with the stipulation, to enjoin Ware from erecting a two-story brick house on lot 14, and joining it onto the southern wall of Davega Bros' said building on lot 13. This southern wall was not erected wholly, or even mainly, on lot 13, but, of its 18 inches breadth or thickness, 14 inches is rested on lot 14, and only four inches on lot 13. It is claimed for Davega Bros. that the intentment of the agreement thus executed by them and accepted by Ware was that the wall should rest in part upon both lots, and that its precise location—more on 14 than 13—is within the contemplation and authorization of the writing. For the purposes of the determination of the case as it is now presented, we shall assume that these positions of appellant are well taken, and that by force of this undertaking by Davega Bros., and Ware's acceptance of it, the former acquired the right to erect this wall to the extent stated on Ware's lot 14. Of course, the mere sale, without more, of lot 13 to them gave Davega Bros. no such right, and if they had it at all, as counsel insist and as we assume they did, they acquired it under this agreement, constituting, as it did, a part of the transaction of the sale by Ware to them. So far as this agreement indicates, and so far as appears in any way in the case, Ware's only interest in the character of building to be erected on lot 13 was that the wall of it next to his remaining lot should be of brick, with apertures for joists left in it sufficient in number and position for the joining onto this wall of a three-story house which might be erected on lot 14. The consideration moving Davega Bros. into this covenant may have been the right they by it acquired to erect one wall of their building mainly on land which did not belong to them, or it may have been a reduction in the purchase price of lot 13, singly or in connection with the acquisition of the right to rest the wall largely upon lot 14. That the consideration for their covenant was one or both of the matters just mentioned there can be little if any doubt. It is not pretended that the joining onto their build-

ing of another of the same dimensions, and even constructed of like material, would have been of any advantage or benefit to their building or to them in any other way. It is alleged in the bill that the joining onto this wall of any building of less than three stories in height would impair and weaken the wall, endanger their building, and thus irreparably injure them. This, however, is specifically denied in the answer, and the affidavits submitted on the motion to dissolve the temporary injunction are satisfactory to show that the joining on of a building of two stories would not injuriously affect the wall at all. It is also alleged in the bill that the joining onto Davega Bros' building of one of less height would entail greater danger from fire to the former than would result from a building of the same height; but this seems unreasonable, and is denied by the answer and disproved by the affidavits. With these preliminary suggestions and assumptions, we come now to inquire whether by force of the agreement executed by Davega Bros., and its acceptance by Ware, the latter is precluded to erect on lot 14 a building of other dimensions than those of the building erected by Davega Bros. on lot 13. In the first place, it is not reasonable to suppose that Ware would voluntarily and without consideration have so limited and embarrassed his use and enjoyment of his remaining lot. It is improbable to a degree that he, after having accorded full consideration to Davega Bros. for erecting the wall so as that he could join onto it, without any reference to or account being taken of the character of the building he should erect, should have, without money and without price, materially lessened the value of his property by restricting his use of it to the erection of a building of prescribed dimensions. In the next place, it is equally unreasonable and improbable that Davega Bros., having already received full compensation for leaving apertures in their southern wall for joists, should have insisted upon a further consideration for so doing; and especially so when this further consideration was one solely of detriment to Ware, and, as we have seen, of no sort of benefit to them. There might have been some occasion from the point of view of Davega Bros. for an engagement on the part of Ware to construct the building on his lot of un-inflammable material,—as of brick with a metal roof,—as making for the immunity of their own building from fire, and, if they had had in mind to secure an additional consideration and benefit to themselves for building their wall for future use by Ware, it would seem in all reason that the stipulation would have had reference to Ware's building in this respect, and not to its dimensions at all. So that we feel safe in the conclusions that nothing passed to Ware to induce him to limit and curtail the uses of his lot, and consequently its value, by agreeing to erect only a three-story 100-foot building upon it, that Davega Bros. had no interest to be subserved by requiring

such an agreement, and that, of consequence, looking thus to the whole transaction and the situation of the parties, the mind is so inclined against the parties having entered into such a stipulation of only positive detriment to one without benefit to the other as that the writing must clearly import it or it must be held not to have been made. Again, this covenant is signed by Davega Bros., and not by Ware. All its express engagements are by and from Davega Bros. to Ware. It expresses no undertaking of Ware whatever. And while we are proceeding upon the assumption that Ware's acceptance of the covenant saddled upon him whatever the paper fairly construed imports that he assumed to do, yet there is potency in the suggestion that so important a matter as a covenant on Ware's part to use his lot only for the purpose of erecting a three-story building thereon would not have been left to inference or construction had it been the intention of the parties that Ware should assume this burden, but would have been clearly expressed in a writing signed by him. Recurring to the language of the agreement, we do not find that it clearly, or at all in fact, imports a covenant on Ware's part not to build a two-story house, or any other than a three-story house, on lot 14. The words, "for a building of like dimensions," are at the end of the writing. They do not aptly and smoothly join themselves onto the words which immediately precede them. They relate not to the immediately preceding words or stipulation, but have reference to the stipulation for joist apertures further back in the writing. They appear to have been added as an afterthought, and to make clearer a term of the covenant which upon reading the paper the writer of it deemed obscure. They relate to the extent to which joist apertures should be let into the wall. The writing preceding this clause did not in express terms prescribe the number, position, or extent of the joist apertures to be left in the wall for joining thereto a building on lot 14. It is not therein stated whether they should extend the whole length of the wall, nor whether they should extend to the top of it. It is not therein set forth that the apertures should be for a 100-foot building, nor for a building of one, two, or three stories. The purpose, however, was for the apertures to extend over the entire three-story 100-foot wall. Possibly the writing without its last clause would have imported and been construed to provide for apertures covering the whole wall. But that there might be no room for doubt or subsequent dispute about this, and, in our opinion, for no other purpose, words were added making the covenant plain and unmistakable in this regard. These words, as we have seen, were, "for a building of like dimensions." They were proper and necessary to a clear expression of the purpose of the parties that the whole of this wall should be provided with apertures for joists for Ware's use. They were added to the writing not to impose the burden of building

a three-story 100-foot house on him, if he should build at all, not to his detriment at all, but for his benefit, by making it clear beyond doubt and room for dispute that the covenants were to provide apertures for joists over the whole surface of their southern wall. The intention in this connection would perhaps stand out in bolder relief if we transpose this last clause, and set it down in juxtaposition to that part of the text to which it obviously relates. The paper would then read, "And we further agree and bind ourselves to erect the wall on the southern boundary of said lot, with apertures for joists for a building of like dimensions," or, in other words, with sufficient joist apertures for joining onto it of a three-story building 100 feet in length. But, without more or without such transposition, the clause in question is merely a part of the covenant to let apertures for joists into the wall, and its sole purpose and effect is to define the extent to which apertures should be left in the wall, and this purely for the benefit of Ware. It was not intended to and it does not impose any duty or burden on Ware or his successors in estate in respect of the character of building to be erected on lot 14. It secured to him the right to have joist apertures let into the whole face of the wall, and to use the wall and these apertures as a part of any building he might choose to erect on lot 14, whether of one, two, or three stories, and it leaves him and his grantees wholly unfettered as to the character of building they may join onto the wall.

Our conclusion, therefore, is that, on the case made by the bill and answer and affidavits, the chancellor properly sustained the motion to dissolve the temporary injunction, and the decretal order dissolving the injunction will be affirmed.

We have considered the affidavits only because the motion to dissolve was submitted on them as well as upon the denials of the answer, and they were offered by both parties without objection from either.

Affirmed.

JELLERSON v. PETTUS et al.

(Supreme Court of Alabama. June 28, 1902.)

PARTITION-DISSEISIN-OSTER-LACHES.

1. Where persons in possession of land under color and claim of title to the whole interest make partition, and convey the whole interest, maps and conveyances in pursuance of the partition being made and recorded, and the grantee in the partition deed enters, claiming the whole interest, there is an ouster and disseisin of all claiming to be tenants in common with the grantee in such partition deed.

2. Where, in a suit for partition, it appears that there had been a disseisin and ouster, as against plaintiff's interest, 40 years before, and that complainant's rights had never been asserted in that time, there can be no recovery.

Appeal from chancery court, Mobile county; Thos. H. Smith, Chancellor.

Suit by Margaret Jellerson against Henry

J. Pettus and others. From a decree for complainant, Pettus appeals. Affirmed.

Fred'k G. Bromberg and Leslie Hall, for appellant. L. H. & E. W. Faith, for appellee.

DOWDELL, J. The bill in this case was filed for the purpose of a sale of the land described, for division among joint owners. Henry J. Pettus, one of the respondents, filed a plea setting up staleness of demand and lapse of time as a bar to a recovery. A submission was had on the sufficiency of the plea, and from the decree of the chancellor holding the plea sufficient this appeal is prosecuted.

The plea, among other things, averred, in substance, that James E. Saunders, Anatole Rabby, and Antoine Rabby were in possession of all the land in 1861, under claim and color of title to the whole interest therein, and that they made partition of the land on January 7, 1861, and, by a partition deed which purported to convey the entire interest, conveyed to James E. Saunders, in severalty, lot 23, the land here in controversy. That the said Saunders immediately went into possession of said land, claiming the whole interest therein. The plea also avers that appellee, Pettus, by mesne conveyances from Saunders and those claiming under him, acquired the claim to the whole interest in this lot, and the possession thereof, and has put \$2,000 worth of improvements on the lot under his claim of exclusive ownership of the whole interest. The plea also avers that the complainant was never in possession of the land, and that respondents never knew or heard of complainant's alleged claim until the filing of his bill.

The facts alleged in the plea as to the partition, viz.: the possession under color and claim of title to the whole interest in the land by those making partition; the partition of the land; the making of maps and conveyances in pursuance of the partition, and placing the same upon record; the immediate entry of Saunders, under the partition proceedings, into exclusive possession, claiming the whole interest therein,—we think were sufficient to amount to an actual ouster and disseisin of all persons claiming, at that time, to be tenants in common with Saunders as to lot 23. *Abercrombie v. Baldwin*, 15 Ala. 369, 373; *Walker v. Crawford*, 70 Ala. 573, 574; *Fleider v. Childs*, 73 Ala. 574.

The statute of limitations began to run from the time of disseisin. Forty years have elapsed since that date,—a length of time quite sufficient to raise up every presumption, in favor of the respondents' title, against the claims of the complainant. In *Black v. Coke Co.*, 85 Ala. 511, 5 South. 94, it was said by this court: "There is, however, a presumption that any and all claims or rights of property which have been permitted to slumber, without assertion or recognition, for twenty years, have no legal existence, or have been adjusted." In the case at bar, under the facts stated in the plea, whatever of claim or right the complain-

ant had, the same has been permitted to slumber for a period of 40 years without assertion or recognition. The chancellor was right in sustaining the plea. We deem it unnecessary to cite other authorities in support of the propositions above stated, and content ourselves by referring to brief of appellee's counsel, where the cases will be found collated.

Affirmed.

TERRY et al. v. ALLEN et al.

(Supreme Court of Alabama. June 28, 1902.)

DEMURRER—RIGHT OF REDEMPTION—CONTRACT—CONSIDERATION.

1. Sustaining of one ground of demurrer to a complaint, though others are overruled, warrants final judgment against plaintiff, he not amending.

2. The statutory right of redemption from foreclosure sale being personal to the owner of the land, an attempted assignment of the right furnishes no consideration for a contract.

Appeal from circuit court, Coffee county; John P. Hubbard, Judge.

Action by S. L. Terry and another against N. N. Allen, partners as Allen Bros. Judgment for defendants. Plaintiffs appeal. **Affirmed.**

The complaint, as originally filed, was amended by the addition of several counts. There was a motion made by the defendants to strike the third count of the complaint. The recital in the bill of exceptions shows that this motion was granted, and the count stricken. There is no bill of exceptions showing the ground of the motion or the rulings thereon. The defendants demurred to the original and amended complaint, assigning many grounds of demurrer. The court overruled some of the grounds of demurrer, and sustained others. Upon the plaintiffs failing and refusing to plead over, after some of the grounds of the demurrer interposed to the complaint were sustained, the court rendered judgment for the defendants.

J. F. Sanders and Espy, Farmer & Espy, for appellants.

McCLELLAN, C. J. When any ground or assignment of demurrer to a complaint is sustained, the demurrer to that complaint is sustained, and, if plaintiff declines to amend, judgment final must be rendered against him. It is of no consequence that the court may, in terms, overrule one or any number less than the whole of the assignments of demurrer. The sustaining of any assignment is as effectual as the sustaining of the demurrer generally, or each and all its assignments expressly. *Watson v. Jones*, 121 Ala. 579, 25 South. 720. The complaint in each of its counts, except the one last filed by way of amendment, on October 2, 1901, set up a contract whereby the plaintiffs undertook to assign to defendants, and the latter undertook to exercise upon certain terms, a statutory right of redemption of certain lands from the purchaser at a foreclo-

sure sale, and claimed damages for a failure on the part of the defendants to carry out this contract. As the statutory right of redemption is not property, nor any right in property, but a mere personal privilege, conferred by the law upon one whose lands have been sold in foreclosure proceedings, and the like, and as this privilege is not assignable, and cannot be exercised by any person other than him upon whom the statute has conferred it, it is clear that those grounds of the demurrer which set up the want of consideration for the undertaking of the defendants, and the absence of any duty, obligation, or capacity on the part of the defendants to carry out the undertaking they had nominally assumed, were well taken, and that, of consequence, the demurrer was properly sustained on such grounds.

The supposed action of the trial court in striking the count filed October 2, 1901, is not shown here by a bill of exceptions, and we therefore cannot review it.

Affirmed.

IVEY et al. v. COSTON et al.

(Supreme Court of Alabama. June 28, 1902.)

EXECUTIONS—CLAIMS BY THIRD PARTIES—CHATTEL MORTGAGEES—AFFIDAVIT OF CLAIM—SALE WITH RESERVATION OF TITLE—BUYER'S INTEREST—SELLER'S RIGHTS AS AGAINST LEVY.

1. Under Code, § 4145, providing that when the claim of a party claiming title to, or a paramount lien upon, property which has been levied on, is based on a mortgage or lien, the claimant must state in his affidavit the nature of the right which he claims, a chattel mortgagee cannot recover the mortgaged property, as against a levy thereon, where he fails to state in his affidavit the nature of his claim, especially if the law day of the mortgage has not arrived.

2. Under Code, § 1890, subd. 2, providing that personal property of defendant may be levied on, whether he has absolute title thereto or only an estate therein for life or any shorter period, where a sale of personalty is made on credit, and the property is delivered to the buyer, the seller reserving title as security, such property may be levied on under an execution against the buyer, and the seller cannot, before the expiration of the term of credit, assert his reserved title as paramount to such levy.

Appeal from circuit court, Crenshaw county; J. C. Richardson, Judge.

Action by T. E. and J. T. Ivey, executors, against one Hamilton. Judgment for plaintiffs, and execution and levy thereunder, and J. W. Coston & Co. file claim to the property levied on, as paramount lienors, etc. From a judgment in favor of claimants, plaintiffs appeal. **Reversed.**

The appellants recovered a judgment against one Hamilton, upon which judgment an execution was issued. This execution was levied upon two mules. Thereupon appellees, J. W. Coston & Co., interposed a claim to the mules so levied upon; setting out in their affidavit of claim that the property so levied upon was

¶ 2. See *Execution*, vol. 21, Cent. Dig. § 107.

"not the property of said J. J. Hamilton, * * * but is the property of J. W. Coston & Co., and that affiant has a just claim to the property levied upon." The character of the claim of the claimants, as to whether or not it was under a mortgage or other lien, was not set out in the affidavit. Upon the interposition of this claim, issue was made, and trial was had to determine the right of property between the plaintiffs in execution and the claimants. The plaintiff introduced in evidence the judgment recovered by him against said Hamilton, and the execution issued thereon, together with the return of said execution, the return showing levy of the execution upon the property involved in the suit. It was shown by the return of the sheriff that the execution was levied on the property on November 9, 1900. J. W. Coston, a member of the firm of J. W. Coston & Co., the claimants, testified that the property involved in the suit had been sold by J. W. Coston & Co. to Hamilton, the defendant in execution, on November 8, 1900, and that, to secure the payment of the purchase price of the property, Coston took a mortgage from said Hamilton upon the property so sold to him, and all other property owned by him; that the note which this mortgage was made to secure was made payable on October 1, 1901. The mortgage was introduced in evidence, and contained the following provision in reference to the mules which were sold: "The title of the same to remain in J. W. Coston & Co. until paid for." The witness J. W. Coston further testified that the claimants claimed title to said property by reason of the mortgage, and that the claimants expressly reserved title to the mules until they were paid for. The cause was tried in March, 1901. This was substantially all the evidence. The plaintiffs requested the court to give to the jury the following charge, and duly excepted to the court's refusal to give the same as asked: "If you believe the evidence, you should find for the plaintiffs." At the request of the claimants, the court gave to the jury the following written charge, to the giving of which the plaintiffs duly excepted: "The court charges the jury that, if they believe the evidence, they must find for the claimants." There were verdict and judgment for the claimants. The plaintiffs appeal, and assign as error the rulings of the court upon the charges asked.

Rushton & Powell, for appellants. Bricken & Bricken and C. E. Hamilton, for appellees.

McCLELLAN, C. J. The claim of Coston & Co. was not interposed under and in accordance with section 4145 of the Code, and therefore they were not entitled to recover as mortgagees,—especially as the law day of the mortgage had not lapsed.

Nor were they entitled to recover upon the title reserved by them in the sale to defendant in execution, for under that sale the defendant had at least the right to the posses-

sion and use of the property until the stipulated time for payment of the price, which time had not expired when the levy was made, nor when the claim was interposed, nor even when the trial was had; and this right and interest of the defendant in the property was leviable. Code, § 1890, subd. 2. Hence our conclusion that the court erred in refusing to give the affirmative charge for the plaintiff, and in giving the affirmative charge for claimant.

Reversed and remanded.

ANDREWS v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

HOMICIDE—TRIAL—EVIDENCE—THREATS BY DECEASED—INSTRUCTIONS—REASONABLE DOUBT—DOUBT OF ONE JUROR—DEGREE OF PROOF.

1. On a prosecution for murder, it was proper to sustain an objection to a question put to a state's witness on cross-examination, as to whether he had heard deceased threaten defendant's life the night before the killing; no evidence having been offered showing any overt act or hostile demonstration, on the part of deceased, at the time of the homicide.

2. The defendant requested the court to charge that every one charged with the commission of a crime is presumed to be innocent until his guilt is established, and the evidence to induce his conviction should be so convincing as to lead the minds of the jury to the conclusion that the defendant cannot be guiltless. Defendant also requested a charge that, unless the evidence against the prisoner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, the jury must acquit. *Held* properly refused as requiring too high a degree of proof.

3. The defendant requested an instruction that, if one juror had a reasonable doubt of the defendant's guilt, the jury must find the defendant not guilty. Defendant also requested an instruction that if one of the jury had a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, the jury must find the defendant not guilty. *Held* properly refused because directing acquittal if any juror entertained a reasonable doubt.

Appeal from circuit court, Crenshaw county; J. C. Richardson, Judge.

Butler Andrews was convicted of murder, and he appeals. Affirmed.

On the trial of the cause, the evidence for the state tended to show that the defendant shot Bob Bogan while his back was turned towards him; that Bogan was walking away from the defendant, and the defendant crept up behind him with a shot gun, and fired upon him, from the effects of which wound he died. The witness Burgin Harris testified to facts showing that such were the circumstances of the killing. The facts relating to the question asked said Burgin Harris on his cross-examination, and the ruling thereon, are shown in the opinion. There was evidence introduced for the defendant, tending to show that, at the time he fired upon the deceased, the latter

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 1940.

was advancing upon him with a drawn knife. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(9) The court charges the jury that every one charged with the commission of a crime is presumed to be innocent until his guilt is established, and the evidence to induce his conviction should not be a mere preponderance of probabilities, but it should be so convincing as to lead the minds of the jury to the conclusion that the defendant cannot be guiltless. (10) The court charges the jury that, unless the evidence against the prisoner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, they must find the defendant not guilty. (13) The court charges the jury that, if one juror has a reasonable doubt of the defendant's guilt, they must find the defendant not guilty. (14) The court charges the jury that if one of their number have a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, they must find the defendant not guilty."

J. O. Sentell and H. W. Rusnton, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. On cross-examination by the defendant of the state's witness Burgin Harris, he was asked if he did not hear Bob Bogan (the deceased), on Sunday night, before the killing occurred, threaten defendant's life. An objection to this question by the state was sustained. At this stage no evidence had been offered showing any overt act or hostile demonstration, on the part of the deceased, at the time of the homicide, and the ruling of the court was therefore free from error. *Jones v. State*, 116 Ala. 470, 23 South. 135, and cases there cited.

Charge 9 refused to the defendant was condemned by this court in *Allen v. State*, 111 Ala. 80, 20 South. 490, as exacting too high a degree of proof. The legal proposition contained in the charge seems to have been approved in the earlier cases of *State v. Murphy*, 6 Ala. 845, and *Coleman v. State*, 59 Ala. 52. We are disposed to adhere to *Allen v. State*, supra, as announcing the more reasonable rule. Charge No. 10 likewise exacts too high a degree of proof, and was properly refused. See cases cited in 1 Mayfield, Dig. p. 173, § 186, subd. 17.

Charges Nos. 13 and 14 were properly refused. These charges asked for an acquittal if any one of the jurors had a reasonable doubt of the defendant's guilt, notwithstanding the rest of the jurors were free from such doubt. Charges of this character were criticised in the case of *Hale v. State*, 122 Ala. 89, 26 South. 236, and the distinction clearly drawn between such and charges which instructed that there could not be a conviction so long as any one of the jury entertained a rea-

sonable doubt of the defendant's guilt. See also, *Pickens v. State*, 115 Ala. 42, 22 South. 551; *Cunningham v. State*, 117 Ala. 60, 23 South. 693.

There is no error in the record. Affirmed.

DUNKLIN v. STATE.

(Supreme Court of Alabama. June 28, 1902.)
CRIMINAL LAW—INJURY TO CATTLE—INDICTMENT—AVERMENTS AS TO INJURY—QUASHING INDICTMENT—PREFERRING ANOTHER INDICTMENT.

1. Cr. Code, § 5091, enacts that any one who unlawfully or wantonly kills, disables, etc., any horse, mule, etc., shall be fined not less than twice the value of the injury. *Held*, that an indictment, for a violation of the statute, which fails to aver the value of the injury, is fatally defective.

2. Cr. Code, § 4922, provides that, when an indictment is quashed for any defect therein, the court may order another indictment preferred for the same charge. *Held* that, where on error an indictment is found fatally defective, it will not be quashed, but the conviction will be reversed, and the cause remanded, with direction to the trial court to quash.

Appeal from circuit court, Lowndes county; J. C. Richardson, Judge.

Henry Dunklin, alias Pat Dunklin, was convicted of a violation of Cr. Code, § 5091, and he brings error. Reversed.

The appellant in this case applied to the supreme court for a writ of error. In compliance with the prayer of the petition, the writ of error was awarded. In the transcript of the record certified in response to the writ of error, it is shown that the defendant was tried and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Henry, alias Pat, Dunklin, unlawfully or wantonly killed, disabled, disfigured, destroyed, or injured a cow, the property of Sallie Reeves, against the peace and dignity of the state of Alabama." The verdict of the jury was in words and figures as follows: "We, the jury, find the defendant guilty on his plea of guilty, and assess his fine at fifty dollars, and further find the value of the injury to be ten dollars." Judgment was rendered in accordance with this verdict.

W. P. McGaugh and Thos. W. Martin, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. Section 4327, Cr. Code, confers authority upon any one of the judges of this court in vacation, or upon this court in term time, to issue a writ of error, in a criminal cause, to the clerk of the court in which the judgment of conviction was rendered; confining, however, the granting of such writ on some error of law apparent on the transcript of the record. This is the procedure adopted in this case. In the transcript of the record before us, it appears that the defendant was

§ 1. See *Animals*, vol. 2, Cent. Dig. § 133; *Malicious Mischief*, vol. 33, Cent. Dig. § 10.

indicted for a violation of section 5091 of the Criminal Code. The indictment contains no averment of the value of the injury to the animal, killed, disabled, disfigured, destroyed, or injured. In view of the fact that the fine shall not be less than twice the value of the injury done the animal, and that one-half of it shall go to the owner of the property destroyed or injured, this averment was necessary. *State v. Garner*, 8 Port. 447; *Caldwell v. State*, 49 Ala. 34; *Bish. St. Crimes*, §§ 444, 445; 1 *Bish. Cr. Proc.* §§ 540, 567; 2 *Bish. Cr. Proc.* §§ 48, 177.

The indictment, being fatally defective in the omission of averment pointed out, will not support a judgment of conviction. *Francois v. State*, 20 Ala. 83, 86; *Hornsby v. State*, 94 Ala. 63, 10 South. 522. We must, however, decline to quash it, but will reverse the judgment of conviction, and remand the cause, with direction to the trial court to quash; as that court has the authority to order another indictment to be preferred if it sees proper to do so. Code, § 4922.

Reversed and remanded.

O'NEIL v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

CRIMINAL LAW—COMMITMENT TO PENITENTIARY—UNREASONABLE DETENTION—QUARANTINE—DISCHARGE—SUSPENSION OF SENTENCE PENDING APPEAL.

1. The convict inspectors contracted with the sheriff to keep a convict who had been sentenced to the penitentiary in quarantine until the danger of infection with smallpox had passed. While he was so held, his petition for discharge on habeas corpus was denied, and he was remanded to the custody of the convict inspectors. They, having no place of safety to keep him in quarantine, hired the sheriff to take charge of him until after the expiration of 21 days. The day before the expiration of that period, they directed where the convict should be taken, but no demand for him was made until four days later. *Held*, that the convict had not been detained from the penitentiary for an unreasonable length of time, entitling him to be discharged.

2. Even if a convict had been detained by the sheriff for the purpose of quarantine an unreasonable length of time after sentence to the penitentiary, he was not entitled to be discharged absolutely, but only from the custody of the sheriff, with an order remanding him to the custody of the convict inspectors.

3. Where a convict who had been sentenced to the penitentiary was held by the sheriff for the purpose of quarantine, it was not error to refuse to suspend the execution of the sentence during the pendency of his appeal from an order denying discharge on habeas corpus.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

John O'Neil petitions for habeas corpus to discharge him from custody. From an order denying his petition, he appeals. *Affirmed*.

John O'Neil filed a petition in which he averred that he was imprisoned and restrained of his liberty by W. R. Waller, the sheriff of Montgomery county, on the farm of said Waller, which was about four miles from the city

of Montgomery. That said petitioner had been tried and convicted in the said city court of Montgomery on an indictment charging him with grand larceny. That after being convicted, he was sentenced to the penitentiary for a term of three years. That he had, on April 23, 1902, filed a petition asking for a writ of habeas corpus, and that he was discharged from such unlawful custody, and that on the hearing of said petition, there was an order issued remanding him to the custody of the inspectors of convicts, to be by them held under the sentence of the city court of Montgomery, but that said order was not complied with and said petitioner was detained by the said Waller as sheriff of Montgomery county in his custody and returned to the farm of said Waller and was there made to work. Thereupon the petitioner averred that his imprisonment was unlawful for the following reasons: "First. Though the original imprisonment was lawful said John O'Neil has become entitled to his discharge by reason of subsequent act, omission or event. Second. The person who has the custody of said O'Neil is not the person authorized by law to detain said John O'Neil. Third. Your petitioner further avers that said John O'Neil is being worked together with felons and misdemeanants, is confined to the same compartments with white and black convicts, and with male and female convicts contrary to the statutes of Alabama (Code, § 4493). Fourth. Said John O'Neil is confined by one Wm. R. Waller as sheriff of Montgomery county who is interested in the profit of his labor contrary to laws of the state of Alabama. Fifth. Said John O'Neil is confined by W. R. Waller, sheriff of Montgomery county, contrary to the Code of Alabama, § 5117. Sixth. Said John O'Neil was convicted on the 26th day of March, 1902, and has not yet been taken to the penitentiary of the state of Alabama, thereby causing an unreasonable and unwarranted delay. Seventh. Your petitioner further avers that the said John O'Neil is detained by said Waller contrary to the order of Hon. A. D. Sayre, judge of the city court, and, if there had ever been any exposure of the said John O'Neil to smallpox, or any other contagious disease, that a sufficient time has elapsed since the sentence of said O'Neil to have demonstrated that the said O'Neil has not contracted any disease and that further detention for observation is unnecessary. Eighth. Your petitioner avers that the order of Hon. A. D. Sayre, has been willfully and intentionally disobeyed and disregarded by the said W. R. Waller, sheriff, and the convict inspectors of Alabama, in that said convict inspectors have not regarded said order of Hon. A. D. Sayre as judge aforesaid, but are trifling with the order of the said judge by a willful disregard and disobedience of said order."

The prayer of the petition was for the issuance of a writ of mandamus addressed to said W. R. Waller, individually and as sheriff of Montgomery county, commanding him to bring

the body of said John O'Neill before the judge to whom the petition was addressed.

Terry Richardson, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. It is well understood, that when a party has been convicted and sentenced to hard labor for the county, or to suffer imprisonment in the penitentiary, a sheriff must not detain him afterwards, in the county jail, or elsewhere, for an unreasonable length of time, and that an unreasonable detention, entitles the prisoner to be discharged from the custody of the sheriff, but not absolutely as we shall see, for a "subsequent act, omission or event." Ex parte Goucher, 103 Ala. 305, 15 South. 601. The sheriff should deliver the convict to the proper authorities after sentence has been passed, as soon as he can do so, consistently with the discharge of his duty. Ex parte King, 82 Ala. 59, 2 South. 763. What is a reasonable or an unreasonable time to detain him, depends on the circumstances of each particular case. If the convict at the time should be too sick to be removed from the jail by the inspectors of convicts, his detention there until such time as he may be able to be safely taken therefrom and carried to the place to which he is sentenced to labor, could not be said to be an unreasonable detention.

In this case, it was shown that smallpox had prevailed in the jail where the petitioner had been confined, up to and at the time of his conviction. To have removed him from jail to the penitentiary, immediately after his conviction, and placed him at labor with other convicts in that prison, would have exposed them to liability to the disease, an act which the ordinary claims of humanity would condemn. There is no law, of which we are aware, that would sanction his transfer under such circumstances, or be violated in his detention elsewhere, in quarantine, until after the lapse of the period fixed by experience to render it safe to the other convicts for him to be taken to the penitentiary. The physician inspector testified on the trial, that in his opinion the petitioner had been exposed to smallpox; that it required 21 days after exposure, for him to become immune therefrom, and that the quarantine period of 21 days expired on the 6th of May, 1902. To what place a convict may be removed and kept in, a case of this character, is not specified in the statute, nor has specific provision been made, so far as we are aware, to meet an emergency of the kind. It may have been deemed unimportant to do so, the presumption being that the inspectors of convicts might be trusted with his keeping meantime, at some suitable, safe place for his detention, until the time arrived when he could, with safety to other convicts, be carried to the place of labor as specified in his sentence. This place may well be at a hospital or outhouse where persons exposed to smallpox are quarantined, or on a farm, or other isolated place, such as the good

judgment of the authorities, and a due regard to the safety and health of the convict may require. This would be no more a violation of law, than would the removal of convicts from one prison to another, in case their health and lives required it. The duty of humane treatment of prisoners, to preserve their lives, health and comfort, so far as comports with their safe-keeping and the punishment they are to receive, pervades our whole convict system, and the claims of humanity are not to be needlessly disregarded.

This convict was sentenced to three years' imprisonment in the penitentiary, on the 14th of April, 1902, after conviction on an indictment for grand larceny. The reason why he was not at once delivered to the penitentiary authorities, as set out in the answer of Waller, who was sheriff at the time, and against whom this writ was issued, was, that "on or about the 14th day of April, 1902, he made a contract with the board of convict inspectors of Alabama for the hire of certain convicts, the object and purpose of which contract were, to place the said convicts in quarantine until the danger of contracting smallpox, to which, as was feared, they had been subjected, should be over and passed, and while he was so holding the said O'Neill, one of them, a writ of habeas corpus was sued out, and he was brought before the Hon. A. D. Sayre, upon application for discharge, which petition was denied, and the said O'Neill was remanded to the custody of the board of convict inspectors, who, as respondent is informed and believes, having no place of safety in which to keep the said O'Neill, without danger of spreading the disease among a large number of convicts, should he develop the disease, to which he had been subjected, procured this respondent, to take charge of the said O'Neill and keep him safely until the expiration of 21 days after he left the jail, which had been for months infected with smallpox." Further answering, he stated, "that on the 5th day of May, 1902, being Monday of the present week, the president of the board of convict inspectors, directed where said O'Neill should be taken for hard labor, to wit, to the Tennessee Coal, Iron & Railroad Company, and [he] so notified that company, on that day, having at the time good reason to believe, that O'Neill would be removed to Pratt City on the following day, May 6, 1902, but [for] some cause, not known to respondent, demand was not made for the said O'Neill, until May 9, 1902, which was done on that day."

The petition, which is the second one before the same judge, was filed on the 8th of May, 1902, and after trial, on the 10th of the same month, the judge, as on the trial of the first writ, refused to discharge the petitioner, and, as before, made an order remanding him to the custody of the inspectors of convicts to be held by them under the sentence of the city court of Montgomery.

The evidence on the trial tended to support the averments of the answer of defendant,

Waller, and under it, we fail to discover that petitioner has presented any good reasons for his discharge. The trial judge very properly held, that it had not been shown, that he had been detained from the penitentiary for an unreasonable length of time. But even if he had been detained by the sheriff for an unreasonable length of time, within which he should have been delivered to the convict inspectors, he would not, on that account, have been entitled to be discharged absolutely, but only from the custody of the sheriff, with an order remanding him to the custody of the convict inspectors, and directing the sheriff to so immediately deliver him. *White v. State* (Ala.) 32 South. 320.

There was no error in the refusal of the judge to suspend the execution of the sentence of the city court, during the pendency of this appeal.

Affirmed.

MARENGO COUNTY et al. v. MATKIN et al.

(Supreme Court of Alabama. June 28, 1902.)

COUNTIES—COUNTY SEATS—COURT HOUSE—CHANGE OF SITE.

1. Where an act of the legislature selected a certain town as the county seat, the board of county commissioners had no authority to remove the court house to a portion of the town not embraced within its limits when the locating act was passed, notwithstanding that the act adding territory to the town was passed shortly after the locating act, and that the actual establishment of the court house occurred after the enlargement of the town, such authority being especially wanting in view of Const. § 41, providing that no court house or county site shall be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose.

Appeal from chancery court, Marengo county; Thos. H. Smith, Chancellor.

Suit by T. D. Matkin and others against Marengo county and Samuel P. Powell and others, as commissioners of Marengo county, to enjoin the defendants from changing the site of the county court house. From a decree for complainants, defendants appeal. Affirmed.

The purpose of the bill was to enjoin the removal of the court house of the county of Marengo from its present location in the town of Linden to another location in said town, for the delivery up and cancellation of a contract made by the county for the erection of a new court house on a new location, and for the delivery up and cancellation of county warrants alleged to have been issued for the purpose of erecting said new court house. A preliminary injunction was issued by the judge of the circuit court. The averments, as disclosed by the bill, necessary to an understanding of the decision on the present appeal, are sufficiently shown in the opinion. The defendants answered the bill, and also demurred to it upon the following grounds: (1) That it did

not appear that the court house was to be removed beyond the corporate limits of Linden, (2) that it appeared the new location was within said corporate limits; (3) that the same was a valid exercise of the powers of the court of county commissioners of Marengo county; (4) that the chancery court, under the facts set out in the bill, was without jurisdiction; (5) that it did not appear that the commissioners' court exceeded its legal authority in the premises. The defendants also moved to dissolve the temporary injunction upon the denials of the answer and for the want of equity in the bill.

Mallory & Mallory, Canterbury & Gilder, R. H. Clarke, J. M. Miller, W. A. Collier, and Elmore & Harrison, for appellants. Wm. H. Tayloe and Wm. Cunninghame, for appellees.

SHARPE, J. Under an act of the general assembly passed in 1820 lands described as the "southwest quarter of section 32, in township 16, of range 3 east, in Marengo county," were fixed by the commissioners as the county seat, and were platted as a town called "Linden." On a lot reserved for that purpose a court house was built, which remained the seat of justice until December 4, 1868, when, by an act of the general assembly, the county seat was removed to Demopolis, and the court-house lot at Linden was sold. At its session in 1869-70 the legislature passed an act, which, with an amendment at the same session, provided for a vote of the people to permanently locate the county seat, but no effective action was had thereunder. The foregoing has no important bearing on the case under consideration, but what follows has more pertinence. On March 1, 1870, an act of the general assembly incorporated for the first time the town of Linden, and enlarged its limits so as to include with the quarter section originally platted adjacent lands in township 16. While the corporate limits so stood, and on February 8, 1871, an act of the general assembly was approved and went into effect, whereby it was provided, among other things, "that the court house of Marengo county be, and the same is hereby, removed from Demopolis to Linden, in said county, and that the same be permanently located at Linden, in said county," and providing further for the removal thither within 60 days of the records and furniture belonging to the county offices; and thereafter the court-house site in Linden was repurchased by the county, and has ever since been used as such site. On February 9, 1871, another act was approved and went into effect, amending the incorporating act so as to add to Linden certain territory theretofore adjoining it and situated in township 15. The county commissioners having lately resolved to build a new court house on the territory last added to Linden, the complainant taxpayers filed this bill to enjoin that action.

It has been declared as a general principle that, "when a city or town is selected as the

county seat, the boundaries of such city or town, as they then exist, become the boundaries of the county seat, and the subsequent inclusion of more territory in such city or town does not enlarge the county seat." 7 Am. & Eng. Enc. Law, 1013. This statement is not opposed by any authority brought to our notice, and is supported by the decisions rendered in *State v. Smith*, 46 Mo. 60; *Way v. Fox*, 109 Iowa, 340, 80 N. W. 405; *State v. Harwl*, 36 Kan. 588, 14 Pac. 158; and *State v. Commissioners of Atchison Co.*, 44 Kan. 186, 24 Pac. 87. Each of these cases involved the authority of county commissioners or supervisors to change the place for county offices and sittings of court to an addition which had been made to a town previously constituting a county seat, and in each the existence of such authority was denied. In respect of the manner in which the county town was incorporated and enlarged, the case last above cited was strictly analogous to the present case. In *Way v. Fox*, supra, the town of Garner, ambitious to become the county seat, extended its limits over uninhabited lands, so as to include the county town of Concord. The county board of supervisors then sought to substitute a county site in the original limits of Garner for the one used at Concord. The supreme court, in passing on the legality of the board's proceedings, held that Garner was not the county seat, and that the supervisors had no power to change the site of the county buildings to that place; and this notwithstanding there was in Iowa a statute defining powers of the board, which the court said "seems to authorize a change of site for the court house, provided the place selected is within the limits of the town at which the county seat is located." In the opinion there rendered it was also said: "Had Concord incorporated and extended her limits so as to take in Garner, there would be little doubt of the legality of the proceedings," and that expression is referred to in appellants' brief as favoring the legality of their action. We have no such statute as the one there considered, and that the court's utterance respecting the case supposed was based on the terms of that statute appears from its preceding statement that: "In the absence of statute it seems to be well settled that, when a city or town is selected as the county seat, the boundaries of such city or town, as they then exist, become the boundaries of the county seat, and the subsequent inclusion of more territory does not remove the county seat." These authorities recognize as true that ordinarily the term "county seat," applies not merely to the lot and buildings used for transacting the public business, but to the territory occupied by such town as may be designated as a county seat. They assume, however, that a county seat is not necessarily coextensive with the town of its location, is not identical with the municipality, and does not move by force of the latter's expansion. We think this principle is correct, and, furthermore, that its ap-

plication is essential to the full maintenance of that part of section 41 of the constitution which provides that "no court house or county site shall be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose," etc. Judicial notice of proceedings in the late constitutional convention discloses that this clause was inserted in the organic law in response to public sentiment engendered by supposed abuses by the legislature of the power it formerly had to change a seat of justice by direct enactment; hence the imperative prohibition of such changes, except by the method defined. How this prohibition might be evaded if the general assembly should extend a county town—as it undoubtedly can—to a distant part of the county, and if the commissioners' court could follow with the court house to the farthest limit of the extension, is apparent. If the removal by such method should be effected, the mischief intended to be forestalled by the constitution would have been fully wrought. In such case the theoretical identity of the old with the new site would not afford consolation to those from whom the court house might depart; nor would the barren theory of legal identity be left to those persons, if subsequently the legislature should divide the municipality so as to leave the old site separate from the new. The case is not affected by the fact that the two enactments—the one fixing Linden as the county seat and the subsequent one adding thereto territory in township 15—were near to each other in point of time, or by the fact set up by the answer that the actual re-establishment of the court house and county offices in Linden occurred after the enlargement of that town. The limits of the county seat were fixed by the act of February 8, 1871, and the events which thereafter happened, whether early or late, were ineffectual to alter the effect of that act.

The conclusion is that the proceedings here assailed were in excess of the powers possessed by the court of county commissioners, and that the decree overruling the demurrer to the bill and the motion to dissolve the temporary injunction should be affirmed.

BARNES v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

HOMICIDE—VENIRE—INSTRUCTIONS—EVIDENCE—GOOD CHARACTER—VENUE.

1. On a prosecution for murder, a motion to quash the venire because the return of the sheriff thereon showed that one of the special jurors whose name was on the list served on the defendant was "not found" was properly overruled.

2. Where, on a prosecution for murder, there was testimony affording an inference for the jury that the killing was malicious and unlawful, and, if not malicious, that it was intentional, or, if not intentional, that it was the result of the unlawful pointing of a loaded pistol by defendant at deceased, an instruction to acquit if the jury believe the evidence in the case was properly refused.

3. Likewise an instruction that defendant, under no phase of the evidence, can be convicted of murder in the second degree or manslaughter in the first degree, was properly refused.

4. On a prosecution for murder, where there was evidence tending to show that the fatal shot was fired by defendant while pointing a pistol at deceased, an instruction that, if the killing was unintentional or accidental, the defendant should be acquitted, was properly refused, as, under Cr. Code, § 4342, making it a misdemeanor for any person to present at another any gun, pistol, or other firearm, whether loaded or unloaded, defendant might have been guilty, although the discharge was accidental.

5. On a prosecution for murder, an instruction that there was no evidence, as argued by the solicitor, of an intentional pointing of the pistol at the deceased, was properly refused.

6. On a prosecution for murder, an instruction that "the fact, if it be a fact, that the defendant is a man of good character may generate a reasonable doubt of his guilt in the minds of the jury," was properly refused.

7. On a prosecution for murder, it was error to refuse to instruct for defendant, where the state failed to prove the venue of the homicide.

8. On a prosecution for murder, evidence of a statement by defendant that he would kill deceased if she did not do what he wanted her to was admissible.

Appeal from city court of Montgomery; William H. Thomas, Judge.

Jim Barnes was convicted of second degree manslaughter, and appeals. Reversed.

Before entering upon the trial, the defendant moved the court to quash the venire, upon the ground that the return of the sheriff showed that H. E. Battle, who was one of the special jurors drawn, and whose name was on the list served on the defendant as a juror for the trial of his case, was not found, and that the return of the sheriff did not show the reason for not finding said juror, as required by the special jury law for Montgomery county. The facts, as set out in the motion, were admitted. The court overruled the motion to quash. To this ruling of the court the defendant duly excepted. A similar motion was made by the defendant because J. O. Sharpe, who was drawn as a special juror, and whose name was on the list served on the defendant, was not found, and the sheriff failed to enter upon his return the reason for his not finding and summoning said Sharpe. The court overruled this motion, and the defendant duly excepted. The witness for the state tended to show that the defendant and Cora Gibson and one Sam Springer and Elsie Duncan were walking down the public road together, laughing and talking; that defendant, Jim Barnes, and Cora Gibson were talking to one another, when the defendant raised his pistol, and, pointing it towards said Cora, the pistol was fired, inflicting the wound from which Cora Gibson died; that, after firing the pistol, the defendant leaned over the woman, and, lifting her head, called her by name several times; that he then left the scene of the shooting, and ran off. There was other evidence tending to show that the defendant and Cora

Gibson were sweethearts, and were engaged to be married, and that there was no fuss or quarrel between them at the time of the shooting. There was no proof of the venue of the offense. The defendant, as a witness in his own behalf, testified that while he was walking along with said Cora, she asked him to let her shoot his pistol, and that, upon his replying that women should not shoot pistols, she tried to take the pistol from him, and in the effort to prevent her, the pistol was accidentally fired, but that there was no fuss or quarrel between Cora and himself, and that they were engaged to be married, and that he did not point the pistol at her. The defendant also introduced several witnesses, who testified to the defendant's good character. During the examination of Jack Allen as a witness for the state, he testified that, a few days previous to the killing, he overtook Sam Springer and the defendant in the public road; that when the witness was within 15 or 20 steps of them, he heard the defendant say to Springer that Cora had told him that her mother objected to his (the defendant's) coming to her house, and that thereafter she (Cora) did not want him to come to see her any more, and if Cora did not do what he (the defendant) wanted her to do, he would kill her. The defendant objected to this portion of the testimony of the witness Allen, and moved the court to exclude the same, upon the ground that it was hearsay, incompetent, and irrelevant. The court overruled the objection and motion, and to this ruling the defendant duly excepted. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that, if you believe the evidence in this case, you will find the defendant not guilty. (2) The court charges the jury that, unless the evidence convinces you beyond a reasonable doubt that the defendant intended to unlawfully point the pistol at the deceased, you cannot convict the defendant. If you should believe from the evidence that the death of deceased was unintentional or accidental, you should find defendant not guilty." "(X) The fact, if it be a fact, that the defendant is a man of good character may generate a reasonable doubt of his guilt in the minds of the jury." "(S) The court charges the jury, if you believe the evidence in this case, you will acquit the defendant of murder in the second degree." "(Z) The court charges the jury that there is no evidence in this case, as argued by the solicitor, of an intentional pointing of the pistol at the deceased by the defendant." "(T) The defendant, under no phase of the evidence in this case, can be convicted of murder in the second degree or manslaughter in the first degree."

Terry Richardson, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The defendant was convicted of manslaughter in the second degree, under an

indictment charging murder in the first degree. Before entering upon the trial, a motion was made to quash the venire, because the return of the sheriff thereon showed that one of the special jurors, whose name was on the list served upon defendant, was "not found." This motion was overruled, and properly so. *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; *Webb v. State*, 100 Ala. 47, 14 South. 865. The cases of *Thomas v. State*, 94 Ala. 74, 10 South. 432, and *Ryan v. State*, 100 Ala. 108, 14 South. 766, relied upon by appellant, have no application here. In those cases names of persons were upon the list served upon defendant who had not been summoned as regular petit jurors for the week in which the case was set for trial.

There was testimony affording an inference for the jury that the killing was malicious and unlawful; if not malicious, that it was intentional; or, if not intentional, that it was the result of the unlawful pointing of a loaded pistol by defendant at deceased. Charges S and T were therefore properly refused.

Section 4342, Cr. Code, makes it a misdemeanor for any person to present at another any gun, pistol, or other firearm, whether loaded or unloaded. Confessedly, if the defendant intentionally pointed the pistol at the deceased, without any intention whatever to take her life, but by accident it was discharged, producing her death, he would be guilty of the crime of which he was convicted. *Johnson v. State*, 94 Ala. 35, 10 South. 667; *Sanders v. State*, 105 Ala. 5, 16 South. 935. The jury might have well believed that the death of deceased was unintentional or accidental, and yet have also believed that the fatal shot was fired by defendant in the course of the unlawful act of presenting the pistol at the person of the deceased. There was therefore no error in refusing written charge No. 2, requested by defendant.

Charge Z was bad for two reasons. The first is that it was an attempt to reply to the argument made by the solicitor. Secondly, it asserted that there was no evidence in the case of an intentional pointing of the pistol at deceased by defendant.

Charge X has been so often condemned that it is needless to say more of it. The bill of exceptions purports to contain all the evidence introduced upon the trial.

Charge 1 should have been given on account of the failure to prove the venue of the homicide. *Harvey v. State*, 125 Ala. 47, 27 South. 763; *Brown v. State*, 100 Ala. 92, 14 South. 761; *Randolph v. State*, 100 Ala. 139, 14 South. 792.

The remaining exception reserved by defendant, which, however, is not insisted upon, relates to the admission in evidence of a conversation between defendant and Springer, overheard by the witness Allen, who testified to it. There was clearly no error in its admission.

For the error pointed out, the judgment must be reversed. Reversed and remanded.

ALABAMA MIDLAND RY. CO. v. THOMPSON et al.

(Supreme Court of Alabama. June 28, 1902.)
CARRIERS—JURY TRIAL—FAILURE TO DELIVER FREIGHT—EVIDENCE—INSTRUCTIONS.

1. Acts 1894-95, p. 98, § 8, providing that a civil cause brought in the Dothan division of the circuit court of Henry county shall be tried without a jury, unless demanded in writing by the plaintiff, does not apply to a suit commenced in a justice court, and removed by appeal to the circuit court.

2. In an action against a carrier for failure to deliver freight, evidence that the consignees had never received the freight was admissible, as tending to show that it had never been delivered at the station, as the contract of shipment provided.

3. In an action against a carrier for failure to deliver freight, an instruction that a waybill offered in evidence by the defendant might be considered in determining whether the goods in question were delivered, together with other evidence in the case, was properly refused, as it singled out and gave undue prominence to a single fact, and was argumentative.

4. Where the evidence was conflicting in an action against a carrier for breach of contract, an instruction that, if the jurors believe the evidence, they will find for defendant, was properly refused.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Action by Thompson & Harrison against the Alabama Midland Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

When the case was called for trial, and before the parties announced ready, the defendant moved the court to try the cause without a jury, and in support of said motion proved to the court that said cause was originally commenced in a court of a justice of the peace in the precinct in which was the Dothan division of the circuit court of Henry county. This motion was overruled, and the defendant duly excepted.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that the waybill issued by the defendant company with the indorsements made on it by the witness Stewart is in evidence in this cause, and the jury may look to it and consider the same in determining whether or not the defendant delivered said barrels at Pansey, together with the other evidence in the case. (2) If the jury believe the evidence in this cause they will find for the defendant."

There were verdict and judgment for the plaintiff, assessing his damages at \$27.52.

Espy, Farmer & Espy, for appellant. R. D. Crawford, for appellee.

HARALSON, J. There was no error in overruling the defendant's motion, that the court try the cause without a jury. The case originated in the justice's court of precinct No. 3, Henry county, Ala. The circuit court

was without authority, in the absence of a waiver to that end by the plaintiffs, to try the cause without a jury. The act referred to by defendant,—as giving it a right to a trial without a jury,—provides for holding the circuit court of Henry county at Dothan, and prescribes the jurisdiction thereof, and regulates the proceedings therein. Acts 1894-95, p. 98. Its eighth section provides, "That whenever a civil cause is brought in said Dothan division of said circuit court, it shall be tried by the judge thereof without the intervention of a jury, unless the plaintiff when he brings the suit demands in writing on the complaint a jury," etc. This section has no reference to suits commenced in a justice's court and removed, as this one was, by appeal into the circuit court.

The case was tried in the circuit court, on appeal on a complaint filed therein, claiming the sum of \$25, damages for the breach of a contract by which defendant received of the Oak City Cooperage Company, at Bainbridge, Ga., on, to wit, July 3, 1899, certain barrels which it agreed to deliver to plaintiffs at Pansey, Ala., for a consideration, but which it failed to deliver to plaintiffs at that point.

The pleas were the general issue, and a second special plea, setting up, in substance, that at the time of the issuance of its bill of lading and ever since, Pansey, Ala., was and has been a flag station on defendant's line of railroad, and defendant did not have at that time, nor since, any agent or depot at said flag station of Pansey, and avers that it delivered the barrels at said flag station, at Pansey, Ala., on the 4th July, 1899, by taking same from the car in which they were hauled and placing them on a small platform, or in a small house at its station place at Pansey, making a complete delivery of the same at Pansey, the destination of said barrels.

Thompson, testifying that he was one of the plaintiff firm, stated that Pansey was a flag station, to which, when freight was consigned, the charges were always prepaid by the consignor; that there was a small house or depot there, with a platform around it and defendant usually delivered freight on the platform, and that there was no agent at Pansey and had never been. He also stated that no barrels were put off there that day by the defendant. He was asked by his counsel, "Did you ever receive those barrels?" to which question defendant objected as calling for illegal and immaterial evidence. The objection was well overruled by the court. If he had received them, the evidence was certainly relevant, and while, if he had not received them, it might not have been conclusive that they had not been delivered, it was proper evidence to be considered by the jury for what it was worth, in connection with all the other evidence, as tending to show that the freight had never been delivered at said station.

The evidence for the plaintiffs and the defendant was in direct conflict,—that for the plaintiffs, that the barrels were never put off

the train and delivered at said station, and that for the defendant, that they had been delivered on the platform at said station.

There was no reversible error in the refusal of the court to give charge 1 requested by defendant. It singles out, and gives undue prominence to a single fact, and is argumentative.

The evidence being in conflict, the general charge, numbered 2, requested by defendant was properly refused.

Affirmed.

BAILEY v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

LIST OF JURORS—CERTIFICATE OF CLERK—SERVICE ON DEFENDANT.

1. It is not necessary that the clerk of the court should make a certificate to the effect that the names of the regular jurors summoned for the week in which the case was set for trial, served on the defendant, were the jurors drawn and summoned for that week.

2. Acts 1898-99, p. 69, relative to the drawing and impaneling of jurors for Dallas county, provides that, whenever one stands indicted for a capital felony, the court must, on the first day of the term, make an order, commanding the sheriff to summon not less than 50 nor more than 100 persons, including those drawn as jurymen for the week, and draw from the jury box the number of names which, with the regular jurors summoned for the week, are necessary to make the number named in said order, and shall cause a list of the names of the jurors summoned for the week and those drawn as provided to be served on defendant. *Held*, that where, in a capital case, there was served on defendant a list of the names of the regular jurors, together with the names of those who were drawn under the statute, there was no error in not having included in such list the names of talesmen placed on a jury in another case, to complete it, on a previous day of the week.

Appeal from city court of Selma; J. W. Mabry, Judge.

Walter Bailey was convicted of murder, and he appeals. Affirmed.

Before the trial was entered upon, the defendant moved the court to quash the venire upon the following grounds: "First. In the pretended certificate of the clerk giving a copy of the jurors summoned for the week in which this case is set for trial, said clerk, in said certificate, says that the names numbered from 1 to 33, both inclusive, are the names of the regular jurors summoned for the week in which this case is set for trial, and said certificate does not say that the names mentioned are the jurors drawn and summoned for the week, and defendant moves to quash the venire, because said clerk in his said certificate does not say that they are the jurors drawn and summoned. Second. Because the records of this court show that the following named persons were drawn and summoned as jurors for said week, viz., Dally F. Jacob, Thos. W. Hall, and Truman McGill, and the names of the said jurors are not included in the list served upon the defendant, and defendant moves to quash the said venire be-

cause the names of said jurors are not included in the list so served upon him as the statute requires."

B. F. Wilson, for appellant. Chas. G. Brown, Atty. Gen., for appellee.

TYSON, J. The motion to quash the venire proceeds upon two grounds. No proof was offered in support of the first ground. Besides, it is wholly untenable. We find no provision in the statute requiring the clerk to make a certificate that the names of the regular jurors summoned for the week in which the case was set for trial, served upon defendant, were the jurors drawn and summoned for that week. Indeed, there is no provision requiring him to make any certificate in respect to this matter at all. All that is required of him, doubtless, is to issue the order to the sheriff to summon the persons drawn and summoned as jurors, make a list of the names of those persons from which the jury must be selected for the trial, make a copy of the indictment, deliver to the sheriff the list and copy of indictment, to be served by him upon defendant or his counsel. The second ground is equally as unmeritorious. Following the requirement of section 10 of the act regulating the selection, drawing, and impaneling of jurors for Dallas county (Acts 1898-99, p. 69), on the 15th day of January, shortly after the convening of the court at that term, the defendant was arraigned upon the indictment, and Thursday, the 6th day of February following, was set for the trial of his case. At the same time, the presiding judge in open court drew from the jury box the names of 32 persons, who, with the regular jurors summoned for the week in which his case was set for trial, were necessary to make the number 65, the number fixed by the order to be served upon defendant from which the jury was to be selected; and an order was entered commanding the sheriff to summon these 32 persons to appear on the 6th of February, as was also an order entered directing the sheriff to forthwith serve on the defendant or his attorney of record a copy of the indictment and a list of the names of the jurors summoned for the week in which the case is set for trial, and the names of those 32 drawn to make the number 65. These 65 persons clearly constitute the venire from which the jury to try the defendant was to be selected, and were the only names he was entitled to have served upon him. There is no dispute but that he had the benefit of those names, but the insistence in motion is that he should have been served with the names also of the three talesmen who were placed upon one of the juries, in order to complete it, on the Monday morning preceding his trial on the following Thursday. To have allowed him those names would have increased the number from 65 to 68, which is unauthorized by the provisions of section 10, which confines the selection of the jury to the 65. Indeed, the language of the section expressly excludes the idea, which

seems to have inspired the motion, that the persons named in it belonged on the venire for the trial of this case. *Johnson v. State* (Ala.) 81 South. 951. The motion was properly overruled.

Some exceptions were reserved upon the trial to the rulings of the court upon the admission of evidence, but they are so wanting in merit we shall not treat of them.

Affirmed.

RAGSDALE v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

HOMICIDE—JURORS—COMPETENCY—EVIDENCE—INSTRUCTIONS—EXCEPTIONS—VENUE—SELF-DEFENSE—"MORAL CERTAINTY" OF PROOF.

1. On a prosecution for murder, where a juror on his voir dire first said that he had a fixed opinion as to the guilt or innocence of defendant, which would bias his verdict, but afterwards stated that he had not, and that he would be governed entirely by the evidence, it was not error to hold him competent.

2. On a prosecution for murder, it was not error to exclude evidence as to why defendant's companion carried an unconcealed pistol in his belt, where he was allowed to prove that it was not carried for the purpose of engaging in a difficulty with deceased, or of aiding defendant.

3. On a prosecution for murder, where defendant was shown to have been the aggressor, evidence that deceased had previously threatened defendant's life, and that defendant had sworn out a peace warrant against deceased, was inadmissible.

4. An exception to a charge as a whole will not be sustained unless the entire charge was erroneous.

5. A charge which ignores proof of venue in a criminal prosecution is erroneous only when there has been no proof of venue.

6. In passing on exceptions to a charge in a criminal case, the court is limited to the charge as copied in the transcript, and cannot consider a paper attached to transcript, certified by the clerk as the original charge.

7. On a prosecution for murder, where the evidence, without conflict, showed that the killing was intentional, it was not error to refuse to charge as to involuntary manslaughter.

8. On a prosecution for murder, a charge that defendant is required to "reasonably satisfy your minds that he acted in self-defense, unless the evidence which proves the homicide proves also the excuse or justification," though placing too great a burden on defendant in establishing a plea of self-defense, was harmless, where the evidence showed without conflict that defendant was the aggressor.

9. On a prosecution for murder, the evidence showed that defendant went to where deceased was playing ball, and said, in an angry manner, "You said you wanted to see me; you can see me now all you want to." Deceased went away toward the pitcher's box, and defendant followed, cursing him. They clinched, and defendant pulled his pistol, and fired, killing deceased. *Held*, that it was not error for the court to charge that if defendant was the aggressor he could not set up a plea of self-defense.

10. On a prosecution for murder, it was not error to charge that if the slayer had any time to think before the act, however short, and did think, and struck the blow as a result of an intention to kill, it was murder in the first degree.

¶ 3. See *Homicide*, vol. 26, Cent. Dig. § 400.

11. On a prosecution for murder, a charge that defendant should not be found guilty "unless the evidence against him should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed against him," was properly refused.

Appeal from circuit court, Greene county; S. H. Sprott, Judge.

William Ragsdale was convicted of murder in the first degree, and appeals. Affirmed.

In the organization of the jury the defendant reserved an exception to the ruling of the court holding that the juror Pippen was qualified. The facts relating to this ruling are sufficiently shown in the opinion.

On the trial of the case, it was shown that Bert Hollingsworth was shot and killed by William Ragsdale in Greene county, Ala., on Saturday afternoon, October 5, 1901; that the killing occurred in a pasture owned by one Chas. B. Pippen, where there was a baseball ground; that on the Saturday afternoon of the killing several persons, including Bert Hollingsworth and his brother, Claude Hollingsworth, had assembled at said pasture for the purpose of playing ball in accordance with their custom; that while the persons so assembled were engaged in playing ball, the defendant Ragsdale and Thad Gibson rode inside of the pasture, through the gate, hitched their horses, and then went up to where the ball game was going on; that Ragsdale immediately walked over to where Bert Hollingsworth was standing and in an angry manner said to him: "You said that you wanted to see me; you can see me now all that you want to," or words to that effect; that immediately Bert Hollingsworth left the defendant Ragsdale and went in the direction of the pitcher's box (some of the witnesses testifying that Bert said "I do not want to see you," or words to that effect); that as Hollingsworth walked off he was in his stocking feet and in his shirt sleeves; that the defendant Ragsdale immediately followed Bert Hollingsworth, cursing him, and about the time Hollingsworth reached the pitcher's box, they clinched, and Ragsdale pulled his pistol and fired upon Bert Hollingsworth, who fell and died immediately.

The evidence for the defendant tended to show that after reaching the pitcher's box, Bert Hollingsworth grabbed the defendant by the throat, and struck him in the face with something hard, which the defendant took to be a knife, and thereupon the defendant fired.

The court at the request of the plaintiff, gave to the jury the following written charges: "(1) The court charges the jury that if they believe beyond a reasonable doubt, from the evidence, that the defendant Ragsdale, and the deceased Hollingsworth had had some trouble a few days before the homicide, and that when he, Ragsdale, on the day of the homicide came to where the deceased Hollingsworth was standing at the 'new home base' he stepped up in front of the deceased, and in an angry manner said to him 'You said you wanted to see me; now you can see me,' and the jury should further find, from the evidence

beyond a reasonable doubt that the deceased left the place and went to the pitcher's stand, some 60 or 65 feet away, and the defendant followed the deceased to that place, and they there became involved in a difficulty, and the defendant killed deceased, then he cannot set up self-defense in this case. (2) The court charges the jury that to make the plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the deceased struck him, and whether the necessity to take the life of the deceased was real or only apparent, if brought about by design, contrivance or fault of the defendant, he cannot be excused on the plea of self-defense. (3) 'Deliberate' and 'premeditated' as those words are used in the statute, mean only this: that the slayer must intend before the blow is delivered, though it be for only an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow, or in other words, if the slayer had any time to think, before the act, however short such time may have been, even a single moment, and did think, and he struck the blow as a result of an intention to kill, produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: "(9) The court charges the jury that if they believe the evidence in this case beyond a reasonable doubt, then they cannot convict the defendant of murder in the second degree." "(11) The court charges the jury that if they believe the evidence in this case beyond a reasonable doubt, then they cannot find the defendant guilty of murder in the first degree." "(25) The court charges the jury that you find the defendant not guilty, unless the evidence against him should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him." "(30) The court charges the jury that if you believe the evidence in this case beyond a reasonable doubt, then you cannot convict the defendant of any higher degree of homicide than manslaughter in the second degree. (31) The court charges the jury that if you believe the evidence in this case beyond a reasonable doubt, then you cannot convict the defendant of any higher degree of homicide than manslaughter in the first degree."

J. P. McQueen and Harwood & McKinley, for appellant. Chas. G. Browne, Atty. Gen., for the State.

HARALSON, J. Eleven men having been selected as jurors, one Pippen was called and asked if he had "a fixed opinion as to the guilt or innocence of defendant which would bias his verdict," and he answered that he had.

Being examined further by the court, he stated that he was not present at the difficulty in which the deceased was killed, nor did he know anything about the facts except from hearsay, and had only heard a few people speak of it. In answer to the further question by the court, "whether the opinion he had would affect his verdict, or would he be governed entirely by the evidence?" he replied, "I would be governed entirely by the evidence, and what I have heard would not affect my verdict." The court then asked him, "Have you a fixed opinion as to the guilt or innocence of defendant that would bias your verdict?" to which he replied, "No, sir. I will be governed entirely by the evidence in the case."

It often occurs, when answering on their voir dire, as to their qualification as jurors, or whether subject to challenge for cause, that persons do not understand the meaning of the questions propounded, and are mistaken in the answers they reply. One may say, that he has not been a resident householder or freeholder of the county for the last 12 months; that he thinks a conviction should not be had on circumstantial evidence, and that he has a fixed opinion as to the guilt or innocence of the defendant, which would bias his verdict, and is honestly mistaken in his replies, as is often shown by his further examination.

The answers of the juror to the questions propounded by the court, fully show that he did not intend to say that he had a fixed and disqualifying opinion as to the guilt or innocence of the accused, for he stated, that he only knew of the case from hearsay; that he would be governed entirely by the evidence; that what he had heard would not influence his verdict, and finally he stated, that he had no fixed opinion that would bias his verdict. We think that under our former rulings, the court did not, as for the objection raised to his competency, err in holding him to be competent. *Carson v. State*, 50 Ala. 134; *Long v. State*, 86 Ala. 37, 5 South. 443; *Hammil v. State*, 90 Ala. 577, 8 South. 380; *Arp v. State*, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137; *Coghill v. Kennedy*, 119 Ala. 641, 654, 24 South. 459.

2. The witness for defendant, Thad Gibson, was indicted jointly with the defendant for this homicide, and there was evidence tending to show his complicity in it. He had testified that he went with the defendant to the place where, and was present when defendant slew the deceased; that he had his pistol in his holster or belt, but did not draw it; that he had carried his pistol that way for over a year, and it was his habit to carry it wherever he went, for some time prior to the shooting.

The defendant offered to prove by this witness, that about 18 months before the killing, one Thomas Buntin was murdered in the county, a few miles from where the witness lived; that witness had taken an active part in apprehending the slayer of Buntin, and had been warned that threats had been

made against his life, and that since said warning he had always carried his pistol, for defensive purposes, buckled around him in a scabbard, and that was the reason he had it on the evening that deceased was killed. This evidence, on objection by the state to it for illegality, irrelevancy and incompetency, the court would not allow. The defendant then asked the witness the following questions: "Had you not been carrying your pistol in a scabbard in this manner since Buntin was killed?" "Had you not been warned since Buntin was murdered that your life was in danger by reason of the active part you had taken in apprehending the murderer of Buntin, and was not that the sole reason that you had been in the habit of carrying a pistol in this manner?" and "Were you that evening carrying your pistol in its scabbard as was your habit, after you received the warning after the Buntin murder?" Each of these questions were properly disallowed. The fact that Gibson was armed on the occasion and wore his pistol unconcealed in a belt strapped around his waist, was brought out by defendant on his cross-examination of the state's witness, Pippen, and the court allowed the witness to state, that on the evening of the killing, he was not carrying the pistol for the purpose of having a difficulty with either of the Hollingsworths,—the deceased and his brother, Claude,—nor was he carrying it for the purpose of assisting the defendant in any difficulty with them. Aside from the objection, that the questions propounded called for the private and uncommunicated intentions of the witness in wearing his weapon, the allowance of the evidence would have been, to go outside the real issues in the case and to broaden them, by going into the various reasons why the witness carried a pistol. The defendant had received the benefit of the proof, if that were important, that the witness wore the weapon unconcealed, and that he was not thus armed for the purpose of engaging in a difficulty with the Hollingsworths, or of aiding the defendant. If entitled to that much, there was no error in not allowing him to go into the transaction of the Buntin homicide.

3. The defendant sought to prove by himself as a witness, that on Thursday before the killing occurred, deceased threatened his life; that he immediately swore out a peace warrant before a justice of the peace, against him; and, by other witnesses, that they had heard deceased, prior to the day of the killing, threaten to take the life of defendant, which evidence the court refused to allow.

The law as settled by this court is, "that no threats previously made by the deceased, whether communicated to the defendant or not communicated, are admissible in trials for homicide, unless it appears from the testimony that, at the time of the killing, the deceased had sought a conflict with the accused, or was making some demonstration,

or overt act of attack, towards the accomplishment of perpetration of such threats. * * * In other words, the circumstances in evidence must properly raise a case of self-defense" (*Roberts v. State*, 68 Ala. 164; *Green v. State*, 69 Ala. 7); that where the defendant is shown to have been the aggressor, threats previously made by deceased against defendant, cannot excuse or extenuate his assault, and that parties cannot, under the pretext of self-defense, bring on a difficulty, and shield themselves by proof of previous threats (*Burke v. State*, 71 Ala. 377). "He who provokes a personal rencounter, in any case, thereby disables himself from relying on the plea of self-defense in justification of a blow he struck during the rencounter." *Scoggins v. State*, 120 Ala. 369, 25 South. 180, and authorities there cited.

The evidence on the part of the state, as well as that by the defendant, shows without conflict, that defendant was the aggressor and brought about the rencounter in which he slew the deceased. The proposed proof about threats of deceased, and the peace warrant he had sued out against him was, therefore, irrelevant and inadmissible, and the court did not err in disallowing it. Nor was there error in not allowing defendant, as a witness for himself, against the state's objection for illegality, irrelevancy and immateriality, to answer the question, "whether or not you were carrying your pistol after Bert Hollingsworth threatened to take your life at Eastman's mill?"—which was some two or three days before the deceased was killed. That fact, if true, in no way justified the fatal assault on the deceased.

4. The court was requested by defendant to give its general charge in writing, which it did. This charge, as to the law of the case, is a substantial copy of the charge of the same judge in the case of *Green v. State*, 98 Ala. 14, 13 South. 482; and which was there declared to be correct. The defendant excepted to this charge as a whole. This exception could not be sustained, unless the entire charge was erroneous, which is not the case.

The venue of the crime was fully proved, without conflict, and is undisputed, and no instruction was given, refused or requested as to the same. "Without a decision by the circuit court, made the subject of an exception, and involving an inquiry into the sufficiency of the evidence, this court will not interfere." *Hubbard v. State*, 72 Ala. 164; *Clarke v. State*, 78 Ala. 477, 56 Am. Rep. 45. Even a charge given at the request of the state, which ignores proof of venue, fully established, is not erroneous on that account. *Smith v. State*, 118 Ala. 118, 24 South. 55. It is only when there has been no proof of venue, that a charge which ignores venue is erroneous. Cases cited on brief of counsel for defendant appear to be of that class.

The defendant excepted "separately and

severally to each portion of said written charge that has been marked with brackets in pencil on the margin of said original charge," and "to each portion or part of said written charge which was marked by quotation marks in pencil on the margin and in the body of said written charge."

This charge as set out in the transcript contains no brackets or quotation marks, to show the parts excepted to by defendant. Attached to the transcript is what purports to be a paper certified to this court by the clerk of the circuit court by order of that court, as the original charge. In it, on inspection, we find some lines on margin of the paper, which are not brackets, and we fail to find quotation marks in it, such as to indicate certainly, in either case, any part of the charge to which exceptions were reserved. But, even if specified portions of the charge were included within brackets or quotation marks, we could not look to it for the purposes of ascertaining exceptions that may have been reserved to any part or parts of it. We are shut up, for such purposes, to the charge as copied in the transcript.

It is objected to this charge as a whole, that it fails to instruct as to manslaughter in the second degree. This objection is unavailing. There was an entire absence of evidence tending to show that the crime was manslaughter in the second degree, but all the evidence without conflict or dispute, showed that the killing by defendant was intentional, and his effort in the case is to justify it on the score of self-defense. In such case, the court was under no duty, and indeed it would have been improper, to charge the jury as to involuntary manslaughter. *Compton v. State*, 110 Ala. 35, 20 South. 119; *Pierson v. State*, 99 Ala. 153, 13 South. 550; *De Arman v. State*, 71 Ala. 351.

Nor was there error, of which defendant can complain, in that part of the general charge as to the burden of proof, which stated, that "In this case, the killing is not denied, nor is it denied that it was done intentionally with a deadly weapon, and the law puts upon the defendant the burden of rebutting the presumption of malice, unless the facts and circumstances of the killing rebut this presumption. (In this case, the burden is upon the defendant to reasonably satisfy your minds that he acted in self-defense, unless the evidence which proves the homicide, proves also the excuse or justification.)"

The latter part of this charge, which for convenient reference we have placed within parentheses, according to our later adjudications is subject to the vice of placing too great a burden on defendant in establishing a plea of self-defense. A defendant is required to do no more for his acquittal, than raise a reasonable doubt of his guilt. *Henson v. State*, 112 Ala. 41, 46, 21 South. 79. But, this was error without injury, since the evidence shows without conflict that the de-

defendant was the aggressor and cannot set up the plea of self-defense. *Scoggins v. State*, *supra*.

5. The charges requested by and given for the state, numbered 1, 2 and 3, respectively, were, under the evidence in the case, free from error.

The defendant requested 59 written charges, 54 of which were given and 5 refused. Those given cover every phase of the case, and were as favorable to defendant as he could require, and, in some instances, more so. Those marked respectively 9, 11, 25, 30 and 31, were bad and properly refused.

Let the judgment below be affirmed. Affirmed.

JESSE FRENCH PIANO & ORGAN CO.
et al. v. **FORBES** et al.

(Supreme Court of Alabama. June 28, 1902.)
INJUNCTION—ACTION ON BOND—WHEN ACCRUED—ATTORNEYS' FEES ON APPEAL—EVIDENCE—INSTRUCTIONS.

1. Attorneys' fees incurred in resisting an effort to have decree dissolving an injunction set aside are recoverable on the injunction bond.

2. Under Code, § 788, providing that, upon application for a preliminary injunction, the complainant shall give a bond "to pay all damages and costs which any person may sustain by the suing out of such injunction, if the same is dissolved," on the dissolution, and failure to pay all damages and costs sustained, a right of action on the bond at once accrues, and is not postponed until after a final hearing on the merits.

3. In an action on an injunction bond for attorneys' fees, the fact that one of plaintiffs' witnesses based his opinion in part, as to the value of the services rendered, on what he had been told by one of plaintiffs' attorneys in the injunction suit, did not make the giving of an affirmative charge for plaintiffs erroneous.

4. In an action on an injunction bond for attorneys' fees, a charge that the opinions of witnesses in reference to the fees, in so far as they were based on what they were told by H. and others, cannot be regarded, was properly refused, as the bill of exceptions shows that the opinion of only one witness was based in part on what H. told him, and only H., and not other persons.

5. In an action on an injunction bond for attorneys' fees, a charge that plaintiff must make out his case by competent evidence, and, if there is not such evidence without an element of uncertainty therein which the jury cannot solve, they must find for defendants, was properly refused, as it required a verdict for defendants if there was an element of uncertainty in the evidence which they could not solve, though they might otherwise be satisfied of plaintiff's right to recover.

6. The charge was also faulty because it required plaintiffs to show to the jury, by "competent evidence," the reasonable amount of the fees, when there was incompetent evidence in the case, without objection from defendants, tending to show what such reasonable amount was.

Tyson, J., dissenting.

Appeal from city court of Montgomery;
A. D. Sayre, Judge.

Action by E. E. Forbes and another against the Jesse French Piano & Organ

Company and another on an injunction bond. From a judgment for plaintiffs, defendants appeal. Affirmed.

The plaintiffs proved the allegations of the complaint as to the institution of the suit in equity mentioned, the giving of the injunction bond, its dissolution by the judge of the city court, and the appeal to the supreme court by the complainants, but without reinstatement of the injunction pending the appeal and the affirmance in the supreme court; and defendants proved that the same cause had afterwards been heard on the merits in the said city court, and that the bill had been dismissed, and that an appeal had been duly taken to the supreme court in said cause, and was then pending at the time of the trial of this cause, but said appeal was taken after the commencement of this suit. The plaintiffs also proved that they employed counsel to have the said injunction dissolved and to attend to the case throughout, but did not agree on any particular fee, but only to pay them a reasonable fee for their services in the case, and it was admitted in open court, as evidence, that no part of the fee had been actually paid to their attorneys. The following recital as to the evidence relating to the services of plaintiffs' counsel is contained in the bill of exceptions: "There was evidence tending to show that the services of plaintiffs' counsel in the lower court and the supreme court in said injunction suit, and pertaining to the injunction, were reasonably worth the fee sued for in the complaint, but one of the attorneys, testifying as to the value of such service, stated that he made his estimate upon what work the record disclosed as having been done, including the opinion of the supreme court, and upon what Mr. Holloway told him had been done; Mr. Holloway being one of the attorneys doing the work, and who was not examined as a witness." The court, at the request of the plaintiffs, among other charges gave to the jury the following written charge: "If the jury believe the evidence in this case, they must find for the plaintiffs." The defendants separately excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following charges requested by them: "(1) That the plaintiffs cannot recover in this case pending an appeal to the supreme court." "(3) That the opinions of witnesses in reference to attorneys' fees, in so far as they are based on what they were told by the Messrs. Holloway or other persons not examined as witnesses, cannot be regarded, and, if it is not shown to what extent what was thus told said witnesses influenced or affected the opinion of said witnesses, then the entire opinion of such witnesses must be disregarded. (4) That the plaintiff must make out his case as to all points, and to show to the jury by competent evidence the reasonable amount of the charges sought to be enforced against the

¶ 2. See *Injunction*, vol. 27, Cent. Dig. §§ 533, 535, 560.

defendant, and, if there is not such evidence without an element of uncertainty therein which the jury cannot solve, they must find for the defendants as to such matters." "(6) That the defendants are not liable for the value of the attorneys' fees for services in the supreme court in this case. (7) That if the plaintiff contracted with his attorneys to pay them a reasonable attorneys' fee for the whole case, and that service has not been completed, the plaintiff cannot recover on a quantum valebat or meruit for part of the services involved in the whole service, without at least showing, to the reasonable satisfaction of the jury, the proportion of the value of the service proposed to be recovered to the whole service. (8) That if the fee to attorneys is not established in amount by agreement with them, or a liability for a specific amount is shown, the plaintiff cannot recover in this case for such attorneys' fees upon a quantum meruit or valebat for part of such fees, if it appears that there is an agreement; for the entire fee is shown, and the ratio of the special services to the whole is not shown. (9) If the jury believe the evidence, they will find for the defendant." There were verdict and judgment for the plaintiffs, assessing their damages at \$200. Defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Gunter & Gunter, for appellants. Holloway & Holloway and Wm. L. Martin, for appellees.

DOWDELL, J. This is a suit on an injunction bond after dissolution of the injunction, to recover damages resulting from the suing out of the writ. The damages recoverable in an action for breach of an injunction bond must be such as are the natural and proximate result of the issuance of the writ. That attorneys' fees incurred in procuring the dissolution of the injunction are such damages is not now to be questioned. The measure of such damage is the fair and reasonable value of the services rendered in procuring the dissolution of the injunction, and this without reference to the ratio the value of such services might bear to the value of services rendered throughout the entire case in which the injunction is obtained, but not to exceed what the plaintiff has contracted to pay in case the compensation has been agreed on and fixed between the plaintiff and his attorney. The price, however, fixed by contract between the plaintiff and attorney is not the measure of defendant's liability, since the plaintiff and attorney cannot by their contract place a liability on the defendant beyond and in excess of what would be fair and reasonable compensation for the services actually rendered. In the injunction suit, an appeal was taken by the defendants from the decree of the chancellor dissolving the injunction, and it

is now contended, by appellants here, that there can be no recovery, in a suit on the injunction bond, for attorneys' fees incurred by the plaintiffs on such appeal. The purpose of the appeal was to review and reverse the decree dissolving the injunction, and the reversal of the decree would necessarily reinstate the injunction. Attorneys' fees incurred in resisting the effort to have the decree of dissolution set aside are as much the natural and proximate result of the issuance of the writ as are the fees incurred in procuring the dissolution in the first instance. There is no merit in the argument of counsel that attorneys' fees for resisting an application for an injunction might as reasonably be claimed as damages in the suit as fees incurred after decree of dissolution, on the appeal from such decree. Fees incurred in resisting an application for the injunction cannot possibly be damages resulting from the issuance of the writ. The bond sued on contracts to pay damages caused by the issuance of the writ, and such as are the natural and proximate consequence of its issuance, and not antecedent damages. It is insisted that what was said in *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5, in this connection, is dictum, and should be departed from. We approve of the reasoning employed in that case, and now sanction as the law what is insisted by counsel was dictum. *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Jackson v. Millsapugh*, 100 Ala. 285, 14 South. 44; *Cooper v. Humes*, 93 Ala. 280, 9 South. 341.

A preliminary injunction, commonly spoken of as a "temporary injunction," is granted pending a hearing on the merits, and only upon the complainant's entering into bond, with surety, conditioned and payable as required by law. The statute prescribes the condition; and that condition is "to pay all damages and costs which any person may sustain by the suing out of such injunction, if the same is dissolved." Code, § 788. The writ is obtained upon an ex parte hearing, and the bond is required as a protection against the abuse of this extraordinary process, and to prevent oppression by its use. It is different from a permanent injunction in that it is preliminary to a hearing on the merits, and by no means dependent on such hearing. A permanent injunction may be had on final hearing on the merits without the requirement of a bond; a preliminary injunction cannot. The bond is the contract of the party executing it; the statute prescribes its terms and conditions; and the right of action arises immediately upon the breach of its conditions. The promise is to pay all damages and costs if the injunction is dissolved. The failure to pay all damages and costs sustained by the suing out of the writ, after the same has been dissolved, is a breach of the bond, and there is nothing in the statute nor in the bond which postpones the right of action until after a final hearing on the merits. There are cases

to be found which hold that there can be no assessment of damages for suing out the writ until upon a final hearing of the cause in which the writ issued. We apprehend that these cases, however, are based upon a statute different from ours, or upon a bond differing in condition from the one here sued on. In 2 High, Inj. (3d Ed.) § 1649, it is said: "The general rule is that upon the dissolution of an injunction, and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues. Nor is it necessary that the obligee should first sue out an execution upon the decree dissolving the injunction, before instituting proceedings at law for a recovery upon the bond, but he may proceed immediately upon the dissolution. But if the bond is conditioned for the payment of such damages as may be sustained if the court shall finally decide that plaintiffs were not entitled to the injunction, no right of action accrues until the final determination of the suit, and the statute of limitations does not begin to run upon the bond until that time." This author states that it has been held, however, that no right of action at law can be maintained on the bond until the final determination of the cause in which the injunction issued, citing *Gray v. Veirs*, 33 Md. 159, and *Penny v. Holberg*, 53 Miss. 567; but the general rule is otherwise, as above stated.

The evidence in the case supported the averments of the complaint,—and that, too, as shown by the bill of exceptions,—without conflict. The fact that one of the witnesses who testified in behalf of the plaintiffs, as to the value of the legal services rendered in procuring the dissolution of the injunction, based his opinion in part on what had been told him by one of the attorneys of the plaintiffs in the injunction suit, as to the amount of service performed, raised up no conflict in the evidence. This evidence was admitted without objection from the defendant, and the fact that it was in along with other evidence that showed the value of the services rendered in no wise affected the probative force of such other evidence, or furnished any reason for not giving the affirmative charge requested by the plaintiffs.

Charge 3 requested by the defendants assumes that the opinions of witnesses were based upon what was told them by Messrs. Holloway and other persons, when the bill of exceptions shows that the opinion of only one witness, as to the value of the service rendered, was based in part on what Mr. Holloway told the witness, and only Mr. Holloway, and not other persons. The charge in this respect was abstract, and for that reason, if no other, was properly refused.

Charge 4 requires the jury to return a verdict for the defendants if there be an element of uncertainty in the evidence which they cannot solve, notwithstanding the jury might otherwise be satisfied, from the evidence, of the plaintiffs' right to recover. The

charge is also faulty in that it requires the plaintiffs "to show to the jury by competent evidence the reasonable amount of the charges," etc., when there was incompetent evidence in the case, without objection from the defendants, which tended to show such reasonable amount of the charges, etc. What we have already said in the foregoing opinion, upon the questions involved, disposes of the remaining charges requested by the defendants, and which were refused by the court.

We find no error in the record, and the judgment is affirmed.

TYSON, J. (dissenting). The point of my dissent goes to the proposition laid down in the opinion that an action may be maintained upon an injunction bond immediately upon the rendition of an interlocutory decree dissolving it, notwithstanding the bill may be retained, and upon final hearing the injunction reinstated. Just how this conclusion is to be reconciled with the proposition decided, that attorneys' fees incurred in resisting the effort to reinstate the injunction by appeal to this court are recoverable in a suit upon the bond, I confess my inability to see. For, if the right of action arose for a breach of the bond immediately upon the rendition of the decree dissolving the injunction, I am unable to comprehend how damages subsequently arising can be recovered. Indeed, two of the cases cited to support the conclusion that counsel fees incurred in resisting the effort, in this court, to reverse the interlocutory decree dissolving the injunction, are recoverable, pointedly sustain the proposition I contend for,—that, until a final determination of the cause in which the writ of injunction is sued out, no suit can be maintained upon the bond.

In *Bolling v. Tate* it is said: "Injunctions restrain action, and the maintenance or breach of the bond depends on the success or failure of the suit or litigation in aid of which it is obtained. If the injunction is made perpetual, the defendant has sustained no legal damages."

In *Jackson v. Millspaugh*, the point presented to this court for decision was whether counsel fees incurred by Millspaugh and his associates (the parties enjoined) in resisting a reinstatement of the injunction by the trial court, which had been dissolved upon the denials in their answers, were recoverable damages upon the injunction bond. Speaking to this point for the court, Stone, C. J., said: "The necessity for getting rid of the temporary injunction did not end the trouble. If dissolved on motion, and afterwards reinstated on proof, this would have left Millspaugh and his associates equally without right to recover, to the extent relief should be obtained under the bill. So, the expense the injunction imposed on them was not limited to getting relief from the temporary injunction. It extended farther, and embraced all the outlay that would become necessary to prevent a reinstatement of the injunction."

The other case cited, of *Cooper v. Hames*, is silent on this point. Thus we see these quotations, taken from the cases relied upon as authority for allowing a recovery of counsel fees for services rendered in this court in resisting a reinstatement of the injunction, fully and pointedly sustain my contention that there can be no determinable breach of the condition of the bond until after the final hearing of the cause. And thus it is made to appear that these cases are approved as authority for allowing counsel fees incurred in this court, and repudiated as authority upon the point under consideration. And Mr. High seems to have been followed in preference to them, and in preference to the overwhelming weight of authority to the contrary. And to see that what he says,—quoted by Justice DOWDELL approvingly,—is directly in the teeth of nearly every decision of the other courts of this country, we have but to refer to note 4 on page 454, and note 1 on page 455, of 16 Am. & Eng. Enc. Law (2d Ed.), where the cases are collected. I have taken the trouble to examine these cases, and they fully sustain the text, which is in this language: "As to the time when the right of action accrues on an injunction bond, the weight of authority is clearly to the effect that no action can be maintained upon a bond, as ordinarily conditioned, until there has been a final decree in the suit in which the injunction was obtained, and the bond executed, and that such right of action does not accrue immediately upon the dissolution of the injunction, but accrues only after the final determination of the action in which the injunction was obtained."

Mr. Spelling in his work on Extraordinary Relief, pointing out the condition of the bond "to pay defendant all damages he may sustain by the issuing of the injunction," says (section 957): "As a general and practically universal rule, an action cannot be maintained on an injunction bond until after the final determination of the suit in which the bond was given." He is fully sustained by numerous decisions which are cited by him in a note. It will be observed that the condition of the bond of which he is speaking is substantially the same as the one here sued on.

The manifest purpose of requiring the bond is to indemnify the person enjoined against loss or damage by reason of the suing out of the writ of injunction. If it is rightly sued out,—that is, if the cause exists which entitles the complainant to the writ,—honesty and justice demand that he should not be made to answer in damages for asserting that right. Whether the cause exists depends upon the proofs, which, of course, cannot be looked into, in most cases, until a final submission of the cause. To permit a complainant who has a just cause to be mulct in damages because, forsooth, of the false denials in an answer sworn to by a defendant for the fraudulent purpose of obtaining a dissolution of the injunction, although upon a final hearing, upon

pleadings and proof, he has fully established his right to the injunction in the first instance, and demonstrated that the denials in the answer were false, would be, it seems to me, not only to encourage perjury, but to sanction it, and place a premium upon it. It would certainly be subversive of justice, and destructive of the object sought to be attained by courts. I can see no force in the suggestion that a permanent injunction may be had on a final hearing without the requirement of a bond. This is true. But where a preliminary injunction is obtained, which, with no amendment of the bill, upon final hearing is made perpetual, can it be seriously doubted that the permanent injunction, as it is called, is the same injunction that was first sued out? I think not. The difference between the two is only in name. The first is called temporary, because the order of the court directing its issuance is subject to revision by the court in which the cause is pending; the second, perpetual or permanent, because the decree adjudging the complainant's right to it is final and conclusive between the parties. If the temporary injunction is finally made perpetual or permanent, it is certainly of no consequence whether it had ever been dissolved for a time, or whether it had been continued in force throughout the entire stage of the litigation between the parties. The result, in making it perpetual, is the same in each case. And, in order to make a temporary injunction perpetual, the court must necessarily determine that the writ was rightfully issued in the first instance,—that is, for cause existing at the time of the filing of the bill, or for cause existing at the time of its issuance, if issued after bill filed, in aid of preserving or maintaining rights pending the litigation.

CARMICHAEL v. MATTHEWS.

(Supreme Court of Alabama. June 28, 1902.)

CLERKS OF COURT—FEES—FINAL RECORD—ENTRIES ON MINUTES.

1. Code, § 934, subsec. 9, makes it the duty of clerks of circuit courts to record, after the final determination of any prosecution, all the proceedings in relation thereto not previously recorded save affidavits for continuance, commissions to take testimony, evidence, and executions. By Code, § 4893, the caption of an indictment must show when and where the court was held, who presided as judge, the venire of the grand jury, and who were summoned and sworn as grand jurors. Code, § 4511, allows the clerk from the convict fund fees for the making of the final record of a conviction for felony. *Held*, that the caption of an indictment, being an inherent part of it, which should be copied with the charging part thereof, the clerk is entitled, under the statute, to compensation for entering the same on the final record of a prosecution.

2. Code, § 2642, provides that the orders, judgments, and decrees entered upon the minutes of the court are parts of the record of the causes to which they pertain, and need not be copied into the final record. If so copied, no fee shall be charged therefor. *Held*, that a clerk is not entitled, under the statute, to com-

compensation for entering on the final record of a conviction the order setting a day for trial, the judgment on verdict, and sentence pronounced; such entries being on the minutes of the court, and compensation for such entries being provided for by Acts 1896-97, p. 1532.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Mandamus by H. H. Matthews, as clerk of the city court of Montgomery, to compel J. M. Carmichael, as the president of the board of inspectors of convicts, to request the auditor to draw his warrant on the state treasurer in favor of petitioner. From an order granting a peremptory writ, respondent appeals. Reversed.

It was averred in said petition that on January 27, 1902, one George Scott was duly convicted for murder in the first degree, and sentenced to the penitentiary for life; that said sentence was in full force and operation at the time of filing the petition; that presently, after the conviction of Scott, the petitioner, as clerk, made out the bill of costs in said cause, containing no item not enumerated in section 1 of the act approved February 18, 1887, providing for the payment of such costs out of the convict fund (Code, § 4511), and made oath to the correctness of each item of the bill of costs; that the same is a legal charge against said Scott, and that said bill of costs amounted, in the aggregate, to less than \$150; that, after said convict had been delivered to the penitentiary officials, the petitioner presented said bill of costs to J. M. Carmichael, as president of the board of convict inspectors, and asked that he request the auditor to draw his warrant upon the state treasurer in favor of the petitioner for the amount of said bill of costs, payable out of the convict fund; that the said Carmichael, after carefully examining said bill of costs, refused to make the request of the auditor, as asked, upon the ground that the bill contained, under the head of "Final Record," an item for which cost is charged at the rate of 15 cents per 100 words, and denominated "Organization of court and grand jury," and another item under the same head, denominated "Order setting day, judgment on verdict, and sentence," for which costs are charged at 15 cents per 100 words; that the entire cost for each of said items did not exceed \$2.50; that, under the ruling of the said Carmichael, the petitioner would be denied compensation for recording all the matters above set forth, with the exception of the indictment. The prayer of the petition was that a writ of mandamus be issued, compelling J. M. Carmichael, as president of the board of inspectors of convicts, to request the auditor to draw his warrant upon the state treasurer in favor of the petitioner for the amount of said bill of costs, payable out of the convict fund. J. M. Carmichael waived the issuance of the rule nisi, and admitted the truth of the allegations of the petitioner, but

denied that the petitioner was entitled to compensation, as claimed. On the hearing of the cause, there was an order granting a peremptory writ of mandamus, as prayed for in the petition. From this order the respondent appeals, and assigns the rendition thereof as error.

J. M. Carmichael, for appellant. Wm. L. Martin, for appellee.

MCCLELLAN, C. J. The caption of an indictment is an essential and inherent part of it. It is that entry of record showing when and where the court was held, who presided as judge, the venire for the grand jury, and who were summoned and sworn as grand jurors. Code, § 4893; *Goodloe v. State*, 60 Ala. 93, and cases there cited. Being thus a part of each indictment, the entry should, in our opinion, be copied, along with the charging part of the indictment, into the final record thereof. Subsection 9 of section 934 of the Code makes it the duty of the clerks of the circuit (and city) courts "to record in well bound books, within six months after the final determination of any suit or prosecution all the proceedings relating thereto, not previously recorded under section 2644 except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions." Section 2644, here referred to, is limited by its express terms to civil cases, and has no bearing on this case. Section 2642 of the Code is, however, not so limited, and it applies to both civil and criminal cases. It is as follows: "Double records dispensed with. The orders, judgments and decrees entered upon the minutes of the court are parts of the record of the causes to which they pertain, and need not be copied into the final record. If so copied, no fee shall be charged therefor." The order setting a day for the trial of a capital case, the judgment on verdict therein, and the sentence pronounced on the judgment, are clearly within the provisions of this section. They are each and all necessarily entered upon the minutes of the court, and neither of them has any place in the final record, required by subsection 9 of section 934, for making which the act of February 18, 1897, provides compensation to the clerk from the state. So far as that act was intended to provide compensation for entries of judgments on the minutes of the court, the intent is conserved by other provisions than that in relation to compensation for making final record. Acts 1896-97, p. 1532.

It follows that, in our opinion, the city court erred in awarding the writ of mandamus to compel the president of the board of convict inspectors to request the auditor to pay the clerk of that court for making a final record of the order setting a day for the trial of the convict, Scott, and of the judgment of conviction and sentence thereon in his case. The judgment of the city court

will be reversed, and a judgment will be here entered dismissing the petition for mandamus.

Reversed and rendered.

ELDRIDGE v. GRICE.

(Supreme Court of Alabama. June 28, 1902.)

EXECUTION—CLAIMANT OF PROPERTY—TRIAL OF CLAIM—BURDEN OF PROOF—TITLE IN THIRD PARTY—FRAUDULENT POSSESSION OF DEFENDANT.

1. Code, § 4141, provides that when an execution is levied on personalty to which one not a party claims title, such person may try the right of property by making affidavit that he holds title to the property claimed, and executing a bond to have the property forthcoming to satisfy any judgment of plaintiff, etc. *Held*, that the affidavit and claim bond of a claimant estops him to deny a proper levy.

2. In a trial of right of property, the burden is on plaintiff to make out a prima facie case that the property levied on is that of defendant in execution, which burden is discharged when he shows that the defendant was in possession of the property at the time of the levy. The burden then shifts to claimant to overcome this prima facie presumption, and to prove ownership in himself.

3. In a trial of right of property, the claimant must recover on the strength of his own title, nor can he show, to support his claim, a title paramount to that of defendant in a third person, a stranger to the proceeding.

4. Claimant claimed a bale of cotton levied on under an execution against her husband, the bale being at time of levy in a warehouse, and the warehouse receipt having been issued to the husband. A witness for claimant testified the cotton was raised by claimant on land rented from witness, that he had purchased several bales of her, to be delivered in the future, and that the bale in suit was delivered to him from claimant by her husband, when witness told him to put it in a warehouse for him, or sell it. The husband testified that the witness, to whom he delivered the cotton at his wife's direction, told him to sell it for him, or store it. *Held*, that claimant could not recover, as the evidence showed the bale the property of the witness.

5. Where it appears that the property, at the time of levy in a warehouse in the name of the principal defendant, had been wrongfully placed there by him in his own name after he had undertaken to store it for another, not a party to the proceeding, his breach of trust was of no prejudice to plaintiff.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Claim by Mary W. Eldridge, under Code, § 4141, to property levied on under execution in favor of John Grice and against W. T. Eldridge. From a judgment for Grice, claimant appeals. Affirmed.

P. A. McDaniel, for appellant. W. O. Long, for appellee.

HARALSON, J. This was a suit for the trial of the right of property under the statute.

That the property had been duly levied on is shown by the affidavit for claimant and her claim bond, which estop her to deny a

proper levy. *Schamagel v. Whitehurst*, 103 Ala. 200, 15 South. 611.

The plaintiff introduced the constable, who testified that on the 15th September, 1900, he levied an execution from a justice's court in the county of Henry issued on a judgment therein, in favor of the plaintiff, against the defendant, N. T. Eldridge, and one C. B. Searcy, on the bale of cotton involved in this suit; that at the time of the levy, said cotton was stored in a warehouse in Abbeville, in the name of defendant, Eldridge, to whom a warehouse receipt had issued to the same. Other evidence tended to show that he was in possession of the property.

It is well settled, that in a statutory trial of the right of property, the burden of proof is on the plaintiff, in the first instance, to make out a prima facie case that the property levied on is the property of defendant in execution, which burden is discharged when he shows that the defendant was in possession of the property, at the time of the levy, such possession being presumptive evidence of title. The burden then shifts to claimant to overcome this prima facie presumption of ownership in defendant, and to prove ownership in himself. *Jones v. Franklin*, 81 Ala. 161, 1 South. 199; *Jackson v. Bain*, 74 Ala. 328; *Vaught v. Oehmig*, 95 Ala. 306, 11 South. 416.

Another controlling principle is, that the claimant must recover on the strength of his own title, and not on the want or weakness of title in the defendant in execution, nor can he show, to support his claim, a title paramount to that of defendant in a third person a stranger to the proceeding. Formerly the claimant, as was held, "must show a legal title in himself, such as will support an action of detinue for the property, or else fail in his claim suit—the possession of defendant, to whose right the plaintiff succeeds, being superior to a want of both title and possession in himself." *Jones v. Franklin*, supra; *Seisel v. Folmar*, 103 Ala. 494, 15 South. 860.

It may be well to add, that under the present statute (Code, § 4141), that any one not a party to the suit, who claims to own an equitable, or a paramount lien, etc., may institute a claim suit to try his right to it at law, as though he had the legal title.

The proof on the part of the claimant tended to show, that the cotton was raised by her. One Murphy testified for her, that he rented a farm and advanced to her money and supplies with which to make a crop on the rented land in 1900, and she made a crop; that the bale of cotton claimed in this case was raised by claimant and was a part of the crop raised by her in 1900 on said rented premises, and that the cotton in question was claimant's; that in the early part of the season, he went to claimant's house and bought nine bales of her cotton at a price then agreed on between her and himself, said cotton to be delivered to him along as claimant got

it ready for market, the proceeds when delivered to be placed to claimant's credit for supplies furnished that year; that some days later, he instructed claimant, that as she got the nine bales of cotton ready for delivery, to carry it to Abbeville and to either sell it and place the proceeds in the bank to witness' credit, or, if the market was not satisfactory, to place the cotton in the warehouse and send witness the warehouse receipt for the same; "that to the time of this bale, claimant had delivered to witness two of said nine bales of cotton, and this was the third bale; * * * that the husband of claimant [said N. T. Eldridge], brought this bale of cotton to his house to him, as one of the [nine] bales he had bought [from claimant], and he, witness, told the husband to carry it to Abbeville and store it in a warehouse for him, or sell it and deposit the proceeds to his, witness' credit in bank."

The defendant in execution, N. T. Eldridge, testified, "that claimant, who is his wife, told him on his leaving home with the bale of cotton, to carry and deliver it to Mr. Murphy, as one of the bales he had bought from her, he having bought nine bales, and to do what Mr. Murphy told him to do with it, and that he carried and delivered it to Murphy, and he told him to carry it and store it in the warehouse for him, or to sell it and deposit the proceeds in bank to his credit."

If these two witnesses, examined by the claimant, are to be believed, and there is no evidence in conflict with theirs, this cotton was raised by and belonged to the claimant, and was afterwards sold and delivered by her to said Murphy, who, after its delivery to him, intrusted it to claimant's husband, the defendant in execution, to carry it to Abbeville and warehouse it for him and in his name, or sell it for him and place the proceeds to his, Murphy's, credit in bank. According to this evidence, Murphy became the owner of the cotton, the title having vested in him by reason of his purchase of the same from claimant and her delivery of it to him.

The claimant, thereafter, had no title to the cotton, and, therefore, no right to maintain this claim suit by proving title in Murphy. If defendant in execution abused Murphy's trust, as the evidence tends to show he did, that did not affect the status of the case, as between plaintiff and defendant, who was in possession of the property at the time of the levy of the execution.

Affirmed.

CARTER v. FULGHAM et al.¹

(Supreme Court of Alabama. May 20, 1902.)

EVIDENCE—RES GESTÆ—INSTRUCTIONS—TRESPASS—JOINT TORT FEASORS.

1. Declaration made by defendant at the time he took plaintiff's mule, he being engaged in recovering mules belonging to the United

States, that he had examined it, but could find no "U. S." mark on it, is admissible as part of the *res gestæ*.

2. The affirmative charge may not be given where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery of the one asking the charge.

3. A charge hypothesizing plaintiff's willingness in the taking by defendants, and also his objection to the taking, is bad for inconsistency.

4. Possession alone is enough to sustain an action of trespass against a mere wrongdoer, who is not the real owner of the chattel taken.

5. A charge requiring one to satisfy the jury by a preponderance of evidence places on him too high a duty.

6. Where J. aids H. by locating and pointing out mules for the purpose of their being taken, and for which he is to receive compensation, and the taking of the mules by H. is wrongful, J. is a joint tortfeasor, as is also F., as whose agent, and under whose instructions, J. acts.

7. While the mere receiving by F. from United States officers of compensation for the recovery from plaintiff of mules supposed to belong to the United States, but in fact belonging to plaintiff, would not amount to a trespass, it is competent as tending to connect him with the trespass.

Appeal from circuit court, Marshall county.

Action by John C. Carter against Oscar Fulgham and another. From a judgment for plaintiff against defendant Jamar alone, plaintiff appeals. Reversed.

This was an action of trespass brought by the appellant, John C. Carter, against the appellees, Oscar Fulgham and J. Q. Jamar, and sought to recover damages for the wrongful taking by the defendants of plaintiff's mules. The facts of the case are sufficiently stated in the opinion. There were several charges requested by the plaintiff, to the refusal to give each of which the plaintiff separately excepted; but, under the opinion on the present appeal, it is unnecessary to set out these charges at length. The court, at the request of the defendant, gave to the jury the following written charges, to the giving of each of which the plaintiff separately excepted: "(1) If the jury believe the evidence, they must find for the defendants upon the question of punitive or exemplary damages. (2) There is no evidence in this case to sustain a verdict on punitive or exemplary damages. (3) The court charges the jury that if Carter had two of the mules of the U. S. government, and if the defendants took one of these mules and one of Carter's own mules on January 24, 1899, and if Carter was willing for defendants to take his own mule in order that he [Carter] might retain the other government mule, then plaintiff cannot recover for his own mule, even if Carter did say that he objected to the taking of said mules. (4) The court charges the jury that, before the plaintiff can recover, he must show that he is the owner of the mules, or some of them, and the burden of proving this is on the plaintiff, and he must prove it to the reasonable satisfaction of the jury by the preponderance of the evidence; and if, after considering all the evidence, the jury are unable to say with reasonable certainty that

¹ Rehearing denied June 28, 1902.

the property sued for, or some part of it, is the property of the plaintiff, the jury should find for the defendants. (5) If the jury believe the evidence, they must find for the defendant Oscar Fulgham." Upon the trial of the cause, the jury returned the following verdict: "We, the jury, find the issue in favor of Oscar Fulgham and for plaintiff against J. Q. Jamar for two hundred and ten dollars," and upon this verdict judgment was rendered in favor of the plaintiff against Jamar and in favor of the defendant Fulgham. From this judgment the plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

John A. Lusk, for appellant. Oscar Hundly and O. D. Street, for appellees.

DOWDELL, J. This was an action in trespass to recover damages for the taking by the defendants of the plaintiff's mules. The appellee Fulgham was sued jointly with one Jamar. The jury returned a verdict in favor of the plaintiff against the defendant Jamar alone. On this verdict judgment was rendered, from which the present appeal is prosecuted by the plaintiff. There was evidence tending to show that the United States government had lost mules, which had either strayed or been stolen, and that Fulgham, who was the sheriff of Madison county, had an arrangement or agreement with the United States officers whereby said Fulgham was to receive \$25 for every mule found and identified by him which had been lost or stolen; that Jamar went, under the instructions of Fulgham, to look after and identify the lost mules; that Jamar located and found the mules in question here in Marshall county; that one Holmes, an officer of the federal government, on this information, went with Jamar into Marshall county, where he (Jamar) had located and found the mules, and there said Holmes, with Jamar, took the mules from the plaintiff, Carter, and carried them to Huntsville. The evidence on the part of the plaintiff tended to show that the mules in question were his property. The plaintiff offered to prove by John M. Carter, who was examined as a witness in behalf of plaintiff, that he (witness) heard Jamar, at the time he took one of the mules in question, tell the plaintiff that he (Jamar) had examined this mule, but could find no mark of "U. S." on it. On motion of the defendant, this testimony was excluded. In this the court was in error. This declaration, being made at the time of the taking of the mule, was competent and admissible as a part of the *res gestæ* of the act of taking.

Notwithstanding the positive denial on the part of the defendant Fulgham that he authorized the defendant Jamar, as his deputy and agent, to have anything to do in the actual taking of mules found and identified by him, and notwithstanding his positive statement to the effect that he instructed Jamar

not to take or have anything to do with the taking of any mules so found and identified by him, there was evidence on the part of the plaintiff which tended to show that the defendant Jamar, in acting with and assisting Holmes, the United States officer, in the taking of the mules in question, did so under the directions of Fulgham, and from which evidence the jury might have reasonably inferred that Jamar, in aiding Holmes in the taking of said mules, was acting as Fulgham's agent. The court therefore erred in giving the general affirmative charge at the request of the defendant Fulgham. The affirmative charge should never be given where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery by the party requesting the charge. *Railroad Co. v. Lancaster*, 121 Ala. 471; *Land Co. v. Slaton*, 120 Ala. 259, 24 South. 720; *Hall v. Posey*, 79 Ala. 84.

There was no evidence in the case which authorized the recovery of punitive or exemplary damages. Consequently, there was no error in the giving of charges 1 and 2 at the request of the defendants.

The suit was for the recovery of damages for the wrongful taking of three mules, the property of the plaintiff. Charge 3 is bad, if for no other reason, on the ground of inconsistency. It hypothesizes the willingness of the plaintiff in the taking by the defendants of the plaintiff's mule, and at the same time plaintiff's objection to the taking. Besides, this charge ignores the evidence as to the subsequent taking by the defendants of the other mule, referred to in the charge as the "government mule," which was left with plaintiff at the time of the taking of his mule; or, in other words, the charge was calculated to lead the jury to the conclusion that if the jury should find from the evidence that two of the three mules sued for belonged to the government, and that no trespass was committed in their taking, and that the third mule was plaintiff's, still he could not recover. Possession alone is sufficient to sustain the action of trespass as against a mere wrongdoer who is not the real owner of the chattel. *Tarry v. Brown*, 34 Ala. 159.

Charge 4, given at the instance of the defendant, was opposed to this view; besides, it imposed upon the plaintiff too high a duty, by requiring him to satisfy the jury by a preponderance of the evidence. The giving of this charge was therefore erroneous.

If Jamar aided Holmes by locating and pointing out the mules for the purpose of their being taken, and for which he was to receive compensation, and the taking of the mules by Holmes was wrongful, then Jamar was a joint tortfeasor; and if Jamar acted as the agent and under the instructions of Fulgham, then Fulgham would be equally guilty with Holmes and Jamar in a wrongful taking. The mere receiving of compensation by Fulgham, without anything more, for mules recovered which were supposed to

have been taken or stolen from the United States government, would not, of itself and alone, amount to a trespass. However, it was competent to be shown in evidence as tending to connect them with the trespass.

There were a number of charges requested by the plaintiff in writing which were refused to him by the court, and to which exceptions were reserved. We deem it unnecessary to treat these refused charges separately, as what we have said we think is sufficient for the purposes of another trial. For the errors pointed out, the judgment of the circuit court is reversed, and the cause remanded.

JERNIGAN v. CLARK.

(Supreme Court of Alabama. June 28, 1902.)

TRESPASS—CUTTING TIMBER—PENALTY—STATUTE—ACTION—EVIDENCE—INSTRUCTIONS—APPEAL.

1. Code, § 4137, provides that any one who cuts down any tree on land of another without his consent must pay a certain sum per tree. In an action to recover the penalty, defendant pleaded that the trees were cut to open a road across plaintiff's lands, after permission from plaintiff, for defendant to haul logs or timbers across said lands. *Held*, that inasmuch as there might have been a road, or no necessity for one, the plea was demurrable.

2. In an action for trespass in cutting trees, defendant pleaded that the trees were cut to open a road across plaintiff's lands, after permission obtained from plaintiff, for defendant to haul logs or timbers across said lands. On appeal, the evidence set out in the bill proved the plea, but the bill did not purport to set out all the evidence. *Held* that, in support of a refusal of the affirmative charge, it would be presumed there was other evidence disproving the plea.

3. In an action to recover the penalty, declarations of defendant to his employes at the time he directed the cutting, to the effect that he had obtained permission from the owner, were properly excluded.

4. Evidence as to a previous controversy between the parties as to cutting of trees on other land was properly excluded, it not being shown that such controversy had any bearing on the cutting involved in the case.

5. In an action to recover the statutory penalty, testimony that plaintiff gave defendant permission to cut such trees as he needed for "crossway purposes" was not pertinent; it not being pretended that the trees for the cutting of which the suit was prosecuted were needed or cut for such purposes.

6. If the court abused its discretion in declining to allow defendant to examine a witness after plaintiff had closed his evidence, the error was harmless because of plaintiff's admitting the fact proposed to be proved by the witness.

7. It was proper to charge, in such action, that if there was a road or roads across the land, or a portion of it, and the plaintiff consented that the defendant might go across his land, it was not a consent of the plaintiff that the defendant might enter upon the land and cut down trees or saplings, and that, if the plaintiff did consent that the defendant might go across plaintiff's land for the purpose of hauling timber or logs, it did not authorize the defendant to go upon the lands and cut down trees or saplings.

8. Where, in an action against two defendants, as a firm, to recover a statutory penalty

for cutting trees, the name of one defendant partner was stricken, it was proper not to instruct that the jury should find for defendants, "late partners."

9. It was proper to refuse to charge that if the jury believed that defendant understood that an authority was conferred upon him by permission to go across said lands to cut the trees, and acted under such understanding, they must find for defendant.

10. Where defendant requested an instruction that if it was necessary to cut the trees from the land in order to open a road, or reopen an old road, and plaintiff gave defendant permission to haul timber across the lands, they must find for defendant if no trees were cut except in opening the road, it was properly refused; there being no evidence that the trees were in an old road.

11. Where the only ground of a motion for a new trial was the discovery of material evidence, and it did not appear diligence was used to procure it before trial, and that, as to most of it, diligence would have discovered it, a denial of the motion will not be disturbed on appeal.

Appeal from circuit court, Coffee county; John P. Hubbard, Judge.

Action by D. W. Clark against J. L. Jernigan. From a judgment for plaintiff, defendant appeals. *Turned.*

The court, at the request of the plaintiff, gave to the jury the following written charges: "(1) If plaintiff owned the lands described in the complaint, and if there was a road or roads across the land or a portion of it, and the plaintiff consented that the defendant might go across his land, this was not a consent of the plaintiff that the defendant might enter upon the land and cut down trees or saplings. (2) If the plaintiff did consent that the defendant might go across plaintiff's land for the purpose of hauling timber or logs, this, within itself, did not authorize the defendant to go upon the lands and cut down trees or saplings." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: "(1) If the jury believe the evidence, they will find for defendant, J. L. Jernigan. (2) If the jury believe the evidence, they will find for J. L. & C. Jernigan, late partners. (3) The court charges that if they believe that Jernigan understood an authority to be conferred upon him, by permission to go across said lands, to cut the trees, and acted under such understanding, they must find for defendant. (4) If the jury believe from the evidence that it was necessary to cut the trees from the land in order to open a road, or reopen an old road, and they further believe that Clark gave defendant permission to haul timber across the lands, they must find for defendant if they believe that no trees were cut except in opening the road." There were verdict and judgment for the plaintiff, assessing his damages at \$180. The defendant moved the court to grant a new trial upon the ground of newly discovered evidence. The court overruled the motion, and the defendant duly excepted.

J. F. Sanders, for appellant. Hickman & Riley, for appellee.

McCLELLAN, C. J. Action by Clark against Jernigan for statutory penalties for cutting trees. Code, § 4137. Defendant pleaded not guilty, and, specially, several facts provable under the general issue, and also a plea numbered 5, which is this: "That said trees or saplings were cut for the purpose of opening a road across plaintiff's lands, after permission obtained from plaintiff, for defendant to haul logs or timbers across said lands." As permission to haul timbers across land is not necessarily permission to fell trees, and thereby open a new road on such lands, since there may already be (as there was here) a road open over the lands, and since, even had there been no road, the wood may have been so open as to admit of hauling through it without felling the trees, this plea should have been demurred to.

No demurrer was interposed, however, and issue was taken on the plea. The evidence set out in the bill of exceptions proves the plea without conflict; but the bill does not purport to set out all of the evidence, and for aught that appears there was other evidence adduced on the trial in disproof of the facts averred in the plea; and, in support of the trial court's refusal of the affirmative charge to defendant, we must assume that there was such other evidence.

The declaration of the defendant, made to his employes at the time he directed them to cut the trees, to the effect that he had obtained permission from Clark to open the road, was properly excluded. The defendant could not thus manufacture evidence for himself.

It was not shown, nor proposed to be shown, that the controversy between Jernigan and Clark with reference to the former cutting trees on other land of the latter had any bearing upon the cutting involved in this case, and evidence as to such controversy was not relevant in this case.

The proposed testimony of Brewton to the effect that Clark gave Jernigan permission to cut what timber he wanted for crossway purposes off his (Clark's) land was not pertinent, since it was not pretended that the trees for the cutting of which this suit is prosecuted were needed or cut for such purposes.

If the court abused its discretion in declining to allow defendant to examine the witness C. Jernigan after plaintiff had closed his evidence in rebuttal, which we by no means decide, the defendant was not prejudiced thereby, for the plaintiff thereupon admitted the fact proposed to be proved by said witness.

On considerations adverted to above in treating of the fifth plea, we hold that the court committed no error in giving charges 1 and 2 requested by plaintiff. What is there said also disposes of the exception reserved to the court's refusal to give charge 1 requested by defendant. Charge 2 of defendant's series was bad for the same reasons, and also for that it

would have directed a verdict in favor of a party who had been eliminated from the case by amendment of the complaint. It will suffice to say in condemnation of charge 3 refused to defendant that its language is inaccurate and confusing. Charge 4 is abstract in that there is no evidence that the trees involved in the suit were cut in opening an old road. To the contrary, the undisputed evidence is that these trees were not in any old road, and were not cut in reopening such road.

We do not feel warranted in disturbing the ruling of the circuit court on defendant's motion for a new trial. The only ground of the motion is that the defendant has discovered material evidence, etc., since the trial. It is not made to appear that he used requisite diligence to discover this evidence before the trial, but as to most of it it does appear that the exercise of due diligence would have discovered it before the trial. *McLeod v. Manufacturing Co.*, 108 Ala. 81, 19 South. 326.

Affirmed.

MITCHELL, Judge, et al. v. STATE ex rel. FLORENCE DISPENSARY.

POWERS v. MAYOR, ETC., OF CITY OF FLORENCE.

(Supreme Court of Alabama. June 28, 1902.)

STATUTES — SUBJECT — DISPENSARY ACT — PECUNIARY INTEREST OF COMMISSIONERS — DELEGATION OF LEGISLATIVE POWER — DEPENDENT CITY ORDINANCE.

1. Acts 1900-01, p. 288, entitled "An act to establish a dispensary in Florence, and a branch thereof in East Florence, and to provide for the issuance of liquor licenses in such city and county until this act goes into effect," is not a violation of Const. 1875, art. 4, § 2, providing that each law shall contain but one subject, which shall be clearly expressed in its title.

2. Acts 1900-01, p. 288, creating a corporation consisting of five commissioners, at a salary of \$50 per annum, to be paid out of the proceeds of the business to establish and maintain a dispensary in Florence, to be managed by persons appointed by them, whose salaries are to be paid in like manner, is void, as against public policy, in that the commissioners and managers have a direct, personal, pecuniary interest in the business.

3. The provision of this act which confers on the commissioners power to suspend the dispensary, thereby prohibiting the liquor traffic entirely, or discontinue it permanently, thereby putting in operation the license laws of the state and city, renders it unconstitutional, as an unlawful delegation of legislative power.

4. A city ordinance prohibiting the sale of liquor except as provided in an invalid dispensary act is also invalid, as it cannot be enforced according to its original intent.

Appeals from circuit court, Lauderdale county; E. B. Almon, Judge.

Mandamus by the state, on the relation of the Florence Dispensary, against J. J. Mitchell, judge, and others, and action by the mayor and aldermen of the city of Florence against W. B. Powers for the violation of an

ordinance. From judgments against defendants in each case, they appeal. Heard together on account of identity of law points involved. Judgments in each case reversed.

These two cases are submitted together, inasmuch as they involve the construction of the same statute. The case of Mitchell, judge, et al., against the State ex rel. Florence Dispensary, was instituted by the Florence Dispensary filing a petition addressed to Hon. E. B. Almon, judge of the Eleventh judicial circuit, in which it was averred that the petitioner was a corporation duly organized under and by virtue of the act of the general assembly approved December 10, 1900, entitled "An act to establish and maintain, regulate, and make efficient, a dispensary in Florence, and a branch thereof, in that part of Florence known as East Florence, Lauderdale county, Alabama, 'and to provide for the issuance of liquor licenses in Lauderdale county and the city of Florence until this act goes into effect.'" Acts 1900-1901, p. 288. That on July 1, 1901, the commissioners named in said act, having previously met and organized and elected a manager and branch manager pursuant to the terms of the said act, established in said city a dispensary and branch thereof, as provided in said act. That upon the establishment of said dispensary the petitioner applied to Hon. J. J. Mitchell, judge of probate of Lauderdale county, for a state liquor license for each place of business, as provided by section 18½ of said act, for a period of six months. That at the time of the passage and approval of the act creating the petitioner the license required by law for retail liquor dealers was \$275 per annum, or \$137.50 from July 1st to January 1st, for each place of business, which sum the petitioner tendered and offered to pay said Mitchell as judge of probate; but that said judge was of the opinion that the petitioner was not entitled to receive the license pursuant to the terms of said special act under which the petitioner was incorporated, and declined and refused to accept the sum of \$275 in payment of this license for the period of six months. That said judge was of the opinion that the annual license to be paid to the state by the petitioner was \$1,925, to be paid in quarterly installments. That the petitioner paid to the probate judge the sum of \$481.25, it being one-fourth of the amount demanded for an annual license, and thereupon said judge issued to the petitioner the said license for three months. That the petitioner is advised, informed, and believes, and so avers, that it has paid to the probate judge the full amount of the license required by law for the period of six months and more, and is, therefore, entitled to receive from said probate judge a state license, or a receipt for the license tax so paid, for the period from July 1, 1901, to December 31, 1901. The prayer of the petition was for a writ of mandamus

directed to said Hon. J. J. Mitchell, judge of the probate court of Lauderdale county, commanding him to issue to the petitioner a license or receipt for the period from July 1 to December 31, 1901. To this petition the respondent demurred upon the following grounds: "(1) That the act under which the petitioner claims to have been organized is unconstitutional and void, in that it is in violation of section 2 of article 4 of the constitution of Alabama of 1875; (2) that said act does not seek to confer authority on the city of Florence in its corporate name or capacity, or through its legislative body, to carry on the business of buying and selling spirituous, vinous, or malt liquors, but seeks to confer such special privilege and authority upon petitioner, a corporation, which is to be controlled by certain individuals." This demurrer was overruled, and thereupon the respondent filed an answer, in which he pleaded the unconstitutionality of the act under which the petitioner was incorporated upon the same grounds upon which the demurrer was based. Upon the hearing of the cause the facts averred in the petition were substantially proved. After the introduction of all the evidence the court rendered judgment granting the relief prayed for in the petition, and ordering the writ of mandamus to be issued to said J. J. Mitchell, as judge of the probate court of Lauderdale county, commanding him to issue a license or receipt as prayed for in the petition. From this judgment the respondent appeals, and assigns as error the overruling of the demurrer to the petition, and the rendition of said judgment.

In the case of Powers against the mayor and aldermen of the city of Florence, a prosecution for selling, giving away, or otherwise disposing of spirituous, vinous, or malt liquors in a public place in the city of Florence, against the peace and dignity of the state of Alabama, was commenced against the appellant W. B. Powers by a complaint made out by an affidavit sworn out before a justice of the peace. On the trial before the justice of the peace the defendant was found guilty as charged, and from this judgment of conviction an appeal was taken to the circuit court. In the circuit court the mayor and aldermen of Florence filed a statement or declaration, which, as amended, was in words and figures as follows: "The mayor and aldermen of the city of Florence charge that within twelve months before the commencement of these proceedings W. B. Powers did, within the city of Florence, sell, give away, or otherwise dispose of spirituous, vinous, or malt liquor or intoxicating beverages at a public place, and subsequent to the 1st day of July, 1901, against the peace and dignity of the city, and contrary to its ordinances in such cases made and provided, in words and figures as follows: 'An Ordinance. Whereas the general assembly of Alabama has passed

an act providing for a dispensary in the city of Florence to go into effect on the 1st day of July, 1901, and whereas it is the intention and duty of this board to restrict the sale and distribution of liquors in this city in conformity to the provisions of said act: Therefore be it ordained by the mayor and aldermen of the city of Florence, that on and after the 1st day of July, 1901, it shall be unlawful for any one within the corporate limits or police jurisdiction of this city, except as provided in said dispensary act, to sell, give away or otherwise dispose of any spirituous, vinous or malt liquors or intoxicating beverages at or in any hotel restaurant, eating house or any other public place, and for every violation of this ordinance the party shall be fined not less than one hundred dollars and shall also be sentenced to hard labor for the city for not less than thirty days. Be it further resolved that the police force are directed to see that the above law is upheld in spirit and letter. Adopted June 24, 1901." To this declaration the defendant demurred upon the following grounds: "(1) That said statement charges no offense against the municipal laws or ordinances of the said city of Florence; (2) that any ordinance of the said city of Florence by which the acts of the defendant complained of or charged are made unlawful or prohibited is unconstitutional, null and void; (3) that any act or statute of the legislature of the state of Alabama by or under which it is sought or attempted to adopt any ordinance of the city of Florence, prohibiting or making unlawful the acts of the defendant set forth or complained of in said statement is unconstitutional, null and void." This demurrer was overruled, and to this ruling the defendant duly excepted. Upon the hearing of the cause there was evidence introduced tending to show that the defendant did sell liquor in the town of Florence, and the ordinance which was set forth in the declaration was proved and introduced in evidence. Upon the introduction of all the evidence the court, at the request of the prosecution, gave to the jury the following written charge: "If the jury believe the evidence beyond a reasonable doubt, they will find the defendant guilty." The defendant duly excepted to the giving of this charge, and also excepted to the court's refusal to give the following charge requested by him: "(1) If the jury believe the evidence, they should find for the defendant." There were verdict and judgment in favor of the mayor and aldermen of Florence, assessing the fine of \$100. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Chas. G. Brown, Atty. Gen., for appellant J. J. Mitchell. Alex E. Walker and Thos. R. Roulhac, for appellant Powers. R. T. Simpson and John T. Ashcraft, for relator appellee. Simpson & Jones, for appellees mayor and aldermen of city of Florence.

McCLELLAN, C. J. The main question presented in each of these cases is the constitutionality of an act approved December 10, 1900, entitled "An act to establish and maintain, regulate, and make efficient, a dispensary in Florence, and a branch thereof, in that part of Florence known as East Florence, Lauderdale county, Alabama. 'And to provide for the issuance of liquor licenses in Lauderdale county and the city of Florence until this act goes into effect.'" Acts 1900-1901, p. 288. In the first place, it is insisted that the act contains two subjects,—the establishment, etc., of a dispensary at Florence, and the issuance of liquor licenses in Lauderdale county until the provisions as to the dispensary go into effect, in violation of the organic provision that "each law shall contain but one subject," and that these two subjects are expressed in the title of the act, in violation of the further provision that the one subject to dealing with which all acts are confined "shall be clearly expressed in its title." Const. 1875, art. 4, § 2. In the consideration of this ground of attack on the constitutionality of the enactment we shall assume that all provisions of the statute other than that with reference to the issuance of liquor licenses to run up to the time for the establishment of the proposed dispensary are covered by the first clause of the caption, pertinent to the subject there expressed, and otherwise valid. So proceeding, we do not find that the position is well taken. The subject dealt with in the act is the establishment and administration of a dispensary in Florence, with a branch at East Florence, in Lauderdale county. The purpose of the act, as expressed in its title,—its subject,—is to establish and maintain, regulate, and make efficient a dispensary in Florence, and a branch thereof in that part of Florence known as "East Florence," Lauderdale county, Ala. Those of the provisions of the act having relation to issuance of liquor licenses to run up to the time the dispensary should be put into operation are cognate, germane, and complementary to its provisions for the establishment and carrying on of the dispensary, necessary and proper, in view of existing law, to the rounding out and perfection of the new system of dealing in liquors which the act proposed to establish; and, being so, they are, in legal contemplation, "clearly expressed" in the first clause or sentence of the title of the act. That a more particular expression as to such provisions is made in the last clause or sentence of the title is of no consequence. Such expression is not the setting forth of another and distinct subject in the title, but the mere specification in or by way of subtitle of a matter covered in a general, but sufficient, way in the main title. The word "dispensary," and the phrases "to establish a dispensary," and "to establish and maintain a dispensary," etc., had come before the session of assembly of 1900-1901 to have general and well understood

meanings in the legislation of the state. The "question of dispensary" or the "issue of dispensary" was the phrase in common and universal use when reference was had to the agitation prevalent throughout the state or in any county or municipality looking to committing and confining the sale of spirituous, vinous, and malt liquors to governmental agencies and on governmental account. And wherever this had been done it was said that "a dispensary had been established," and by that statement the fact that this traffic had been so committed and confined was as aptly and accurately and fully made known to the common apprehension, as if every detail had been stated. There, of course, may be dispensaries for the disposition of commodities other than these liquors; but when reference is made to them by the use of the word "dispensary" there must be some express differentiation, else the reference will be understood to be to dispensaries of liquors. Especially is this true of the use of the word in legislation, for when it is proposed by a bill to establish a dispensary everybody at once understands that it is a dispensary of spirituous, vinous, and malt liquors which is proposed, and that the purpose is not only to authorize the sale of these liquors by agents of government, but also and further to prohibit the sale of them by private persons. Indeed, the prime consideration underlying the establishment of dispensaries by law, that which is always put forward by moralists and sociologists in advocacy of legislation to that end, that which in their estimation outweighs the objection which many people have to bodies politic engaging in this traffic at all, is that the establishment of the dispensary by committing the dealing in these liquors to public agencies, which are presumably devoted and consecrated to the public welfare, and are without interest or incentive to augment their sales, and thereby to increase profits, or to sell liquors of an inferior and deleterious quality, takes the traffic entirely out of the hands of private persons, who lack the public agencies' consecration to the public good, who have interest and incentive to increase their sales, and to supply cheap and deleterious liquors, whose places of business must be inviting to loiterers, etc.; and it is upon this theory that statutes establishing dispensaries have heretofore proceeded. So that the corollary to the establishment of a dispensary is the prohibition of the sale of liquors by private persons. So universal is the notion that such prohibition is the prime purpose of such statutes, and so uniformly has such prohibition been made part of them, that the expression in the title of an act of a purpose to establish a dispensary is the expression of a purpose to prohibit the selling of liquors by private persons on private account, or, at least, there is such correlation to the common understanding between the establishment of the dispensary and the prohibition—the latter is so cognate,

germane, and necessary to the purpose of the former—as that it is covered by the expression, and authorized under it. Hence it is that the title of the act under consideration, as set forth in its first clause, "to establish and maintain, regulate, and make efficient, a dispensary," etc., is to all legal intent the expression of a purpose to authorize the sale of liquors by public agencies, and to prohibit it by private persons, to commit and to strictly confine the business to a public agency. Theretofore it had been lawful for private persons to engage in this business in Florence, and perhaps at other places in the county, upon being licensed so to do. The purpose of the act, as evinced by its title, was to substitute the dispensary for the licensed dealings by individuals; to substitute the system of governmental traffic for the system of private traffic under licenses. It was deemed necessary to allow some time after the passage of the act for preparation to institute the change contemplated. The act was approved December 10, 1900. It was not to go into effect in the actual establishment of the dispensary and the taking over thereby of this business until the 1st of the following July. There was no contemplation that the business under license should cease until the business under public agency should begin, but the contrary. Under existing law, however, the licensed traffic could not continue up to the inauguration of the dispensary traffic, because there was no authority in the judge of probate to issue licenses to carry on this business from January 1st to July 1st, the statute authorizing licenses only for the whole year when taken out prior to July 1st; and there was no authority after the passage of this statute for that officer to issue licenses for the whole year, since this act, and properly under its main title, prohibited sales under license after July 1st. So that it seems clear to us that the provision in this statute for the issuance of licenses to run up to the time the dispensary should go into operation was not only cognate and germane and complementary to the subject expressed in the first sentence of its title, and referable thereto, but, further, that it was necessary to the subject so expressed, involving as that subject did, and as the purpose of the act expressed in the title did, when taken in connection with the provision as to the time at which the dispensary should go into full operation, the continuance of the traffic under license up to July 1, 1901, and the substitution on that day for traffic under license the traffic by public agency. Such substitution at that time was the end the legislature had in view. To this substitution the continuance of the existing traffic was necessary, and to such continuance the provision as to the issuance of licenses for the first half of the year 1901 was essential. The point is, we think, substantially determined in the cases of *Ex parte Mayor*, etc., of City of Birmingham, 116 Ala. 186,

22 South. 454, and *State v. Griffin* (Ala.) 31 South. 112; and upon these authorities and the foregoing considerations our conclusion is that but one subject is expressed in the title to this act, and that the provision for licenses extending up to July 1, 1901, is within the subject so expressed. The cases of *Bradley v. State*, 99 Ala. 177, 13 South. 415, and *State v. Davis* (Ala.) 30 South. 344, are distinguishable from the case at bar in this: The prohibition intended by the statutes under review in those cases could be effected as well without their provisions for refunding license money as with those provisions, while in this case the purpose of the statute to substitute one system of traffic in liquors for another on July 1, 1901, could not be fully effectuated without a provision for the issuance of licenses running up to that time. We adhere to these Cases of *Bradley* and *Davis*, but they mark the limit beyond which we will not go in declaring acts of assembly violative of section 2 of article 4 of the constitution of 1875.

The other objections urged against the constitutionality of this act are that certain private persons and their successors are by it constituted a body corporate to inaugurate, carry on, and, if they see fit, suspend, or discontinue, the dispensary; that the act confers police powers upon the corporation; and that this entity is a private corporation; and that the act commits the liquor traffic in Lauderdale county to this private corporation, to the exclusion from that business of all other private corporations and private persons. A statement, in brief, of the provisions of the act is necessary to a proper understanding and consideration of these objections to its constitutional integrity. The act itself appoints the first individuals who are to carry it into effect. There are five of them, and they are appointed for terms of one, two, three, four, and five years, respectively. On the expiration of the term of each, his successor is to be elected by the board of mayor and aldermen of Florence and the commissioners' court of Lauderdale county, assembled in joint meeting, which is to be presided over by the mayor of Florence. These five "dispensary commissioners," as they are called in the act, constituting a corporation, are to elect one of their number annually to be chairman, and another to be secretary and treasurer. Each of the commissioners is required to take and subscribe an oath that he will faithfully and honestly discharge all the duties imposed on him by the act. The secretary and treasurer is required to give bond, with good and sufficient surety, to be approved by the mayor and aldermen, conditioned for the faithful performance of his duties. The commissioners are to employ managers for the dispensary in Florence and its branch in East Florence, fix their compensation, which is not to be made to depend upon the amount of sales, and regulate and superintend them in carrying on the business.

The commissioners are to pay liquor license for each place of business as now required by law. Each of the commissioners is to receive a salary of \$50 per annum, and that one of them who is secretary and treasurer is to receive \$100 per annum additional. The commissioners are required to "appropriate the net profits of said dispensary to the city of Florence and the county of Lauderdale in such ratio as may now be received by them from existing saloon licenses." Neither the city nor the county is to put any money into the business, nor is either liable for any debts incurred by the commissioners in carrying it on. The corporation constituted of the commissioners has capacity to sue and may be sued, and this entity is to maintain and operate the dispensary from the funds arising from the sale of liquors; and, in order to inaugurate the dispensary and to purchase liquors from time to time, the corporation is authorized to borrow money, or to pledge its credit. The salaries of the commissioners and the managers are to be paid out of the business. The act is in a sense of a mandatory nature, or mandatory in form, rather, in its imposition of the duty to establish and carry on the dispensary upon the commissioners. Yet they incur no penalty or liability of any sort for refusing or failing to establish it, and the contingency of such refusal or failure is within the expressed contemplation of the act, which contains this provision: "If said commissioners fail to establish such dispensary by the 15th day of July, 1901, then the board of mayor and aldermen of the city of Florence may do so under the provisions of this act." Moreover, having established a dispensary, the act expressly confers upon them "full power and authority, at any time they may see proper so to do, to suspend, or discontinue permanently said dispensary and close out all stock thereof on hand"; and provides further "that if the dispensary commissioners at any time determine to permanently discontinue the dispensary, * * * the board of mayor and aldermen of the city of Florence and the probate judge of Lauderdale county are hereby authorized to issue liquor licenses as now or hereafter provided by law, if the board of mayor and aldermen of the city of Florence does not put into operation a dispensary under this or some other act." The anomalies of this enactment apparent from the foregoing statement are numerous and striking. Under the guise of establishing and maintaining a "dispensary," by which, as we have seen, is always intended the committing and confining the liquor traffic to disinterested public and governmental agencies,—the purpose and only justifying motive always being to conserve the morals and good order of the community, and never being primarily pecuniary profit or benefit to the agency, or to the local or general body politic, the state, county, or town,—the act commits this traffic in Florence and throughout

Lauderdale county to a corporation created by it, and constituted by it of certain named individuals, whose only connection with any recognized governmental agency or power is that these individuals are named by the state, and their successors are to be appointed by the county and city legislative bodies acting jointly, and that they are required to pay the net proceeds—the profits—of the business to the city and county. Neither the city nor the county engages in the business, nor has any control over it beyond naming successive members of the corporation. The act creates a corporation, and breathes into it a standing in the courts, a capacity to borrow money and to incur debts, and launches it upon a precarious mercantile venture without a cent of money to inaugurate the business or a cent's worth of property to form a basis of credit. License taxes are to be paid by this concern, the dispensers—managers—are to be paid by it, the salaries of its own members are to be paid by it; and all these payments must be made out of the profits of the business. Moreover, rents are to be paid, and the money borrowed and debts incurred in setting up and conducting the business are to be paid out of it; and, while the commissioners are not personally liable for debts incurred, they would naturally have a lively individual concern to have them paid, and the credit of the artificial entity composed of them maintained; and they as well as the managers have a direct personal concern in this connection, since without the payment of debts the business could not be prosecuted and their salaries would cease. So that it is clear that each and all these commissioners and the managers have direct personal pecuniary interests, and the commissioners an additional personal concern of a moral nature, in this business, in its continuance, in its profitableness, in its volume, in increasing the sales of the dispensary. All this is out of all harmony with the theory and motive and public policy of dispensing legislation. So, too, are the further provisions of this act which virtually leave the establishment of the dispensary in the first instance to the discretion of these commissioners, and expressly confer upon them the power and authority to suspend it for any length of time they see fit, and to discontinue it permanently if they choose so to do. Wherever legislation of this character (that is, for the committing of this traffic to dispensaries) has been had,—in this state and out of it, as far as we are advised,—it has proceeded on the theory that the public alone should be interested in the business; that the state, county, or municipality, as the case might be, should engage in the business, should supply the funds to inaugurate it and carry it on, should with public funds pay the dispensers or other necessary agents, so that they would be wholly disinterested, and without incentive to exploit the traffic or to increase its volume, and should, while on the one hand

receiving whatever profits might incidentally result from thus on principles of public policy controlling and carrying on a traffic requiring police regulation, and, in a sense, repression, on the other, incur and bear the losses which might result from the business. And it is, to say the least, largely upon this theory that the courts have upheld such legislation. Can legislation not proceeding upon this theory be upheld? Can an act which departs from this theory so radically as the act under consideration be sustained at all? The exigencies of the present appeal do not require us to respond to these queries.

Again, leaving out of view the considerations just adverted to, or rather dealing with them from another standpoint, it is obvious that an act proceeding on the general lines upon which this one proceeds might amount to an arbitrary designation by the legislature, or by the commissioners' court of a county and the board of mayor and aldermen of a town in that county, of private persons or a private corporation to carry on the liquor traffic, to the exclusion of all other private persons and private corporations, in palpable violation of fundamental law. For illustration: Suppose it were a fact that the net profits of the liquor business in Florence and East Florence were \$10,000, and this act had provided a salary of \$2,000 for each of these five commissioners, would any court hesitate to declare that such a statute would be the conferring of a special privilege on these men or this close corporation composed of them; that it would be invidious, and class legislation, and unconstitutional and void? Would not such a statute be clearly for the benefit of these individuals, exclusive of the equal right of other individuals to engage in this business? We do not know what the profits of these dispensaries are. They may, for aught we know to the contrary, not exceed the \$350 to be paid to these commissioners. And can it make any difference what the commissioners are to receive out of the business, when they in fact are to receive all its issues and profits, when they, and not the state, nor the county, nor the city, inaugurate it, and supply the funds for prosecuting it, and themselves, to the exclusion of all others equally entitled to engage in the traffic under organic guaranties, carry it on, and receive the proceeds of it? Can the legislature, indeed, thus provide for the farming out of this traffic to persons named by itself or to be named by the county and town authorities upon conditions involving merely the payment of some part of the proceeds to the county and town, and forbid other persons to engage in the traffic at all? These, too, are questions which we are not under the necessity of answering.

This act has infirmities of a more glaring, and certainly emaculating, nature than those we have been discussing. To our minds it palpably involves an unwarranted and unconstitutional delegation of legislative pow-

er, and incidentally, so to speak, the conferring of police power to and upon the dispensary commissioners named in the act and their successors. Whether the act should go into effect and operation at all or not was left to all essential intents and purposes to their uncontrolled discretion. They might be unable to raise funds or secure credit necessary to inaugurate the dispensary and for that reason fail to establish it. Or they might, without any reasons apart from their own notions of the expediency and wisdom of dispensary legislation, refuse and fail to execute the act. If they failed to establish the dispensary for any reason or for no reason, we are not of opinion, on the terms of this act, that they could be thereunto compelled. Indeed, the appointees of the act were under no duty to qualify, and undertake its execution, and they might have declined to do so. No provision is made for such a contingency, and its occurrence would have effectually prevented the act from ever going into effect. But the legislature not only committed the question as to whether this act should ever go into operation to five named private persons, but it went further, and expressly provided that these same persons, they having concluded to put the act into operation, could suspend it at any time, and could also repeal it in substance and effect, whenever they chose so to do, by permanently discontinuing the dispensaries; and that upon such repeal other important laws should revive and become operative in Florence and throughout Lauderdale county. Upon a mere suspension of the dispensary by these commissioners, there would be absolute prohibition of the liquor traffic in Lauderdale county. The suspension might be for a week, or a month, or a year, yet, if it was a suspension only,—that is, if the commissioners intended to resume the business of the dispensary at the end of the week, or month, or year, as the case might be,—the effect of the exercise by them of the power to suspend conferred by this act would be not only to suspend a law of the state, but to establish prohibition throughout the territory covered by the act for the time of suspension, be it short or long. If they chose to “discontinue permanently the dispensary,” that is, ceased to carry it on with the intention not to resume its business, they thereby put into operation the license laws of the state and of the city, and thus authorized the unlimited traffic in liquor throughout the county. In other words, and in short, this act delegated to these five persons the legislative power of determining whether it should ever become a law and go into effect, the legislative power of suspending it at any time and for any length of time, they having concluded to make it a law and put it in operation, and the further legislative power of repealing it by determining to discontinue the dispensary proposed to be established. And the exercise of each of these important rights of election

on the part of these five men, or a quorum of them, necessarily has the effect of controlling the state's policy in respect of this traffic in Lauderdale county; and the conferring of these rights is in reality delegating to them to determine which of the three possible policies should be enforced by legislation—whether there should be unlimited sales under license, or sales through the dispensary system, or absolute prohibition of all sales. And, of course, the exercise of this delegated legislative power to the results we have indicated necessarily involved the exercise of the police power of the state in respect of this traffic in liquors.

Whether the sale of liquors in Lauderdale county should be free and unlimited, or whether it should be prohibited, or whether it should be permitted but regulated, and, if regulated, whether by the requisition of licenses or through public agencies called “dispensaries,” were matters and questions with which the legislature alone was competent to deal. The whole subject is legislative, and is committed to the general assembly. They cannot “substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust”; and much less can they substitute for their own the judgment, patriotism, and wisdom of five private persons. Of course, the legislature may enact a local statute to go into effect upon its adoption, or, rather, acceptance by the people of the locality to which it is to apply, or they may confer certain powers of local legislation upon public political corporations; but they cannot delegate to Brown, Jones, Smith, Johnson, and Roberts, private persons, the power to say whether a statute framed for and to affect the county and all the people of the county in which these persons may live shall go into effect,—in fact become a law,—nor can they delegate to these persons the power to suspend for a moment of time the operation of a statute which has gone into operation, or to repeal it; and they cannot confer upon these persons, directly or indirectly, the power of determining what police regulations shall obtain in the county in respect of intoxicating liquors; nor can any of these powers be delegated to a corporation constituted of these persons, and charged with the duty of administering this act should it elect to put it into operation, and so long as it refrained from suspending or repealing it. 6 Am. & Eng. Enc. Law, p. 1021 et seq.; *Schultes v. Eberly*, 82 Ala. 242, 2 South. 345; *Clark v. Port of Mobile*, 67 Ala. 217; *Dunn v. Court of County Revenues*, 85 Ala. 144, 4 South. 661; *Stanfill v. Court of County Revenue*, 80 Ala. 287. This is not a case for the elimination of the unconstitutional provision which we have been considering from the act, and leaving it to stand in other respects. It is far from reasonable to suppose that the legislature would have peremptorily required the persons named in

the act to form a penniless corporation, and launch it upon a perilous mercantile venture, and peremptorily held them to the prosecution of that venture, regardless of their ability and inclination to inaugurate it or continue its operations. Indeed, the legislature had no power to do this. With the eliminations referred to made, there is not only no reason to believe the act would have been passed, and no ground for saying that it could now be executed in accordance with legislative intent, but it would still be impotent to force the commissioners, or the corporation composed of them, to its continued execution. There would still be no legal assurance against their suspending or permanently discontinuing the dispensary. Moreover, the elimination of these provisions, and the consequent giving of a peremptory and mandatory character to the act, would involve also, it would seem, the alternate dependent provisions as the issuance of licenses, or the establishment of a dispensary by the city of Florence in the event the commissioners should fail to establish a dispensary or permanently discontinue it.

Upon the foregoing considerations we are constrained to declare the act in question unconstitutional and void. It follows that the probate judge of Lauderdale county was under no duty to issue any licenses to the dispensaries which had been established by the commissioners, and hence was not compellable by mandamus to issue licenses to them for the last quarter of the year 1901. The judgment of the circuit court awarding mandamus against him must, therefore, be reversed, and a judgment will be here entered dismissing the petition for mandamus.

The ordinance of the city of Florence for violating which the appellant Powers was convicted not only expressly refers to this invalid dispensary act as the sole authority for its adoption, but it also expressly excludes the dispensaries and sales made by them from its operation. The dispensary act being stricken down, the ordinance stands before the higher law as if it had in terms confined the sales of intoxicating liquors to seven named persons,—the dispensary commissioners and managers,—and prohibited such sales by other persons. It is impossible to conceive how the ordinance can be enforced according to the intent of the mayor and aldermen of Florence, or that it would have been adopted by them at all for enforcement as it must be enforced if allowed to stand for any purpose; that is, against the persons expressly excluded from its operation, as well as against all other persons. It is not a case of an ordinance good and bad in separable parts, but of one in which the infirmity of invidious, partial, and unequal effect and operation affects and destroys the whole. The ordinance must fall with the statute upon the supposed authority of which it was adopted, and the judgment against Powers for an alleged violation of it must

be reversed,—the question of the invalidity of the ordinance having been properly presented on the trial, and reserved for review,—and a judgment will be here entered discharging him from further prosecution.

Reversed and rendered in each case.

SCOTT et al. v. BRASSELL.

(Supreme Court of Alabama. June 28, 1902.)

MORTGAGES—CERTIFIED COPY—EQUITY—PROOF—ANSWER AS EVIDENCE.

1. Code, § 992, provides that conveyances of property acknowledged or proved and executed within 12 months from date shall be received in evidence by transcript if the original has been lost. *Held* that, in a suit to foreclose a mortgage, the original being lost, a certified copy of the mortgage from the probate court was properly admitted.

2. Where, in equity, complainant introduces in evidence the answer of defendant, the court must consider the denials of the answer, as well as the admissions.

3. In a suit to foreclose a mortgage, the unsworn answer denied that the debt was not paid, but admitted the making of the mortgage and note. Complainant introduced the note and mortgage and the answer in evidence. *Held*, that the proof of plaintiff could not prevail against the answer.

Appeal from chancery court, Montgomery county; W. L. Parks, Chancellor.

Suit by A. B. Brassel against Thomas B. Scott and another. From a decree for complainant, defendants appeal. Reversed.

Gordon Macdonald and Jno. D. McNeel, for appellants. Hugh Nelson and Graham & Steiner, for appellee.

HARALSON, J. The bill was filed to foreclose a mortgage on land. Its first section averred, that on the 13th January, 1888, the complainant sold to defendant, Thos. J. Scott, a certain described parcel of land; that said Scott owed complainant \$240, as a balance due on the purchase money therefor, and on the 23d January, 1888, he executed to complainant his promissory note therefor, payable on the 23d January, 1890, with interest from date, the original of which it was averred was then in possession of complainant and unpaid, except that the interest was paid by said Scott to the 25th January, 1895. It is averred in section 3 of the bill, that at the time of the execution and delivery of said note, the said Scott and his wife, Mary A. Scott, executed and delivered to complainant in order to secure the said note, a mortgage on said tract of land so sold to said Scott by complainant, a copy of which mortgage is attached to the bill, and made a part thereof as Exhibit B. It is further averred that the original mortgage had been lost or misplaced, and could not be found after diligent search, but the same had been duly probated and recorded, on the 3d of May, 1888, and complainant offered to produce a certified copy thereof from the records

¶ 2. See Equity, vol. 19, Cent. Dig. § 689.

of the probate court. In the mortgage, it is recited that the mortgagor was indebted to the complainant in the sum of \$240, evidenced by his promissory note bearing even date with the mortgage.

Scott and his wife answered the bill, in which answer they aver that the debt mentioned in the note and the mortgage to secure same, had been fully paid before the commencement of this suit, and deny that complainant had in his possession the said note. They admit, however, all the allegations of said section 3 of the bill, which contained said mortgage as an exhibit, which mortgage recited the mortgage debt of \$240, and it was averred in that section of the bill, that the original mortgage had been lost. The oath to the answer was waived, and it was not sworn to.

Thomas J. Scott died during the pendency of the suit, and Mary A. Scott having qualified as his executrix, filed a separate unsworn answer, in which she denied the allegation of the indebtedness of her testator as averred in the bill.

There was no testimony taken in the cause. The submission states: "The complainant being called, offers the following testimony, to wit, (1) original bill and exhibits; (2) certified copy of the mortgage described in the bill; (3) original note secured by mortgage; (4) decree pro confesso v. Interstate B. & L. Ass'n; (5) answer of Thomas J. and Mary A. Scott to original bill which answer was filed on the 8th April, 1899." The defendant submitted on the answer of Mary A. Scott as executrix, with objection to proof by plaintiff of the mortgage by certified copy. The chancellor ordered a reference to ascertain the mortgage indebtedness, and afterwards rendered a final decree of foreclosure of the mortgage.

1. There was no error in admitting a duly certified copy of the mortgage from the probate court. Its loss was averred in the bill and admitted in the answer. Its execution was proved according to law, and it was recorded within 12 months from its date. Code, § 992.

2. There was no limitation of the purpose for which the answer of Scott and wife was introduced by complainant. It was offered as evidence without any qualification,—confessions and denials together as a whole. The court was required to look to the denials therein, as well as to the admissions. *Crawford v. Kirksey*, 50 Ala. 590, 597. The answer denies the averments of the bill, that said Scott had never paid any part of said note, and that the same was still due, and contains the averment, as before stated, that the debt mentioned in the bill, to secure which said mortgage was given, was fully paid long before the commencement of this suit. An unsworn answer when it contradicts the averments of the bill, is mere pleading, and is entitled to no more weight as evidence than the bill, but it is required

still, that the allegations of the bill be sustained by proof sufficient to overcome the contradictions of the answer. *Latham v. Staples*, 46 Ala. 462; *Lockhart v. City of Troy*, 48 Ala. 480; *Rainey v. Rainey*, 35 Ala. 282; *Story*, Eq. Pl. 875a.

But here, the complainant takes himself out of this attitude of the pleading, and introduces the answer of defendant as his own evidence, proving thereby the denials of the averments of his bill, on which its equity rested. It was supposed, the introduction of the note and the mortgage by complainant would do away with this denial. It may be, though we do not decide it, that such proof might have been sufficient to sustain the bill, as against the mere denials of an unsworn answer; but the effect of such evidence could not prevail, as against denials of the answer, made evidence by their introduction as evidence by complainant.

The situation is one, where greater justice may be subserved by not here rendering a decree, but by a reversal and remandment of the cause.

Reversed and remanded.

WHITAKER v. MCKINNEY et al.

(Supreme Court of Alabama. June 28, 1902.)
WILLS—PROBATE—SETTING ASIDE DECREE—LACHES.

1. Where, 38 years after a decree admitting a will to probate, an application is made to set aside the decree, on the ground that one of the next of kin had no notice of the proceedings, the application is barred by laches.

Appeal from probate court, Marshall county; A. M. Ayres, Judge.

Petition in probate court by Simon Whitaker against Sarah McKinney and others to set aside a decree admitting to probate a paper purporting to be the will of Amos Stapler, deceased. From a judgment for defendants, petitioner appeals. Affirmed.

On December 2, 1898, plaintiff filed a petition, in which the following facts were averred: In 1861 one Amos Stapler died in Marshall county, leaving considerable real estate and personal property. His widow resided on the homestead occupied by the deceased at the time of his death up to her death in 1891. Amos Stapler left as his heirs at law several brothers and sisters, among whom was the mother of the petitioner, who has since died, leaving the petitioner as one of her heirs at law. On October 27, 1863, there was presented to the probate court of Marshall county an application to have probated and established a certain paper purporting to be the last will and testament of said Amos Stapler, on the presentation of which instrument an order was entered on the minute books of said probate court, and a day set for the hearing. At the regular term of said county, held on December 11, 1865, a decree was entered upon the minute books of the

probate court establishing the said will, and admitting the same to probate. There were a number of persons named in said will as legatees and devisees, and the names of such persons, and of the heirs and distributees and legal representatives of such persons, are set out in the petition. It was then averred in said petition that Sarah Whitaker, who was one of the next of kin of said Amos Stapler, and who was the mother of the petitioner, was not notified of the proceedings to probate said last will and testament of said Amos Stapler, and that none of the next of kin of said Amos Stapler were notified of such proceeding except those named in said instrument as legatees and devisees, and that, therefore, the decree admitting said instrument to probate was voidable; that said order, purporting to admit said last will and testament, was made and entered in 1865, "but that the same has never been put to final record, for the reason that the said decree was illegal and voidable, but since the death of said Rebecca Stapler [the widow of Amos Stapler] certain of the heirs of the legatees in said instrument mentioned are setting up claims for said alleged will and its voidable probate, and are seeking to have said estate faithfully administered and distributed, according to the terms of said alleged last will and testament. Petitioner avers that he is entitled, on account of no notice having been given his mother, and because of the long lapse of time during which said minute entry has never been put to final record, to have said alleged last will and testament to probate vacated and annulled." The prayer of the bill was that the court enter an order vacating and annulling said order of the probate court admitting such instrument to probate. On the hearing of this petition, there was introduced evidence tending to show the facts averred in the petition, and also to show various acts of administration were performed by the executor under the will of Amos Stapler, and the person recognized by the court as the personal representative of said Amos Stapler.

O. D. Street, for appellant. John A. Lusk, for appellees.

SHARPE, J. If it be assumed that the parties in interest who were not notified of the probate proceedings would have been entitled to have the judgment of probate set aside on timely application, still laches plainly imputable to appellant must prevail against his application. A third of a century is ordinarily sufficient to obscure a transaction such as the making of a will, and to make it difficult, if not impossible, to prove the contents of a lost will. A reproduction now of the evidence on which the contents of the will was established and the judgment was rendered in 1865 might be impracticable, and hence to set aside the judgment, and open the way to a contest of the will, would be at

the imminent risk of allowing the appellant an advantage from his own unreasonable delay.

Affirmed.

COOK v. STATE.

(Supreme Court of Alabama. June 28, 1902.)
CRIMINAL LAW—JURY—SPECIAL VENIRE—EVIDENCE—ROBBERY—CONVICTION OF ASSAULT WITH INTENT TO ROB.

1. Code, § 5004, relative to the drawing of special venires, requires the court to draw not less than 25, nor more than 50, names for each capital case. *Held* that, where there were three capital cases set for trial, it was prejudicial error to an accused to draw one special venire, instead of one for each case, in the absence of any showing that he had the first trial, and the benefit of the full venire.

2. Code, § 5004, relative to the drawing of special venires in capital cases, directs a list of the names of those drawn for the trial to be made out by the clerk, and an order issued to the sheriff to summon the persons so drawn. Section 4993, relative to the drawing of petit jurors, requires that the order to the sheriff shall show the residence and occupation of the persons drawn. Section 4997 provides that no objection can be taken to any petit venire save for fraud. *Held*, that failure of the list on a special venire to show the residence and occupation of the veniremen was not error, in the absence of fraud.

3. While it is not mandatory, the list on a special venire should state the residence and occupation of the jurors.

4. On a criminal prosecution, the state showed that accused fled, and was apprehended in M., and the defendant sought to show declarations of accused, a week prior to the crime, to the effect that he intended to go away, and that he might go to M. *Held*, that the declarations were not admissible, as they were too remote, and formed no part of any declaration elicited by the state.

5. On a prosecution for robbery, accused may be convicted of an assault with intent to rob.

6. Where, on a criminal prosecution, the evidence is conflicting, it is proper to refuse defendant a general charge.

Appeal from circuit court, Geneva county; John P. Hubbard, Judge.

Sewell Cook was convicted of assault with intent to rob, and he appeals. Reversed.

Before entering upon the trial of the case, the defendant moved the court to quash the venire of this cause, for the reason that no special venire had been drawn by the court from the jury box and summoned by the sheriff for the trial of the defendant; but that the court had drawn and the sheriff had summoned only one special venire for the trial of three capital cases. On the hearing of this motion it was shown that the case against the defendant, Sewell Cook, and the case against his codefendant, Marshall Rambo, and a case against another defendant, Will Thomas, on a charge of murder, were all set for the same day, upon the arraignment of each of said three defendants, and that the court had drawn from the jury box 50 names as a special venire.

¶ 5. See Indictment and Information, vol. 27, Cent. Dig. §§ 596, 619.

which, together with the regular jurors he ordered to be served upon each of said defendants in the three several cases. The motion to quash was overruled, and the defendant duly excepted.

Among the charges requested by the defendant and to the refusal to give each of which the defendant separately excepted, was the following: "(6) The court charges the jury that they cannot find the defendant guilty of assault with intent to rob."

J. J. Morris, for appellant. Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. 1. Three capital cases were set down for trial on the same day, and a special venire of 50 persons, to serve as jurors on the trial of each case and for all of them, was drawn. The defendant moved to quash the venire, "for the reason that no special venire had been ordered by the court and summoned by the sheriff for the trial of defendant, but that the court had drawn, and the sheriff had summoned the special venire for all three of said trials," which motion was overruled.

The present statute requires the court to draw "not less than 25 nor more than 50 names for each capital case." Code, § 5004. This requirement of the statute was not followed, but for some reason disregarded. It is unnecessary to decide whether this error of ordering one special venire for two or more capital cases set for trial on the same day, would be without injury requiring a reversal of the judgment, when it affirmatively appears that the appellant's case was the first called and tried, and that he had the benefit of the full venire drawn. But if so, such a drawing could only be sustained when this appears. Unless this is affirmatively shown, and not left to inference, the doctrine of error without injury cannot be applied. In this case, it is not made to appear that the defendant had the benefit of the entire venire drawn for his and the other capital cases set for trial at the same time, and this constitutes reversible error.

2. Section 5004 of the Code, which has reference to drawing and summoning special juries in capital cases, directs a list of the names of the persons drawn for the trial, "to be immediately made out by the clerk of the court and an order issued to the sheriff to summon the persons so drawn to appear on the day set for the trial" etc. It does not, in terms, require "the place of residence and occupation of each person," to be specified on the list. It would seem, however, from the directions contained in sections 4980 and 4993, that it was the intention to have the residences and occupations set out, when it may be done, so as to give that information to the defendant, and it would be well, while it is not mandatory, for this practice to be observed by clerks, when practicable. The provisions of these sections are directory, and it is now provided, that

"no objection can be taken to any venire for a petit jury, except for fraud in drawing or summoning the jurors." Cr. Code, § 4997. It is not pretended that there was any fraud in this case.

3. It was shown by the state, that defendant, after the alleged crime, fled to and was apprehended in Montgomery. In rebuttal of this evidence, the defendant asked his witness, Whitehead, if, on Saturday previous to the alleged robbery, he did not hear Mr. Lurie tell defendant to go and look at his place across the river, and if defendant had not just told witness, that he would look at the place, and if it did not suit him, he would go right away to Montgomery. This appears to have been about a week before the offense was committed. He also sought to prove by one Stewart, that about a week before the alleged offense occurred, defendant told him that the place he lived at did not suit him, and that he was going off, to be gone about two weeks. The court refused to allow the proof in either instance. There was no error here. The declarations of defendant sought to be proved, were remote from the time of the alleged offense, had no connection with and formed no part of it, nor of any conversation or declaration elicited by the state.

4. The defendant was found guilty of an assault with intent to rob. The crime of robbery generally includes an assault, and under an indictment for the greater, one may be convicted of the lesser offense. Code, § 5306; *Thomas v. State*, 125 Ala. 45, 27 South. 920. The charge numbered 6 requested by defendant and refused, was therefore properly refused.

The general charge requested by him, was properly refused, since the evidence was in conflict.

The fourth and tenth lay stress upon special facts and were subject to the vice of being argumentative.

For the error indicated the judgment below is reversed and the cause remanded.

Reversed and remanded.

O'NEAL v. CURRY.

(Supreme Court of Alabama. June 28, 1902.)
SALE ON CREDIT OF ANOTHER—BAD FEELING OF WITNESS—EVIDENCE—INSTRUCTIONS.

1. Evidence that plaintiff made no arrangement for his tenant to get guano from any one else is irrelevant on the issue whether he arranged for him to get it of defendant.

2. On the issue whether plaintiff arranged to have defendant let plaintiff's tenant have guano on his credit, there being evidence that defendant let the tenant have money, but not till plaintiff signed the note with him, and that he went after the guano and money at the same time, plaintiff may show that, while the tenant got the guano on his first trip, he did not get his money then, but that defendant then drew up a note for the money for him to take to plaintiff for his signature, and that, on bringing back the note signed, he got the money; there being no reason why, if defendant let the tenant have the guano on plaintiff's credit,

he should not have required a writing of plaintiff in respect thereto, as in case of the money.

3. On the issue whether defendant's sale of guano to plaintiff's tenant was on plaintiff's credit, there being no written evidence of it, plaintiff may show that he gave his note for the guano he bought for himself of defendant.

4. Bad feeling on the part of plaintiff's witness towards defendant is not shown by the facts that defendant had foreclosed a mortgage given by witness, and had sworn out a warrant for witness' arrest for removing mortgaged property, and defendant had left the country to avoid arrest under the warrant.

5. Plaintiff is entitled to a charge that the burden of proof is on defendant to establish his set-off.

6. A requested charge that the jury may look to the fact, if it be a fact, that plaintiff is contradicted in his testimony by certain witnesses, together with all the other evidence, in determining the weight they will give his testimony, is bad, as argumentative, and singling out a fact on which special stress is laid.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Action by J. A. Curry against W. C. O'Neal. Judgment for plaintiff. Defendant appeals. Affirmed.

The court at the request of the plaintiff gave to the jury the following written charge: "The court charges the jury that the burden of proof is upon the defendant to establish his set-off."

The defendant duly excepted to the giving of this charge, and also excepted to the court's refusal to give the following charge requested by him: "The court charges the jury that they may look to the fact if it be a fact that plaintiff is contradicted in his testimony by W. C. O'Neal, J. T. Thrasher, J. A. Davis, Harmon Andrews, Jep Davis, Coolly Gissendanner and T. C. Andrews, together with all the other evidence in this case in determining the weight they will give his testimony in their consideration of the same."

There were verdict and judgment for the plaintiff.

Espy, Farmer & Espy, for appellant. B. F. Reid, for appellee.

HARALSON, J. This suit was commenced in a justice's court on the 7th October, 1899, by the plaintiff, J. A. Curry, on a complaint in two counts, the first one claiming of defendant, W. C. O'Neal, \$75 due from him to plaintiff, for the value of two bales of lint cotton sold by plaintiff to defendant, on the 7th October, 1899 (1898), which sum of money was alleged to be due and unpaid; the second count claiming the same sum alleged to be due by account made with plaintiff by defendant, for merchandise, goods and chattels sold by plaintiff to defendant, on the 7th October, 1899 (1898), which sum was alleged to be due and unpaid.

The justice trying the case found and rendered a judgment in favor of the defendant, and the plaintiff appealed to the circuit court. There, the defendant interposed pleas

numbered 3, 4 and 5, the third averring "that at the time the suit was brought, the plaintiff owed the defendant the sum of \$51.30 for certain guano sold by Dothan Guano Company to plaintiff, the — day of January, 1898, which account belonged to defendant at the time the suit was brought." "(4) That at the time the suit was brought, the plaintiff owed the defendant, the sum of \$51.30 for certain guano sold by Dothan Guano Company to plaintiff, on or about the month of January, 1898, which account belonged to and was the property of the defendant, at the time this suit was brought, and that on October 7, 1898, the defendant tendered and offered to pay plaintiff the sum of \$21.19, in currency, and plaintiff refused to take same, and upon bringing this suit, the defendant brought said sum of \$21.19 into this court, and the same is now in this court," and "(5) that on the 7th October, 1899, the defendant offered and tendered plaintiff, the sum of \$21.19 in currency, and plaintiff refused to accept this sum, but refused the same, and this defendant, upon the bringing of this suit against him, brought said \$21.19 into the court, and the same is now in this court."

The plaintiff demurred to the pleas of set off on several grounds, but no action appears to have been taken by the court on the demurrers.

The plaintiff filed, as stated, three replications "to the plea of set-off," (1) denying each and every allegation of the plea; (2) that the account mentioned in the plea consisted of a promise on the part of the plaintiff, to answer for the debt of one Harmon Andrews, and the plaintiff averred, that there was no consideration for said promise expressed in writing and signed by the plaintiff, or by any person lawfully authorized to sign the plaintiff's name thereto, and (3) that the said account offered as a set-off is an account alleged to have been contracted by plaintiff and said Harmon Andrews with the Dothan Guano Company.

Upon these replications, the defendant, as appears, took issue, and upon issue on them, the case was tried, and judgment rendered for the plaintiff for \$81.96, from which judgment, the defendant appeals, assigning errors for rulings during the trial.

The plaintiff's testimony tended to prove his complaint. He stated that defendant gave as a reason for not paying him for the two bales of cotton sold to him for \$75, that plaintiff owed him an account for guano purchased by plaintiff's tenant, Andrews. He admitted, that in the spring of 1898, he made arrangements with O'Neal to let other tenants on his place besides Andrews have guano, but denied that he instructed Andrews to go to O'Neal or the Dothan Guano Company to get any guano. He admitted that he made arrangements with O'Neal for said Andrews for money to make his crop with, in the year, 1898, amounting to \$50, and that

¶ 5. See Evidence, vol. 20, Cent. Dig. § 120.

Andrews brought a note to him from O'Neal already filled out for that sum, which he signed with Andrews, who returned it to O'Neal and received from him the money, which note, as the evidence shows, without conflict, the plaintiff afterwards paid to O'Neal. He also stated that O'Neal did not decline to let Andrews have money unless plaintiff would also let him buy guano from him. The defendant asked the plaintiff on cross-examination, if he made any arrangements for Andrews to get guano elsewhere, that year, which question upon the objection of plaintiff, and over exception of the defendant, the court declined to allow the witness to answer. In this there was no error, since the answer, if in the negative, was wholly irrelevant to the issues. If plaintiff had failed to make such an arrangement, it did not tend to prove that he made it with defendant or with the Dothan Guano Company.

The witness, Andrews, for defendant, testified that plaintiff borrowed \$50 for him from defendant in the spring of 1898, which he got after executing his note therefor with the plaintiff as his surety, and that defendant would not let him have the money until plaintiff signed the note with him, and that he went for the guano and the money at the same time. Plaintiff asked the witness on the cross, if he got the money on the first trip he made to Dothan for it. To this question he replied that he did not get the money on that trip; that O'Neal refused to let him have it, and drew up a note for plaintiff to sign with him for the money; that he carried out a load of guano and the note for plaintiff to sign, which he did, and the next day he returned and got the money. To the above question when propounded, the defendant objected, for that it called for illegal, irrelevant and incompetent evidence, which objection, against defendant's exception, the court overruled. We are unable to say that the evidence did not tend to support the plaintiff's replications. Why should defendant have let the witness have the guano on plaintiff's account, without a written order, and yet have required the witness to give plaintiff as his security on a note for the money he let him have? According to defendant's contention he was to let Andrews have both the money and guano on plaintiff's credit, which plaintiff denied as to the guano. If he was dealing with him on plaintiff's account and credit, as to both, a written order was as necessary in the one case as in the other, and the fact, that he let the witness have the guano without a written order, and required it as to the money, tends, at least, to show, that defendant sold the guano to the witness on his own credit. This ruling was the ground of the fourth assignment of error.

The plaintiff offered to prove by this witness, that he gave his individual note to defendant for the guano he got from O'Neal

in 1898. The defendant objected, because the evidence proposed was illegal, and because the note itself was the best evidence and should be produced. The objection for illegality was untenable, as, if Andrews alone gave a note for the guano, it tended to show it was sold to him on his individual credit; and as for the other objection, if the production of the note was necessary, before secondary evidence of its contents could be introduced, the plaintiff showed a sufficient predicate for its introduction. The witness was allowed to answer, that he gave to O'Neal, or the Dothan Company a note for the guano he got from them in the year 1898.

Plaintiff asked the witness, J. A. Davis, who testified that he was present when Andrews came for the money, what took place between O'Neal and Andrews when the latter came for the money. The witness was allowed to answer, over the objection and exception by defendant for illegality, that Andrews did not get the money, but that O'Neal gave a note to him to carry and have plaintiff sign it with him, and when he brought the note back, O'Neal paid him the money. This evidence was admissible, for the same reasons that the evidence constituting assignment of error 4, above considered, was admissible. It tended to show that defendant was trading on plaintiff's credit as to the money loaned Andrews, and on Andrews' credit as to the guano.

The witness for the plaintiff, in rebuttal, one Graves, testified to facts favorable to the plaintiff. On the cross he was asked, what his feelings were towards defendant, and he answered that they were good. He was then asked by defendant, if in the fall of 1898, the defendant had not foreclosed a mortgage he had given him and sold his property; also, if in the fall of 1898, defendant had not sworn out a warrant against him for removing mortgaged property; and if in fact, he did not flee the country to avoid arrest under said warrant. The defendant's counsel stated to the court, that these questions were asked for the purpose of eliciting testimony that the feelings of the witness towards the defendant were bad. The court declined, on objection by the plaintiff, to allow the questions to be asked. In this there was no error. The matters referred to in the questions might have implied at the time, a bad feeling on the part of the defendant towards the witness; but these facts of themselves, did not imply a bad or revengeful feeling on the part of the witness towards defendant.

There was no error in charge 1 requested and given at the request of the plaintiff. *Cook v. Malone* (Ala.) 29 South. 653.

The charge requested by defendant is argumentative, and singles out a fact on which special stress is laid.

Finding no error in the record, let the judgment below be affirmed.

Affirmed.

BEAR CREEK MILL CO. v. PARKER.

(Supreme Court of Alabama. June 28, 1902.)

MASTER AND SERVANT — INJURIES — NEGLIGENCE OF SUPERIOR — PLEADINGS — SUFFICIENCY — CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK.

1. Code, § 1749, subd. 2, provides that where an injury is caused by the negligence of a co-employé who has any superintendence intrusted to him, while in the exercise of such superintendence, the master is liable. Subdivision 3 provides that, when an injury is caused by the negligence of a co-employé to whose orders the one injured was bound to conform, and did conform, the master is liable. A count alleged that plaintiff was injured in coupling cars by the negligence of B., acting as loader or boss of the train hands, to whose orders plaintiff was bound to conform, and did conform. The negligence complained of was that B. failed to furnish sufficient light to do the coupling in the nighttime. *Held*, that the averments do not bring the count either under subdivisions 2 or 3 of the act, nor as concurring grounds, as specified from the two; it not being alleged that B. was intrusted with any superintendence, or that the order was negligently given.

2. A count alleging that plaintiff, while in the performance of his duties as a train hand, was caught between two cars, and thrown under the wheels, whereby his leg was crushed, such injury being caused by the negligence of the locomotive engineer, sufficiently alleged the negligence of defendant.

3. A further count, alleging the injury as above, and that it was caused by the negligence of one S., who was in the employment of the defendant, and intrusted with the superintendence of the train hands on defendant's cars and the coupling thereof, and that the injury occurred while the said S. was in the exercise of such superintendence, sufficiently alleged the negligence of defendant.

4. In an action for personal injuries, a plea that when the injury occurred plaintiff was engaged in coupling cars by putting the pins in place when the rooster entered the drawhead, and, in violation of the rule of defendant, was standing between the rails, was faulty in not predicated the matters therein set up as a proximate cause of the injury.

5. A plea that plaintiff was injured while continuing to work after dark, in disobedience of an order of defendant's foreman to cease work, was also faulty for the same reason.

6. In an action by a servant for injuries received in coupling cars, to a plea that plaintiff by his own negligence contributed proximately to the injury by attempting to couple the cars, as set out in the complaint, without having a sufficient light, a demurrer that the plea fails to allege that it was incumbent upon plaintiff to furnish a light, that it is not responsive to the complaint, and sets up no legal defense, and that it fails to allege anything which negatives the negligence alleged against the defendant, should have been overruled.

7. In an action by a servant for injuries received in coupling cars under order of a superior, a plea that the servant by his own negligence contributed proximately to his injury, in that he stood between the rails in making the coupling, which was a dangerous position to occupy for that purpose, and there was a much safer position which he might have occupied, viz. a position outside the track, was defective in not averring that the safer position therein described was one in which he could have complied with the order of his superior in making the coupling, and that going between the rails to couple cars was so obviously dangerous, under the circumstances, as that he should have disregarded the order, and not assumed the risk.

Appeal from circuit court, Monroe county: John C. Anderson, Judge.

Action by George Parker against the Bear Creek Mill Company. From a judgment for plaintiff, defendant appeals. Reversed.

This suit was brought to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as a train hand or loader. The complaint contained five counts. Under the opinion it is only necessary to refer to the first, third and fifth counts. The substance of the first count is sufficiently stated in the opinion. The third and fifth counts are as follows: Third count. Plaintiff further claims of the defendant the sum of ten thousand dollars as damages for that heretofore to wit: On the 23d day of November, 1899, the defendant then and there managing and operating a logging railroad in said county of Monroe and plaintiff being then and there in the service and employment of the defendant as a train hand or loader and while in the performance of his duties as such train hand or loader was caught between a loaded and unloaded car of the defendant and was thrown under the break beam or wheel of one of said cars whereby his right leg was so crushed, mutilated and bruised as to render the amputation thereof necessary below the knee thereof, and plaintiff alleges that then and there a person whose last name as plaintiff is informed was Echols, but whose first name is to plaintiff unknown and which said Echols was then and there in the service or employment of the defendant as a locomotive engineer and as such locomotive engineer had the charge or control of a locomotive or train on said logging railroad or a part of the track of said railroad caused the aforesaid injury to plaintiff by reason of his negligence as such locomotive engineer. And plaintiff alleges that he not only suffered his loss of his said leg as aforesaid, but that by reason of his said injury he also suffered great bodily and mental pain and anguish to his damages as he says in the sum of to wit, ten thousand dollars."

"Fifth count. Plaintiff claims of the defendant ten thousand dollars as damages for that heretofore to wit, on the 23d day of November, 1899, in said county of Monroe the defendant was then and there managing and operating a logging railroad track and a locomotive and timber cars thereon and plaintiff was then and there in the employ of the said defendant as a train hand or loader and while in the discharge of his duties under said employment plaintiff was caught between two of the said cars of the said defendant and his right leg so crushed, mangled and bruised as to cause him to lose the same below the knee thereof as well as to cause him great bodily and mental suffering, and plaintiff avers that his said injuries were caused by reason of the negligence of one Bill Simmons who was then and there in the service or employment of the defendant and was then and there intrusted with the superintendence of the train hands or loaders on defendant's said cars and the coupling

thereof, and that said injury occurred while the said Bill Simmons was in the exercise of such superintendence, and plaintiff avers that by reason of the loss of said leg and the said bodily and mental suffering he has been greatly damaged in to wit, the sum of ten thousand dollars, and that such injuries were sustained while plaintiff was endeavoring to couple two of said cars under the said superintendence of the said Bill Simmons."

The defendant demurred to each of the counts of the complaint upon the following grounds: "(1) The acts of negligence sought to be charged are not stated with that definiteness and certainty required by law. (2) The only charge of negligence is in the form of a conclusion of the pleader without a statement of the facts from which the conclusion is drawn. (3) The facts stated do not make out a case of liability under the statutes of Alabama on the part of an employer to an employee for an injury done through the negligence of a fellow servant. (4) The facts stated do not show negligence on the part of the defendant or its employees. (5) The facts stated do not show negligence on the part of Echols, the engineer. (6) The facts stated do not show negligence on the part of Bill Simmons. (7) The facts stated fail to show that the engineer backed the train at a greater rate of speed than was safe and proper under the circumstances."

The demurrer to each of the counts of the complaint was overruled, and to each of these rulings the defendant separately excepted. The defendant filed 19 pleas; but under the opinion, it is not necessary to set out all of these pleas at length. The 5th, 6th, 9th, 10th, 12th pleas were as follows:

"(5) That defendant had established a rule requiring all of its trainmen not to stand between the rails of its railroad track while assisting in coupling cars by putting the coupling pin in place when the rooster entered the drawhead; that this rule had been made known to the defendant before the injury complained of occurred; that when the injury complained of occurred plaintiff was engaged in assisting to couple defendant's cars by putting the coupling pins in place when the rooster entered the drawhead, and, in violation of the said rule, was standing between the rails of defendant's railroad track.

"(6) That about dark on the evening that the injury complained of occurred, the plaintiff, together with the entire train crew, of which he was a member, had been ordered by defendant's foreman, who had the control and supervision over all of said train crew, to cease work for that day, but some of said train crew including plaintiff, disregarded the said order and attempted to continue work, and that while plaintiff was continuing to work after dark in disobedience of the said order, the injury complained of occurred."

"(9) That about dark on the evening that the injury complained of occurred, the plaintiff, together with the entire train crew, of

which he was a member, had been ordered by defendant's foreman, who had the control and supervision over all of said train crew, to cease work for that day, but some of said train crew including plaintiff, disregarded the said order and attempted to continue work, and that while plaintiff was continuing to work after dark in disobedience of the said order, the injury complained of occurred, and that such disobedience contributed proximately to the injury complained of.

"(10) That plaintiff by his own negligence contributed proximately to the injury of which he complains by attempting to couple the cars as set out in the complaint without having a sufficient light."

"(12) That plaintiff by his own negligence contributed proximately to his injury complained of in that he stood between the rails of the railroad track in assisting to make the coupling described in the complaint which was a dangerous position to occupy for that purpose and there was a much safer position which he might have occupied, viz. a position outside of said railroad track."

The plaintiff demurred to the fifth plea upon the ground that the negligence set forth therein is not alleged to be the proximate cause of the plaintiff's injury.

To the sixth plea, the plaintiff demurred upon the following grounds: (1) it fails to allege that plaintiff in continuing to work after dark, contributed proximately to the injury complained of. (2) It fails to allege any fact which relieves the defendant of the negligence alleged against him. (3) It fails to allege any fact showing that the plaintiff was guilty of any negligence which proximately contributed to the injury complained of.

To the ninth plea the plaintiff demurred upon the following grounds: (1) Said plea sets up no facts which relieved the defendant from liability to plaintiff for defendant's negligence at the time of the injury complained of. (2) It fails to allege any facts which show contributory negligence on the part of the plaintiff.

To the tenth plea the plaintiff demurred upon the following grounds: (1) Because said plea fails to allege that it was incumbent upon plaintiff to furnish a light. (2) Said plea is not responsive to the complaint filed in the cause, and sets up no legal defense thereunder. (3) Said plea fails to allege anything which negatives the negligence alleged against the defendant in the first count of the complaint.

To the twelfth plea the plaintiff demurred upon the grounds that said plea fails to allege that in the safer position therein described, the plaintiff could have conformed to the order to couple the cars as described in the complaint.

These demurrers were sustained to each of the pleas, and to each of such rulings the defendant separately excepted.

Stevens & Lyons, for appellant. J. H. Barefield and B. L. Hubbard, for appellee.

HARALSON, J. The errors assigned are for the overruling of the demurrers to the several counts, and for sustaining demurrers to the 3d, 4th, 5th, 6th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 17th and 18th pleas. Defendant's counsel in brief waive the errors assigned to the 2d and 4th counts of the complaint, and admit that they are good, leaving the 1st, 3d and 5th to be considered.

1. It would seem that count 1 of the complaint, from its averments was filed under both subdivisions 2 and 3 of the employers' liability act (Code, § 1749), which it was competent to do, if the grounds provided for in the two, concurred to produce the injury; but to authorize a recovery under such a count, the plaintiff would have to establish both allegations of negligence so set up. *Bridges v. Railroad Co.*, 109 Ala. 287, 19 South. 495.

Subdivision 2 of said act is, "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence;" and subdivision 3 reads, "When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employé, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed."

The count alleges that injury was caused by reason of the negligence of one Bill Simmons in the service or employment of the defendant corporation as loader or boss of the train hands, to whose orders and directions the plaintiff was bound to conform and did conform; and that the injuries sustained by plaintiff,—quoting the language of the count,—“resulted from plaintiff's having so conformed to the orders and directions of the said Bill Simmons, who was then and there in the service of the defendant, and that said injuries were caused by the negligence of the said Bill Simmons,” etc. The pleader went further, and stated the facts relied on to show the negligence of said Simmons,—that at the time of his injuries, when in the execution of the order of said Simmons, plaintiff was ordered by him to make a coupling of certain empty cars with certain loaded cars, which were being pushed backward by the locomotive to where the empty cars were standing; that when appellee attempted to make such coupling; the said Simmons negligently failed to furnish necessary light therefor, it being in the nighttime, and by reason of his said negligence, plaintiff received the injuries complained of, which resulted from plaintiff's having conformed to the orders and directions of the said Simmons, then and there in the service of defendant.

It is not averred, as will appear, that Simmons, who is described in the count as “loader or boss of the train hands,” was intrusted with any superintendence, as such, as contra-

distinguished from an ordinary servant or employé to do certain designated work. *Dantzer v. Iron Co.*, 101 Ala. 309, 315, 14 South. 10, 22 L. R. A. 361. Nor is it averred, that the order alleged to have been given by said Simmons to plaintiff, to couple the cars, was negligently given. The negligence complained of was, that he failed to furnish sufficient light, to do the coupling in the nighttime,—the injury having occurred in the darkness of night. It is manifest, therefore, that the averments do not bring the count, either under subdivisions 2 or 3 of said act, nor as concurring grounds of injury as specified from the two.

2. The objections urged to the third and fifth counts—the same we have had so often to encounter,—because, as alleged, they fail to aver the facts relied on to constitute negligence, are wanting in merit. Under our adjudications they are sufficient in this respect. Authorities supra; *Railroad Co. v. Davis*, 119 Ala. 572, 24 South. 862; *Armstrong v. Railroad Co.*, 123 Ala. 233, 26 South. 349; *Railroad Co. v. Foshee*, 125 Ala. 200, 27 South. 1006.

3. The defendant pleaded 19 pleas, “separately to each and every count thereof,” stating that each plea “is interposed as a separate plea, to each count of the complaint separately.” These pleas are thus pleaded indiscriminately to the complaint and to each count thereof, when patently many of them have no reference or application to one or more of the counts. If the pleas had been to the counts at which they were specially aimed, it would have been in the interest of saving time and trouble, and less liable to confuse and mislead. Counsel for defendant insist alone on errors in sustaining demurrers to pleas 5, 6, 9, 10, and 12. The fifth and sixth are faulty in not predicating the matters therein set up as the proximate cause of the injury to the plaintiff. The demurrer to the ninth is general, and the plea sets up nothing not provable under the general issue. The tenth is to each of the counts and sets up the particular negligence of the plaintiff which is alleged to be the proximate cause of the injury to plaintiff, and not being liable to the demurrer specially aimed at it, the demurrer should have been overruled.

When the twelfth plea was interposed, it was applicable to the 1st count, to which, as we have held, a demurrer should have been sustained. In its application to the complaint generally, it may be stated, that it is a recognized rule that “if there are two ways of discharging the service, apparent to the employé, one dangerous and the other safe, or less dangerous, he must select the safe, or less dangerous way, and cannot recover for an injury sustained when the danger is imminent and so obvious that a prudent man would not incur the risk under the same circumstances.” *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Railroad Co. v. George*, 94 Ala. 200, 10 South. 145. Although this is the general rule, well stated in plea 12, yet as applicable to this

case, the plea is defective in not averring that the safer position therein described which the plaintiff is alleged to have abandoned for a more dangerous one, was one in which he could have complied with the order of his superior in making the coupling; and it further fails to aver that going between the rails to couple cars was so obviously dangerous, under the conditions prevailing, as that an employé should have disregarded the order of his superior, and not assumed the risk.

For the errors indicated let the judgment below be reversed and the cause remanded.

Reversed and remanded.

WALKER v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

CHILD AS WITNESS—INTELLIGENCE OF CHILD—ASSAULT—INDICTMENT—PROOF—VARIANCE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—DEGREE OF PROOF NECESSARY.

1. A child of 10 testified that her mother was dead, and she had been adopted by defendant, stated her father's name, and gave her name as it was before her adoption. She testified that she went to Sunday school and to church; that she said her prayers, and believed in God; that if she told a story about the case, she would be put in jail, and when she died she would go to the "bad man"; but that she did not know who would send her to the "bad man." *Held* that, aside from her religious training, she was of sufficient intelligence to testify.

2. On a prosecution for an assault and battery on a child, it appeared that she had been adopted a short time before the prosecution, that her name prior to the adoption was L. B., and that she was as well known by the name of B. as by that of W.—that of the one who had adopted her. The child testified she was always called by the name of B. *Held* proper to overrule a motion to exclude the child's testimony on the ground that her name was L. W. and not L. B., as charged in the indictment.

3. On the evidence it was proper to refuse to charge that it was an indispensable element of the indictment that the child's name be as certain as that of the one charged; that if her name was L. W., the jury should acquit, and that they should acquit if they had a reasonable doubt that she was as well known by the name of L. B. as L. W.

4. On a prosecution for an assault on a child, it was not error to refuse to charge that the jury "should weigh the testimony of an immature child with that degree and measure of their common knowledge and understanding of children in the narrative of events during childhood"; the instruction being incomplete and elliptical.

5. A request to charge that it is a well-settled rule of the law that if there are two reasonable constructions which can be given to facts proven,—one favorable and the other unfavorable to the accused,—it is the duty of the jury to give that which is favorable rather than that which is unfavorable to the accused, was properly refused.

6. Defendant requested the court to instruct that circumstantial evidence does not warrant a conviction unless to a moral certainty it excludes every other hypothesis than that of guilt, and that no matter how strong may be the circumstances, if they can be reconciled

with the theory that some other person may be guilty, then the guilt of the accused is not shown by the measure of proof required. *Held* properly refused, since the law does not require the exclusion of every hypothesis, but only every reasonable hypothesis.

Appeal from circuit court, Jackson county; J. A. Bilbro, Judge.

Will F. Walker was convicted of assault and battery, and he appeals. *Affirmed*.

On the trial of the case the state introduced in evidence the child alleged to have been assaulted, who was shown to be 10 years old. Her testimony on her voir dire is set forth in the opinion. The defendant objected to her testifying, the court overruled the objection, and the defendant duly excepted. This witness testified that the defendant whipped her with a leather strap very hard. She testified that her name was Lucinda Breeden, and her father's name was Breeden; that her mother was dead, and that she was adopted by the defendant, Will F. Walker, and it was admitted that she was the adopted child of said Walker, taking his name. The defendant moved to exclude the testimony of the child, upon the ground that the defendant was indicted for an assault on Lucinda Breeden, while the child's name was Lucinda Walker. The court overruled this motion, and the defendant duly excepted. The state introduced several witnesses, who testified that the child assaulted was well and better known by the name Lucinda Breeden than by the name of Lucinda Walker. The defendant, as a witness in his own behalf, testified that at the time he is charged with having whipped the child he was in bed, where he had been confined for four weeks; that he did not whip the child, but that his wife whipped her; that the child was his adopted child at the time of the whipping. The testimony of this witness was corroborated by the testimony of several witnesses introduced in his behalf. The defendant introduced the record of the probate court showing that the child was adopted prior to the alleged assault, taking his name, etc. The defendant requested the court to give to the jury, among others, the following written charges: "(6) The court charges the jury that it is an essential indispensable element of the indictment that the name of the child alleged to have been assaulted is as certain as the name of the person charged with the assault." "(3) The court charges the jury that if they believe the evidence, the child's name was at the time of the alleged assault Lucinda Walker, and you should acquit the defendant." "(5) The court charges the jury, if they are not satisfied beyond a reasonable doubt that at the time of the alleged assault she was as well known by the name of Lucinda Breeden as she was by the name of Lucinda Breeden, or Lucinda Walker, the jury should acquit the defendant." "(13) The court charges the jury that

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 555.

it is a well-settled rule of the law that if there be two reasonable constructions which can be given to facts proven,—one favorable and the other unfavorable to a party charged with crime,—it is the duty of the jury to give that which is favorable rather than that which is unfavorable to the accused. (14) The humane provision of the law is that upon circumstantial evidence there should not be a conviction unless to a moral certainty it excludes every other hypothesis than that of the guilt of the accused, no matter how strong may be the circumstances; if they can be reconciled with the theory some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof the law requires." "(2) The court charges the jury that they should weigh the testimony of an immature child with that degree and measure of your common knowledge and understanding of children in the narrative of events during childhood."

Milo Moody, for appellant. Chas. G. Brown, Atty. Gen., for the State.

MCCLELLAN, C. J. The child alleged to have been assaulted and beaten was 10 years old. Being offered as a witness for the state, she testified on her voir dire as follows: That she went to Sunday school and to church; that she said her prayers, and believed in God; that if she told a story about this case she would be put in jail, and when she died she would go to the "bad man"; but that she did not know who would send her to the "bad man." That she was of sufficient intelligence, apart from religious training, to be admitted to testify is apparent from the foregoing and her other evidence in the case. Under the rule declared in all our adjudications, the circuit court properly allowed the child to testify. *Kelly v. State*, 75 Ala. 21, 51 Am. Rep. 422; *Beason v. Same*, 72 Ala. 191; *Carter v. Same*, 63 Ala. 52, 35 Am. Rep. 4; *McKelton v. Same*, 88 Ala. 181, 7 South. 38. The name of the child prior to her adoption by Walker was Lucinda Breeden, and she is so named in the indictment. The adoption had occurred only a short time (about one month) before the alleged assault. The child testified that her name was Breeden, and that she was always called by that name, and was never called by the name of Walker. "Several other witnesses stated that she was as well or better known by the name of Breeden than Walker." With this evidence in the case, the court's rulings on objections to testimony and requests for instructions made by defendant, having relation to the name of the child, were free from error. Charge 5, refused to defendant in this connection, is abstract, there being no evidence that the child was named or known by the name of Breeder. Charge 2, refused to defendant, is incomplete and elliptical. Charge 13, requested by defendant, "has been repeatedly condemned by this court." *Comp-*

ton v. State, 110 Ala. 24, 35, 20 South. 119. The law does not require the exclusion of every hypothesis of innocence, but only every reasonable hypothesis. Charge 14 was properly refused.

We find no error in this record, and the judgment of the circuit court must be affirmed.

MANN v. STATE.

(Supreme Court of Alabama. June 23, 1902.)

MURDER—SELF-DEFENSE—EVIDENCE—REBUT-TAL—DISCRETION OF TRIAL COURT—IN-STRUCTIONS—DOCTRINE OF RETREAT—WRIGHT OF EVIDENCE—REASONABLE DOUBT.

1. On a prosecution for murder, on the organization of the jury a venireman was asked by the solicitor for the state whether he would convict on circumstantial evidence if the evidence were such that, while it left some doubt in his mind, still it satisfied him beyond a reasonable doubt. *Held*, that the allowance of the interrogatory was within the unrevisable discretion of the trial court.

2. On a prosecution for murder, during the course of the opening statement of counsel for the state, the defendant's counsel having stated what he expected the evidence would show as to the reasons which actuated the defendant at the time of the homicide, the solicitor in reply stated: "The state expects the evidence to show that when the defendant was asked on habeas corpus trial as to what he had reference to when he told the deceased, 'You must get down on your knees and apologize,' he testified that he had reference to the deceased coming to his office, and assaulting him with a knife; had reference to his calling him a son of bitch in the presence of a negro; and had reference to his drawing a pistol on him that evening." *Held*, that there was no error in the statement, since counsel in such a statement has a right to state the case as he proposes to present it, and the statement was warranted by that of defendant's counsel.

3. Where, on a prosecution for murder, the counsel for the state has in his opening statement not exceeded any of his rights in such respect, a statement of the court, in refusing to strike a part of the statement, that he would instruct the jury to disregard it, was too favorable to defendant.

4. On a prosecution for murder, a witness, testifying as to a dying declaration, stated on cross-examination that his recollection was that deceased said, as soon as he saw defendant starting towards him, he drew his pistol. On redirect examination, he was asked to refer to the typewritten statement of his evidence on the preliminary trial, for the purpose of refreshing his recollection, and then to state whether or not the typewritten statement contained, word for word, the memoranda taken down as made by deceased, and whether or not he remembered what deceased did say as to whether or not defendant had his pistol out before he drew his. *Held*, that the question whether the redirect examination was in rebuttal was addressed to the trial court's discretion.

5. The question whether the question was leading was for the trial court's discretion.

6. Where, on a prosecution for murder, a witness appears to the court to be an unwilling witness, it is within the court's discretion to allow the state solicitor to lead him.

7. When, on a criminal prosecution, the court allows the state solicitor to lead a witness, because he appears unwilling, it is proper for the court to state his reason for allowing the solicitor to lead him.

8. On a criminal prosecution, it was not error to allow the state solicitor to ask a witness, for the purpose of refreshing his memory, whether he had not testified to certain facts on the preliminary trial of defendant.

9. Where, on a criminal prosecution, the defense had drawn from a witness all facts within his knowledge having any pertinency to the case, and he had testified to having a conversation with deceased about defendant, it was not error not to allow him to answer questions as to how a certain conversation between him and deceased "came up," "what introduced this conversation," etc., or to testify that deceased told him that it was a mistake about defendant shooting his (defendant's) wife.

10. On a criminal prosecution, it was not error to sustain objections to questions by defense to its witness as to whether the witness had been summoned by the state or defense, inasmuch as whether a party has summoned a witness or not, his failure to introduce him affords no ground for an inference or argument.

11. On a prosecution for murder, it appeared that defendant had demanded an apology of deceased, who did not make any apology, but threatened defendant, and advanced on him, when defendant shot him. The evidence showed that probably not more than a minute elapsed between the demand and shot. *Held* proper to sustain an objection to a question by defendant's counsel to a witness as to how many minutes elapsed between the demand and the shot.

12. On a prosecution for murder, defendant having killed deceased as the latter was advancing on him during a difficulty between them, there being abundant evidence that deceased was a powerful man physically, and defendant weak and delicate, it was proper to exclude testimony to account for defendant not being more robust, such as that he had led a sedentary life; that he had not taken much outdoor exercise; that his work was not such as to harden his muscles; and that he had lung trouble.

13. On a prosecution for murder, defendant having shot deceased during an altercation, evidence as to how long defendant had lived in the city, place of his birth, how long he had known deceased, and place of defendant's marriage, was properly excluded, the facts having no pertinency.

14. On a prosecution for murder, defendant having killed deceased during a difficulty between them, there was evidence that there had been ill-feeling between the parties for some time, and that deceased had, some time prior to the difficulty, accused defendant of stating that the wife of deceased was not a fit person for defendant's wife to associate with. *Held*, that it was proper to exclude testimony of defendant that, in consequence of remarks derogatory to the character of deceased, he had said something to his wife "about going with deceased and his wife, or staying away from them, or something of that character," etc.

15. Defendant, who was sitting in a pavilion, called to an acquaintance to come over to his table, when deceased, who sat at a near-by table, remarked, "Lend me a dollar;" whereupon defendant arose, and asked, "Who made that crack?" An altercation ensued, defendant's pistol was knocked from his hand, but he retreated to where it lay, picked it up, and demanded that deceased apologize. Deceased refused to do so, and was shot by defendant. It appeared there had been ill-feeling between the parties, and defendant claimed he had been previously insulted by deceased. *Held*, that questions by the state solicitor to defendant, as a witness on cross-examination, as to why he thought the remark, "Lend me a dollar," was addressed to him, and whether he did not go for his pistol with the purpose of getting it, and coming back and making deceased apologize, etc., were proper.

16. On a prosecution for murder, the defense being self-defense, it was not competent for defendant to testify that in his opinion or conclusion there was no "reasonable method of escape without exposing himself to great danger, taking all the surrounding circumstances into consideration"; that, as a "matter of fact, there was not any safe method by which he could have retreated without exposing himself to being shot"; "that, under existing facts, believing, as he had said he did believe, that Dickson was armed, he could not have escaped without increasing his danger"; and that, "if he had turned his back, Dickson would have had an opportunity to shoot him."

17. On a prosecution for murder, defendant having killed deceased while the latter was advancing on him and threatening him, the distance defendant had retreated having been testified to several times by him, it was not error to sustain an objection to a question put to him on his redirect examination as to how far he had retreated.

18. On a prosecution for murder, it appeared that deceased and defendant had been engaged in a difficulty, threatening each other, and both armed; that defendant's pistol had been knocked from his hand, but that he backed off to where it lay, and picked it up, and shot deceased. *Held*, that a question put to defendant, as to whether the difficulty had ended when he picked up the pistol, was properly disallowed, as calling for an opinion of the witness.

19. On a prosecution for murder, it appeared that defendant, who was seated at a table in a pavilion, called a friend to come over to his table, whereupon deceased, who was sitting at a near-by table, said, "Lend me a dollar;" that defendant arose, and asked, "Who made that crack?" whereupon a difficulty ensued; that, while deceased was advancing on defendant, he demanded an apology, which deceased refused, whereupon he was shot. Defendant testified he thought the remark a sarcastic way of accounting for his calling his friend. A witness testified that defendant had testified on his preliminary trial that, when he (defendant) demanded an apology, the apology required was for insults deceased had given him in his office, for insulting language in speaking of defendant to a negro, and another insult in "backing him with a pistol." *Held*, that the testimony was admissible in rebuttal of that tendency of defendant's own testimony to show that the demand for an apology had reference to the insult on the occasion of the killing.

20. The testimony was admissible as showing malice and formed design, and that he shot, not in self-defense, but in redress of insults for which deceased would not apologize.

21. On a prosecution for murder, it appeared that defendant had shot deceased during an altercation, and while deceased was advancing on him, but that, at the time defendant shot, deceased's pistol had been taken from him by one of the bystanders, who interfered, seeking to prevent bloodshed. The prosecution claimed that defendant knew when he fired the fatal shot that his antagonist was unarmed, and it was the theory of the defendant's testimony that defendant acted on the belief that deceased was armed. *Held*, that in support of the state's theory, and in rebuttal of that of defendant, it was proper to admit testimony of a witness as to what defendant had testified to on the preliminary hearing, as to his making an effort to empty his pistol in the air to keep deceased from using it on him.

22. On a prosecution for murder, wherein it appeared that defendant had killed deceased during an altercation, and that there had been prior ill-feeling between them, and a dispute between them in defendant's office, a diagram of his office, made by defendant while he was being examined as a witness, was properly received in evidence on behalf of the state.

23. On a prosecution for murder, it appeared

that defendant had killed deceased during an altercation, and that there had been ill-feeling between them, and the defendant, as a witness, had denied, in effect, that deceased had said he did not want defendant to marry deceased's sister on account of their short acquaintance, and because of his reputation for drinking. *Held*, that it was proper for the state solicitor to state to the jury the fact of such denial.

24. On a prosecution for murder, where the defense was self-defense, defendant requested the court to charge that the law gives to every one the right to kill in self-defense in every case where the one who does the killing is not at fault in bringing about the fatal difficulty; and if defendant was not at fault in bringing about the difficulty, and he probably believed that it was necessary to shoot deceased in order to protect his own life, then he should be acquitted. *Held* properly refused, in that it had the infirmity that it charged on the right to kill in self-defense, without instructing as to constituents of such defense.

25. For the same reason it was proper to refuse to charge that the fact that women and children were near the place of the killing could not be considered, and that if the circumstances left the minds of the jury so that they could not say to a moral certainty who provoked the difficulty, and whether the defendant shot in self-defense, they should acquit.

26. For the same reason it was proper to refuse to charge that, if the jury believed defendant's conduct measured up to the standard of self-defense required by law, they should acquit.

27. For the same reason it was proper to refuse to charge that, if the jury were of the opinion that the defendant acted in self-defense as defined by law, it was the duty of the jury to find him not guilty.

28. For the same reason it was proper to refuse to charge that, if the testimony of the defendant raised a reasonable doubt as to whether or not he acted in self-defense as charged on by the court, there should be an acquittal.

29. On a prosecution for murder, the court refused to charge that "the law gives to every one the right to kill in self-defense, in every case where the one who does the killing is not at fault in bringing about the fatal difficulty; and if defendant was not at fault in bringing about the difficulty, and he probably believed that it was necessary to shoot deceased in order to protect his own life, then he should be acquitted." *Held*, that the instruction was properly refused, for that it would have authorized an acquittal on the ground of self-defense, though the jury might have found that defendant could have retreated in safety.

30. The instruction was bad in that a probable belief that a necessity to kill exists is not sufficient, but the actor must believe the danger imminent.

31. On a prosecution for murder, defendant requested the court to instruct that "the place where the killing occurred, and the fact that women and children were near by, cannot and must not be considered by you at all. All you can consider are the circumstances of the killing. . . . and if those circumstances have left your minds in confusion, so that you cannot say to a moral certainty who provoked the difficulty and whether the defendant shot in self-defense when he killed the deceased, then it is your duty to give the defendant the benefit of your confusion and doubt and acquit him." *Held* properly refused, for that the first sentence was an argument.

32. In view of the fact that there was evidence of a previous difficulty between the parties, the charge was erroneous in that it confined the jury to the circumstances of the killing.

33. The instruction was erroneous in that it pretermitted the doctrine of retreat.

34. On a prosecution for murder, it appeared that defendant, who was seated at a table in a pavilion, called a friend to come over to his table, whereupon deceased, who was sitting at a near-by table, said, "Lend me a dollar;" that deceased arose, and asked, "Who made that crack?" whereupon a difficulty ensued; that while deceased was advancing on defendant he retreated to where his pistol lay, picked it up, and he demanded an apology, which deceased refused, whereupon he was shot by defendant. Defendant requested the court to charge that if the jury could not say to a moral certainty who provoked the difficulty, and whether the defendant shot in self-defense when he killed the deceased, then they should acquit. *Held*, that as there was justification for a verdict of guilty, whether defendant provoked the difficulty or not, the instruction was erroneous, in that it required an acquittal unless the jury should believe that defendant provoked the difficulty.

35. On a prosecution for murder, it appeared that defendant testified that while sitting at a table in a pavilion he called a friend over to his table, when deceased, who sat near by, remarked, "Lend me a dollar"; that defendant considered it an insult, and he asked, "Who made that crack?" that as he rose from the table deceased rose with his pistol in his hand; that after his (the defendant's) pistol was knocked out of his hand, he did not see any one take the pistol from the deceased, nor did he know that the pistol had been taken from him; that he (the defendant) retreated, and when he got to the place where his pistol was lying he picked it up for the purpose of defending himself against the deceased; that as the deceased advanced on him, and when he was within five or six feet of the defendant, the defendant fired upon him, believing that the deceased had a pistol; that the deceased then rushed upon him, and in the struggle the defendant fired two or three times. *Held* proper to refuse to charge that defendant was entitled to an acquittal on his own testimony.

36. Defendant requested the court to charge that it is not necessary there should be actual danger of death in order to justify the taking of life, but if defendant believed that at the time of firing the shot it was necessary to prevent death or harm to him the jury must acquit. *Held*, that the instruction was properly refused, because it pretermitted all reference to the duty of retreat where retreat will not increase the peril.

37. For the same reason it was proper to refuse to instruct that if previous threats of the deceased had been communicated to the defendant, and if those threats, in connection with the actual conduct of the deceased at the time of the shooting, generated in the mind of defendant a reasonable belief that he was in danger of death or of serious bodily harm, then the defendant had the right to act upon these appearances, providing he was not the aggressor in the difficulty.

38. It was not error to refuse to charge that unless the jury are so convinced of guilt that they would each venture to act upon that decision in matters of the highest concern and importance to their own interest they must acquit.

39. Defendant requested the court to instruct that "the defendant is authorized under the statute to testify in his own behalf, and the jury have the right to give full credit to his statement," and that if the testimony raised a reasonable doubt as to whether he acted in self-defense the jury should acquit. *Held* properly refused, in that it authorized an acquittal on a doubt engendered by the testimony of defendant, when such doubt might have been removed by other evidence.

40. The requested instruction was defective,

¶ 30. See *Homicide*, vol. 26, Cent. Dig. §§ 159, 160.

in that its first proposition was a mere argument.

41. Defendant requested the court to charge that if the evidence for the state showed the defendant guilty, but the evidence for the defendant shows equally that he is not guilty, so as to leave their minds in equipoise, it would be their duty to acquit. *Held* properly refused, it being the duty of the jury to consider all the evidence, and not to consider each side separately.

42. For the same reason it was not error to refuse to charge that if, after weighing all the evidence, the jury could not say which were the heavier, that for the state or that for the defendant, then they should acquit.

43. For the same reason it was not error to refuse to charge that the jury should not hesitate to acquit if they found the evidence for the state not the strongest.

44. For the same reason it was proper to refuse to charge that the jury should refuse to acquit if the evidence for the defendant was as strong as that for the state.

45. In view of the fact that defendant's own testimony afforded abundant ground to find that he had one time retired from the difficulty to arm himself, whereby the jury might find him guilty, whatever the strength of his evidence the preceding four instructions were erroneous.

46. On a prosecution for murder, where the defense was self-defense, and defendant claimed he did not know deceased was unarmed, the court refused to instruct that if the jury found the defendant not guilty provided he did not know deceased was unarmed, they must acquit if they found deceased was powerful enough to have inflicted serious injury with his hands. *Held* properly refused, because it pretermitted all reference to the doctrine of retreat.

47. On a prosecution for murder, where the defense was self-defense, the defendant requested the court to charge that if they believed deceased was powerful enough to have inflicted serious bodily injury on defendant with his hands, which defendant knew, and that defendant was free from fault in bringing on the injury, they must acquit, though he may have known deceased was not armed. *Held* properly refused as pretermitting doctrine of retreat.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Charles B. Mann was convicted of murder in the second degree, and he appeals. Affirmed.

During the organization of the petit jury for the trial of the case George Stewart was drawn as a juror, and, in answer to the question propounded to him by the court, answered that he would convict on circumstantial evidence "if the evidence proved the crime beyond a doubt." Thereupon the solicitor asked said Stewart the following question: "Suppose the evidence was such that while it left some doubt in your mind, still your mind was satisfied beyond a reasonable doubt, would you convict then?" The defendant objected to the solicitor asking this question, the court overruled the objection, and the defendant fully excepted. The said Stewart answered that the evidence could be strong enough for conviction. Thereupon the state challenged said Stewart peremptorily.

The bill of exceptions contains the following recitals as to the opening statement of

counsel: "During the course of the opening statement of counsel, the defendant's counsel having stated what he expected the evidence would show as to the reasons which actuated the defendant at the time of the homicide, the solicitor in reply stated: 'The state expects the evidence to show that when the defendant was asked on habeas corpus trial as to what he had reference to when he told the deceased, "You must get down on your knees and apologize," he testified that he had reference to the deceased coming to his office and assaulting him with a knife, had reference to his calling him a son of bitch in the presence of a negro, and had reference to his drawing a pistol on him that evening.' The defendant moved to rule out statement upon the ground that the defendant has not testified and it is not known that he will testify, because the statement, if made, is not in the nature of a confession. The court denied the motion, and the defendant excepted, the court stating that he would tell the jury that they should pay no attention to the statements of counsel."

On the trial of the cause it was shown that David Dickson was mortally wounded at Monroe Park, a pleasure resort near the city of Mobile, in Mobile county, on Sunday evening, June 16, 1901. The evidence for the state tended to show that said David Dickson was sitting in a pavilion with some friends when the defendant entered the pavilion and took a seat at a table some distance from the one occupied by Dickson; that between the table occupied by the defendant and the one where the deceased was sitting there was a table at which some actresses were sitting; that shortly after the defendant came in he called to one Tuttle, and asked him to come over to his table; that just as the defendant called a waiter returned some change to the actresses, and Dickson remarked, "Lend me a dollar;" that thereupon the defendant rose from his table, and asked, "Who made that crack?" or "Who made that statement?" at the same time pulling his pistol from his hip pocket; that after the defendant rose with pistol in hand the said Dickson got up from the table where he was sitting and drew his pistol; just after the defendant drew his pistol one Peter Burke, Jr., who was near him, knocked the pistol out of his hand; that as the said Dickson advanced upon the defendant the latter pulled his coat open, and said, "Shoot me, you cowardly cur; you haven't the nerve to shoot;" that thereupon one Hill rushed up to Dickson, and took his pistol away from him, and tried to keep the defendant and the said Dickson from getting together; that as Dickson advanced towards the defendant the defendant backed off to where the pistol had been knocked from his hand, and picked up the pistol; that thereupon the defendant leveled the pistol upon Dickson, and said to him, "You must get down on your knees and apologize to me"; that Hill then said to the

defendant, "Don't shoot, the man is unarmed and has no pistol"; that Dickson refused to apologize, and the defendant immediately shot him; that as soon as the first shot was fired Dickson rushed upon the defendant, and grappled him, and immediately two or three shots were fired by the defendant; that Dickson fell upon the defendant, and held him with arms outstretched, until some one came and parted them; that Dickson received two wounds in the difficulty from the effects of one of which he died on June 19th. There was evidence introduced showing that there was ill-feeling between the defendant and the deceased which had existed for some time.

The defendant, as a witness in his own behalf, testified that when he called his friend Tuttle to come over to his table he heard the remark made by some one at the table near by, "Lend me a dollar," which he considered an insult, as being a sarcastic way of accounting for his calling Tuttle to his table, it being his purpose to borrow money from him; and thereupon he rose from the table, and asked the question as to "who made that crack," or "who made that statement"; that at that time he did not know that the deceased was in the pavilion, but that as soon as he rose from the table the deceased rose also with his pistol in his hand; that after his (the defendant's) pistol was knocked out of his hand he threw up his hands, and said to the deceased that he was not armed, and, calling him a cowardly cur, told him to shoot; that he did not see Hill or any one else take the pistol from the deceased, nor did he know that the pistol had been taken from him; that he (the defendant) retreated, and when he got to the place where his pistol was lying he picked it up for the purpose of defending himself against the deceased; that Hill was trying to prevent the deceased from getting to him, and that as the deceased passed by Hill, going towards him, and when he was within five or six feet of the defendant, the defendant fired upon him, believing that the deceased had a pistol; that the deceased then rushed upon him, and in the struggle the defendant fired two or three times. The defendant also testified that several days before the killing the deceased came to his office, in the custom house, in company with one Clayton; that upon going to his office the deceased asked the defendant to come out into the hallway, whereupon the defendant asked him to come in, saying that he was alone; that thereupon the said Dickson came into the defendant's office, and said to him that he understood that he (the defendant) had stated that Dickson's wife was not a fit person for his (the defendant's) wife to associate with; that the defendant denied making such statement, and immediately Dickson commenced to curse the defendant, and called him the vilest and most opprobrious epithet, and threatened to cut his throat. The defendant also testified that

on the next day after this occurrence, or the second day thereafter, the said Dickson again came to the custom house inquiring for the defendant, and said to the elevator man to tell the defendant that the defendant was "the s—n of a b—h," and that when he came home he (Dickson) would "shoot his d—d head off." There was also evidence introduced showing that David Dickson, the deceased, weighed about 160 to 180 pounds, was about 5 feet 10 inches tall, was a strongly built man, and that the defendant was a delicate man, about 5 feet 10½ inches tall, and weighed about 130 pounds. There was also evidence introduced tending to show that the defendant had married Dickson's sister, and that Dickson objected to such marriage, and made a violent protest against it. The defendant, as a witness in his own behalf, testified that the only objection Dickson had to defendant's marrying his sister was that he had not obtained the consent of his sister's mother, and that the defendant obtained the consent of the mother, and was married to his sister at Dickson's house.

Dr. Harry T. Inge was examined as an expert, and, after testifying that on the 16th day of June, 1901, David Dickson was brought to his sanatorium suffering from pistol-shot wounds, and that he died on June 19, 1901, then testified to the dying declaration which was made by Dickson after he had been told by the doctor that he was going to die. The doctor further testified that the dying declaration was taken down by a nurse at the sanatorium as it was made by Dickson. In testifying as to what the declaration was, he stated, on cross-examination, that his recollection was that Dickson said that "as soon as Mann saw him that Mann started towards him with a pistol, and he said he drew his pistol about the same time." Upon redirect examination the solicitor asked Dr. Inge "to refer to the typewritten statement of his evidence on the preliminary trial for the purpose of refreshing his recollection, and then to state whether or not the typewritten statement contained word for word the memoranda that the nurse took down as made by Dickson, and whether or not he remembered what Dickson did say as to whether or not Mann had his pistol out before he drew his." The defendant objected to this question because it was not in rebuttal. The court overruled the objection, and the defendant duly excepted. The witness answered that he would state that Dickson said as soon as Mann saw him Mann started towards him drawing his pistol.

During the examination of one John Hyde as a witness he testified that he never heard the defendant make any threat against the deceased within two or three months prior to the difficulty. Thereupon the solicitor asked the witness, "Did he (the defendant) ever talk with you about Dickson?" The defendant objected to this question, because it called for incompetent, irrelevant, and imma-

terial evidence. The court overruled the objection, and the defendant duly excepted. The witness answered, "Yes, he has spoke to me about Mr. Dickson." The solicitor then asked the witness the following question, "Did he ever say anything to you relative to the fuss they had in the custom house?" Upon the defendant objecting to this question upon the same ground, the solicitor requested the court to be permitted to lead the witness. In answer to this request, the court replied: "I will let you lead him. I think he is an unwilling witness." The defendant reserved an exception to this remark of the court, which was made in the presence of the jury.

One J. J. McAuley was examined as a witness in behalf of the state, and testified that he had seen the difficulty between the defendant and the deceased, and also testified to the circumstances of the difficulty. This witness testified that the defendant, after his pistol was knocked out of his hand, said to the witness: "Shoot, you coward; I don't believe you would shoot me." The solicitor then asked the witness the following question: "For the purpose of refreshing your recollection, I will ask you if on the preliminary examination you did not swear, in answer to the question of Mr. Robinson, that he said, 'Shoot, you God damn coward; I don't believe you would shoot.'" The defendant objected to this question, because it called for irrelevant, illegal, and incompetent evidence. Thereupon the court instructed the witness that he must not testify as to whether he swore to that fact upon the former trial, but if after refreshing his memory he could now remember it as a fact he could answer. The defendant excepted to the ruling of the court.

Upon the examination of George Wolfe as a witness for the state, he testified that he knew the deceased in his lifetime, and the defendant, Mann; that about eight days before the shooting at Monroe Park he had a conversation with Dickson in reference to the defendant Mann while Dickson was eating lunch. The defendant then asked the witness the following separate questions: "Just tell the jury how this conversation came up." "Mr. Wolfe, state to the jury what introduced this conversation, how it was started, and all about it." "Who started that conversation?" To each of these several questions the state separately objected, upon the ground that it called for irrelevant and immaterial evidence. The court sustained each of such objections, and to each of these rulings the defendant separately excepted. The witness then testified that Dickson told him about his going to the custom house, and calling Mann to account for what he had stated about Dickson's wife.

Upon the examination of George P. Tuttle as a witness by the defendant, he was asked the following questions: "Were you sum-

moned as a witness for the state or for the defendant?" "Were you summoned here in behalf of the defendant or by some one else?" The state objected to each of these questions, the court sustained each of such objections, and to each of these rulings the defendant separately excepted. The witness Tuttle testified to the circumstances of the difficulty between the defendant and the deceased at Monroe Park, and stated that after Mann recovered his pistol he demanded an apology. Thereupon counsel for the defendant asked the witness the following question: "How long a time elapsed between demanding the apology and the firing of the first shot; how many minutes?" The state objected to this question upon the ground that it assumed that some minutes elapsed. The court sustained the objection, and the defendant duly excepted. Counsel then asked, "How long was it?" and the witness answered, "A minute or two," he thought.

Upon the examination of Chas. B. Mann, the defendant, as a witness in his own behalf, he testified that he was 23 years old on the 29th day of June, 1901, that he was 5 feet 10½ inches tall, and weighed about 130 pounds. The defendant as a witness was asked the following questions: "Was your work of a severe nature, or was it clerical work?" "Mr. Mann, I will ask you if you did any outdoor work, or was your work entirely indoors?" "I will ask you if your work was of such a character as to harden your physical condition or otherwise?" "Did you take any outdoor exercise of any character beyond the ordinary walking to and fro incident to your business?" The state objected to each of these questions upon the ground that they called for irrelevant, immaterial, and illegal evidence. The court sustained each of the objections, and to each of these rulings the defendant duly excepted. Counsel for the defendant then asked the defendant the following questions: "How long had you lived in Mobile at the time of the killing?" "Where did you live before you came to Mobile?" "How long after you came to Mobile was it that you met Mr. Dickson?" "At what place in Mobile were you married?" The state objected to each of these questions upon the ground that it called for illegal and irrelevant evidence, the court sustained each of the objections, and the defendant separately excepted to each of such rulings. The defendant testified that during the few months he lived in Mobile he heard a great many remarks derogatory of his character. Thereupon counsel for defendant asked him the following questions: "In consequence of that did you say anything to your wife about going with Dickson and his wife, or staying away from them, or anything of that character?" "Did you or not on that account raise any objection to your wife going with Dickson and his wife?" The state objected to each of these questions, the court sustained the objection,

and the defendant duly excepted. The defendant then testified that he did undertake to prevent his wife from going with Dickson and his wife, and then testified to the difficulty between Dickson and him in the defendant's office at the custom house. After the defendant had testified that when he called upon his friend Tuttle, and asked him to come over to his table, that the remark, "Lend me a dollar," was then made, and it seemed to him that it was in a sarcastic tone, clearly insinuating that he called Tuttle to borrow a dollar from him, and that he then got up and asked, "Who made that remark?" the solicitor then asked the defendant the following question: "This party merely said, 'Lend me a dollar,' and why should you have thought that this remark was intended for you?" The defendant objected to this question upon the ground that it called for irrelevant, immaterial, and incompetent evidence, and for the uncommunicated thoughts of the witness. The court overruled the objection, and the defendant duly excepted. The witness answered that the remark was made after the second request for Tuttle to come over, and, inasmuch as it came from the direction where Tuttle was sitting, he naturally concluded such was the motive. After the defendant had detailed the circumstances of the shooting, and had stated that Dickson began to shove Hill and advance on the defendant, and that he (the defendant) then retreated, and went back to where the pistol was slapped from his hand and picked it up, the solicitor asked the defendant the following question: "Didn't you go over there with the purpose in your mind of getting that pistol, and going back and making Dickson apologize?" The defendant objected to this question, upon the ground that it called for irrelevant and immaterial evidence, and duly excepted to the court overruling his motion. The witness answered that he went over there to get his pistol to put himself on an equal footing with the deceased, and that he wanted him to apologize. On the redirect examination of the defendant as a witness he was asked by his counsel the following questions: "Was there or did you see any reasonable method of escape around that ladies' pavilion, without exposing yourself to great danger, taking all of the surrounding circumstances into consideration?" "As a matter of fact was or not there any safe method by which you could retreat without exposing yourself to being shot at by Dickson?" "Could you under the existing facts, believing, as you say you did, that he was armed, have escaped without increasing your danger?" "Had you or not at that time exhausted every avenue of escape?" "How far altogether had you retreated at that time?" "Did you then think or believe that Dickson was in a position to shoot you unless you had a pistol?" The state objected to each of these questions, the court sustained each of the objections, and to each of these rulings the defendant separately

excepted. The counsel for the defendant then asked him the following question: "When you picked up your pistol off the ground, and moved around that way, had that difficulty ended or was it still continuing?" The state objected to this question, the court sustained the objection, and to this ruling the defendant duly excepted. In rebuttal the state, against the objection and exception of the defendant, offered in evidence the diagram of the defendant's office, which was made by the defendant while on the stand.

Hon. W. S. Anderson testified in rebuttal that he heard the case on habeas corpus, and that the defendant testified upon that hearing freely and voluntarily, without threats or inducement. The solicitor then asked, "What did Mr. Mann say that he meant by that statement when he told Dickson to get down on his knees and apologize?" The defendant objected to this question because no sufficient predicate had been laid thereof, and because it is irrelevant, immaterial, incompetent, and illegal, and because it is not in rebuttal. The court overruled the objection, and the defendant excepted. The witness answered: "He wanted him to apologize. He said he referred to the insults he had given him in his office at the custom house, to the insulting language he had applied to him to a negro, and to the insults he had given him at Monroe Park, in backing him back with his pistol." The defendant moved to rule out the testimony on the ground stated in the objection to the question, the court overruled the motion, and the defendant excepted. The solicitor then asked the witness: "Judge, in reference to the shooting, what did he say, if anything, about how many shots he fired, and whether or not they were all fired at Dickson, or whether or not some of them were fired into the air, and, if so, his reasons for doing that?" The defendant objected to the question on the grounds stated in the last objection. The court overruled the objection, and the defendant excepted. The witness answered: "I don't remember distinctly how many times he said he fired, but I do remember he said as he was going down he fired a shot in the air, or made an effort to empty his pistol, so as to keep Dickson from getting it. That he tried to empty his pistol by firing it off." The state thereupon closed the case, and counsel proceeded with the argument of the case.

During the course of the argument the solicitor said: "Mann has denied that Dickson said at the custom house that he did not want Mann to marry his sister on account of their short acquaintance, and because of his reputation for drinking." The defendant objected to the argument, because there was no evidence upon which to base the same. The court said that the question had been asked the witness Mann, that he had replied in the negative, and that the solicitor had the right to make the argument. The defendant excepted to the ruling of the court.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked:

"(8) The law gives to every one the right to kill in self-defense, in every case where the one who does the killing is not at fault in bringing about the fatal difficulty; and if you find from the evidence in this case that Charles B. Mann was not at fault in bringing about the difficulty with Dickson, and further find that he probably believed that it was necessary to shoot Dickson in order to protect his own life, then it is your duty to acquit Charles Mann."

"(16) The place where the killing occurred, and the fact that women and children were near by, cannot and must not be considered by you at all. All you can consider are the circumstances of the killing, just as those circumstances have been related by witnesses, and if the statements of those circumstances have left your minds in confusion and doubt, so that you cannot say to a moral certainty who provoked the difficulty and whether the defendant shot in self-defense when he killed the deceased, then it is your duty to give the defendant the benefit of your confusion and doubt, and acquit him.

"(17) If, after weighing all the evidence, you can say beyond a reasonable doubt which is the heavier, that for the state or that for the defendant, then it is your duty to acquit the defendant.

"(18) If the evidence for the state shows that the defendant is guilty, but the evidence for the defendant shows equally that he is not guilty, and you so find, this would leave your minds in equipoise, and it would be your duty to acquit the defendant."

"(26) The court charges the jury that a probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal; and if from all the evidence in this case they believe the defendant's account of this transaction is the correct one, and that his conduct at the shooting measured up to the standard of self-defense which the law requires, it is the duty of the jury to acquit him."

"(29) It is not necessary that there should be actual danger of death or of great bodily harm in order to justify the taking of human life; but if the jury are satisfied from the evidence in the case that the circumstances attending the firing of the fatal shot were such as to impress the defendant with the reasonable belief that at the time of the firing of said shot it was necessary in order to prevent death or great bodily harm to his person, then the jury must acquit the defendant, unless they further believe that the defendant was not free from fault in bringing on the difficulty.

"(30) I charge you that if previous threats of the deceased had been communicated to

the defendant, and if these threats, in connection with the actual conduct of the deceased at the time of the shooting, generated in the mind of defendant a reasonable belief that he was in danger of death or of serious bodily harm, then the defendant had the right to act upon these appearances, providing he was not the aggressor in the difficulty."

"(33) The jury alone are to determine the credibility of witnesses and the weight to which their testimony is entitled. In passing upon the truth or falsity of the witness' testimony, the jury may weigh it in the light of human nature and affairs. If after applying the test of reason and probability, and considering all the testimony in the case, the jury are of the opinion from the evidence that the defendant acted in self-defense as defined by law, it is the duty of the jury to find him not guilty."

"(38) Unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, they must acquit him."

"(41) The defendant is authorized under the statute to testify in his own behalf, and the jury have the right to give full credit to his own statements. If in this case the testimony of the defendant is sufficient to raise a reasonable doubt in the minds of the jury as to whether or not he acted in self-defense as charged upon by the court, it is the duty of the jury to acquit him."

"(46) I charge you that you should not hesitate to acquit the defendant if you find that the evidence for the state is probably no stronger than the evidence for the defendant.

"(47) I charge you that you should not hesitate to acquit the defendant if you find that the evidence of the defendant is probably as strong as the evidence for the state."

"(51) The court charges the jury that one is justified in taking the life of another if at the time there reasonably appeared to be present, impending, imperious necessity so to do, provided he is free from fault in bringing on the difficulty. (a) If from all the evidence in this case you find that the defendant is not guilty, provided he did not know that Dickson was unarmed, then you must acquit the defendant if you find that Dickson was powerful enough to have done the defendant serious bodily harm with his hands or fists, and that the defendant knew his power. (b) I charge you, gentlemen of the jury, if you believe from the evidence in this case that David Dickson was powerful enough to have inflicted serious bodily harm upon the defendant with his hands or fists, and that the defendant knew that fact, and further find that the defendant was free from fault in bringing on the difficulty, and that he was convinced by reasonable circumstances that David Dickson then and there intended to do

him serious bodily harm, then you must find the defendant not guilty, even though he may have known that Dickson was not armed."

McAlpine & Robinson, for appellant.
Chas. G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. It was within the un-revisable discretion of the city court to allow the solicitor to interrogate the venireman George Stewart as shown by the record.

It is difficult to conceive upon what ground an objection to the opening statement of the solicitor, as to what he expects the evidence will show, can be predicated. Issue cannot be taken upon the existence of his expectations in that regard. It cannot be asserted in any way that we know of either that he does not expect this or that testimony to be forthcoming, or that, though he believes this or that testimony to be in existence, he does not expect the court will receive it in evidence. He is not confined to foreshadowing testimony which he knows the court will receive, for he cannot thus forestall or be required to anticipate the court's judgment, but he may in this way state to the jury the case as he proposes and expects to present it to them on the evidence. At most, these preliminary statements, when resorted to in our practice,—and whether resorted to to at all or not in any case is within the election of counsel,—are tentative, and intended to give the jury a general grasp of the case, that they may be the better able to understand and apply the facts as they are developed in the course of the trial, and they constitute no evidence of the facts nor in any sense take the place of evidence. That part of the statement of the solicitor in this case to which objection was made, moreover, would be unobjectionable even were it conceded that such statements are open to challenge in this way. The facts which the solicitor stated he expected to prove were in rebuttal of the line of defense set forth in the preliminary statement of defendant's counsel, and evidence of them was actually and properly received on the trial. The court committed no error in declining to "rule out" the solicitor's statement, which the judge did in terms, but at the same time said that he would instruct the jury to "pay no attention to statements of counsel." It is proper to remark that this declaration was too favorable to defendant. The presiding judge doubtless intended to instruct the jury to pay no attention to the statements as evidence; for, of course, it was their duty to be attentive to these statements as statements of counsel going to show what they expected the evidence to be.

There is no merit in the exception reserved on the redirect examination of the witness Inge. The only objection to the question was that the evidence called for was not in rebuttal. This objection—as also that the question

was leading which is urged in argument, but not made at the time—was addressed to the discretion of the trial court.

The witness Hyde, the trial court thought,—and doubtless correctly,—was an unwilling witness. The judge was well within the range of his discretion, therefore, in allowing the solicitor to lead him; and of course the judge had the right to state the ground upon which he allowed leading questions to be propounded to him, viz., that in his opinion the witness was an unwilling witness. All the questions asked this witness relative to a former trouble between the defendant and the deceased seem to have been necessary to get out of him what the former had said in the nature of threats against the latter.

We are unable to see that the court erred in allowing the solicitor to ask the witness McAuley solely for the purpose of refreshing the latter's memory whether he had not testified to certain facts on the preliminary trial of the defendant. This is a recognized and often resorted to mode of refreshing the memory of witnesses.

It is entirely clear from the bill of exceptions that the defense drew from the witness Wolfe every fact within his knowledge having any pertinent and legal bearing on the case; and it is of no consequence that the court did not allow him to answer questions as to how a certain conversation between him and Dickson, the deceased, "came up," "what introduced this conversation," etc., or to testify that Dickson told him that it was a mistake about Mann's shooting his (Mann's) wife, etc.

It has been decided several times recently by this court that the failure of a party to introduce a witness affords no ground for any argument or inference unfavorable to such party, and the fact that the witness has been subpoenaed by that party and is in attendance can make no difference in this connection. Hence it was wholly immaterial in this case whether the witness Tuttle, who was in attendance but who was not introduced by the state, had been subpoenaed for the prosecution or not.

It will suffice to say in approval of the court's action upon the question to the witness Tuttle, "How long a time elapsed between the demanding of an apology and the firing of the first shot,—how many minutes?" that it assumes that minutes elapsed, when it is probable on the whole evidence that less than one minute elapsed.

There was abundant evidence in the case going to show that Dickson was a strong, powerful man physically, and that Mann was weak and delicate, and this was not questioned. There was, therefore, neither occasion nor excuse for going into an inquiry as to how it came to pass that Mann was not robust and strenuous; as, for instance, that he had led a sedentary life, that he had not taken much outdoor exercise, that his work

was not such as to harden his muscles, that he had lung trouble, etc.

The length of time Mann had lived in Mobile, the place of his residence before he came to Mobile, the length of time which elapsed after he came to Mobile before he met Dickson, and the place of his marriage in Mobile, were facts of no pertinency to any issue in the case. The same is true in respect of the proposed testimony of Mann that, in consequence of remarks derogatory of his character having come to him, he said something to his wife "about going with Dickson and his wife, or staying away from them, or something of that character," etc.; but all this was brought out in the further examination of the defendant as a witness in his own behalf.

The questions by the solicitor to the defendant as a witness on cross-examination as to why he thought the remark, "Lend me a dollar," was addressed to him, and whether he did not go for his pistol with the purpose of getting it and coming back and making Dickson apologize, etc., were proper under repeated decisions of this court.

It was not for the defendant to testify to his opinion or conclusion that there was no "reasonable method of escape without exposing himself to great danger, taking all the surrounding circumstances into consideration"; that as "matter of fact there was not any safe method by which he could have retreated without exposing himself to being shot at by Dickson"; "that under existing facts, believing, as he had said he did believe, that Dickson was armed, he could not have escaped without increasing his danger"; and that "if he had turned his back Dickson would have had an opportunity to shoot him." These were issues to be tried by the jury, and not for the determination of the defendant for them. It was their province, and not his as a witness, to draw conclusions from the facts in this connection.

The distance that Mann had "retreated" had been testified to several times by him, and there was neither injury nor error in the ruling of the court on the question, "How far altogether had you retreated at that time?" asked the defendant on the redirect examination of him as a witness, if, indeed, the court made any ruling upon it.

The question, "When you picked up your pistol off the ground and moved around that way, had that difficulty ended, or was it still continuing?" called for an opinion or conclusion of the witness Mann, and was properly disallowed. He immediately after stated the facts in this connection, or what he testified to be the facts.

The testimony of the witness W. S. Anderson to the effect that Mann, the defendant, had testified on his preliminary trial that when he (defendant), just before the shooting, demanded of Dickson that he apologize to him, the apology required was for the "in-

sults Dickson had given him in his office at the custom house, for the insulting language Dickson had applied to him in speaking to a negro, and for the insults Dickson had given him at Monroe Park in backing him with a pistol," tended to show malice, premeditation, and formed design on the part of the defendant, fault in following up the difficulty at Monroe Park, and that he shot Dickson, not in self-defense, but in redress of these insults, for which Dickson failed to apologize on his demand, and was therefore admissible. If it had not been in rebuttal, it would have been none the less within the discretion of the court to receive it; but it was in rebuttal of that tendency of defendant's own testimony to show that in making the demand for an apology he had reference to the insult which Dickson had on that occasion put on him, and not previous ones.

The further testimony of this witness as to what Mann had testified on the preliminary hearing as to his making an effort to empty his pistol in the air to keep Dickson from using the weapon on him went in rebuttal of Mann's testimony on this trial, and the theory of the defense, that he acted all along on the belief that Dickson had a pistol, and to support the theory of the prosecution that at the time of the fatal shot Mann knew that Dickson was unarmed, and for these purposes was competent.

It is not conceivable that the introduction in evidence by the state of the diagram of his office at the custom house made by defendant while he was being examined as a witness could have prejudiced the defendant; and, whether it did or not, the diagram was in the nature of an admission freely made by him, and competent evidence on the trial.

The defendant as a witness had denied, in effect, "that Dickson said at the custom house that he did not want Mann to marry his sister on account of their short acquaintance, and because of his reputation for drinking," and there could be no legal objection to the solicitor stating to the jury the fact of such denial.

To charge a jury that a man has the right to kill in self-defense, without instructing them as to the constituents of self-defense, is to submit to them a question of law, and such a charge should not be given. This was ruled in *Miller v. State*, 107 Ala. 40, 19 South. 87, and has been often reaffirmed. Charges 8, 16, 26, 33, and 41, refused to the defendant, each had this infirmity.

Charge 8 was bad for the further reason that it would have authorized an acquittal on the ground of self-defense though the jury might have found that Mann could have retreated without increasing his peril, or even in absolute safety; and upon the yet further consideration, apart from others, that a probable belief that a necessity to kill exists is not sufficient. The actor must believe that the danger is imminent and actual to life or

member, and the facts must be such as import that such danger is real, that it must be real, or it must reasonably appear so.

Charge 16 is bad for the farther reasons that its first sentence is an argument; that it is misleading in confining the jury to the circumstances of the killing when there was evidence of a previous difficulty and of antecedent threats; that it pretermits the doctrine of retreat; that it requires an acquittal unless the jury should believe to a moral certainty that the defendant provoked the difficulty when there was abundant justification for a verdict of guilty whether he provoked the difficulty or not, and perhaps for other reasons.

Charge 26 has at least one infirmity other than that common to it and charges 8, 16, 33, and 41: The defendant was by no means entitled to an acquittal on his own "account of the transaction."

Charge 29 pretermits all reference to the duty of retreat where retreat will not increase the peril, as does also charge 30.

Charge 38 is in the language of a charge that was at one time approved by this court, but that decision has been departed from, and charges in this language have recently been several times held bad.

Charge 41 was open to the further objection that it authorized an acquittal on a reasonable doubt engendered by the testimony of the defendant, when such doubt may have been entirely allayed and removed by the other evidence in the case. Moreover, the charge is in its first proposition a mere argument.

Charges 17 and 18 were properly refused. The jury was under no duty to weigh the evidence for the state and for the defense separately, and then the one against the other, and find which was "the heavier," nor to consider the evidence for the state separately; and, finding that it showed the defendant guilty, then to consider the evidence for the defense separately; and, finding that it equally showed the defendant not guilty, to acquit him; but their whole duty was to consider all the evidence before them, and upon it to say whether or not the defendant was guilty beyond a reasonable doubt. The effect of those charges would have been only to inject confusing and improper issues into the case. Charges 46 and 47 are of the same character; and they, as well as 17 and 18, when referred to the evidence, are each bad upon the further consideration that whatever in a sense may have been the heftiness or strength of the evidence "for the defendant" or "of the defendant," and however thoroughly the jury might have been convinced of its truth, it was yet open to them to find the defendant guilty, his own testimony affording the jury abundant ground to find that he at one time retired from the difficulty for the purpose of arming himself, and, having accomplished this, voluntarily re-entered upon it.

Charges 51 (a) and (b) have many faults,

but it will suffice to advert to their pretermision of all reference to the doctrine of retreat.

Affirmed.

LIGHTMAN v. BOYD.

(Supreme Court of Alabama. June 28, 1902.)

DETINUE—TITLE OF DEFENDANT—GOODS PROCURED BY FRAUD—BARTER—TITLE.

1. A thief traded a mare stolen by him for a gray horse, and then traded the gray horse to plaintiff for a black horse. Thereafter one acquiring the black horse at execution sale sold it to defendant for value. *Held*, in detinue, that the horse traded to plaintiff not having been stolen, title to the horses in that trade passed, as the parties intended, and hence defendant had title.

Appeal from circuit court, Madison county; Osceola Kyle, Judge.

Action by P. S. Boyd against S. S. Lightman. From a judgment for plaintiff, defendant appeals. Reversed.

Cooper & Foster, for appellant. S. S. Pleasants and Douglass Taylor, for appellee.

HARALSON, J. In *Leigh v. Railroad Co.*, 58 Ala. 165, where the general rule is stated, "that in the absence of authority, or of property, a sale or pledge of chattels, confers no title, even when the person making it is in possession, and the person to whom it is made pays a valuable consideration, or advances money in good faith, and without notice of the right or title of the true owner," it is said, there are cases recognized as exceptions to this rule, one of which is—"where the owner, with the intention of sale, parts with the property, though under such circumstances of fraud as would authorize him to reclaim it from the vendee. In this class of cases it is accurately said: 'We must distinguish whether the facts show a sale to the party guilty of the fraud, or a mere delivery of the goods into his possession, induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in and the possession of the goods to the person guilty of the fraud, or deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case.' Benj. Sales (1st Am. Ed.) 319."

In *Moore v. Robinson*, 62 Ala. 537, it is again said: "As a general rule, the title of property, like the flow of a stream, cannot rise higher than its source, and so, one not the owner, and not having authority therefor, conferred by the owner, cannot sell or make a valid pledge of property. *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. (7th Am. Ed.) pt. 2, p. 1192 et seq. A different rule prevails, if the seller have a title, even though acquired by fraud. A bona fide purchaser for value from such fraudulent holder of the title, without notice of the fraud, will be protected."

grounds, that the money in its hands was not the money of plaintiff, and she has no right to sue for and collect the same, in any event; and that, the money paid to the justice of the peace in said garnishment proceeding, and the costs paid to the clerk of the United States court, in said bankruptcy proceeding, constitute a discharge of liability for said fund. But this defense cannot avail it. To protect it, the fund must have been paid on a judgment in garnishment rendered against it, or, as against the garnisher, that it was paid with her consent. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Ross v. Pitts*, 39 Ala. 306; 8 Am. & Eng. Enc. Law, 1197.

It is true, that when said R. W. Anderson deposited the money in bank to his individual credit, that fact, without more, showed, prima facie, that it belonged to him, but not conclusively so. If it really belonged to plaintiff, the fact that her husband, to whom she intrusted it, to be kept for her, deposited it in bank to his own credit, did not change her title to it. That it did belong to her, he and she both swear, and he, that he so notified the bank at the time he made the deposit, and there is no evidence to the contrary. It is also undisputed, that after the writ of garnishment was served, and before the garnishee answered, garnishee was notified that plaintiff claimed \$370 of the fund in its hand. It was the duty of the garnishee in making answer, to make known that it had been notified that plaintiff claimed the fund or a part of it in its hands, and if it failed and paid after notice of such claim, it did so at its peril. Such failure precluded plaintiff from asserting her claim to the fund in the justice's court. *Saller v. Insurance Co.*, 62 Ala. 221; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Woodlawn v. Purvis*, 108 Ala. 513, 18 South. 530.

The mere fact that the trial judge did not mark "Given," on a charge which was requested by plaintiff and which was given, is not reversible error. The defendant did not direct the attention of the court to the failure, and took no exception at the time. For aught appearing, the failure of the judge to so mark the charge, was a mere inadvertence. *Barnewell v. Murrell*, 108 Ala. 366, 18 South. 831.

Affirmed.

KANSAS CITY, M. & B. R. CO. v. CHILDERS.

(Supreme Court of Alabama. June 28, 1902.)
RAILROADS—INJURIES TO ANIMALS—NEGLIGENCE.

1. Where the evidence in an action for the killing of a cow on defendant's road showed that the track east of where the cow was found was straight for at least a quarter of a mile, and that there was a curve about 200 yards west of that point, the general charge for defendant was properly refused, as the jury might have found that the engineer, by the exercise of due diligence, might have seen the cow in time to avoid killing her.

Appeal from circuit court, Walker county;
A. A. Coleman, Judge.

Action by W. A. Childers against the Kansas City, Memphis & Birmingham Railroad Company for the killing of a cow. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee against the appellant, to recover damages for the alleged negligent killing of a cow. Issue was joined upon the plea of the general issue. The plaintiff proved the ownership of the cow killed.

The evidence tending to show negligence on the part of the defendant is set forth in the opinion.

The defendant requested the court to give to the jury the following written charges, and duly excepted to the court's refusal to give the same as asked: "If the jury believe the evidence in this case, they must find for the defendant."

There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the refusal of the court to give the charge requested by it.

Walker, Tillman, Campbell & Porter and Nesmith & Nesmith, for appellant. M. L. Leith and D. A. McGregor, for appellee.

HARALSON, J. The proof on the part of the plaintiff tended to show, that the cow was killed by a train on defendant's road running from east to west; that the track of the road east of where she was found, was straight for at least a quarter of a mile, and that there was a curve in the road about 200 yards west of that point. If this was true, in view of the fact that persons running a train are charged with the duty of keeping a lookout for animals and using diligent efforts to avoid injuring them, the character of the road, at and on each side of the place of the accident, left it open to the jury to infer, that by the exercise of due diligence on the part of the engineer, the animal might have been seen in time to avoid killing her. In such a state of case, it cannot properly be affirmed, that there was no evidence tending to show negligence on the part of those operating the train. *Railroad Co. v. Boyd*, 124 Ala. 525, 27 South. 408; *Railroad Co. v. Davis*, 103 Ala. 661, 16 South. 10; *Same v. Gentry*, 103 Ala. 635, 16 South. 9. The general charge for defendant was properly refused.

Affirmed.

BENNEFIELD v. STATE.

(Supreme Court of Alabama. June 28, 1902.)
WITNESSES—IMPEACHMENT.

1. Where a prosecution for giving intoxicating liquor to a minor was instituted by him, and he is the only witness against defendant, he, though testifying that he is friendly to defendant, may be asked whether his father is friendly to defendant.

Appeal from Cleburne county court; T. J. Burton, Judge.

ness, it was open to the jury to infer gross negligence on the part of the conductor. The court was not authorized, therefore, to take this question from them. There was no error in refusing the charges requested by defendant.

A motion was made for a new trial on the ground, among others, that the damages awarded were excessive. It was refused. We do not feel authorized, under the facts of the case, to set the judgment aside on that ground.

Affirmed.

BESSEMER SAV. BANK v. ANDERSON.

(Supreme Court of Alabama. June 28, 1902.)

GARNISHMENT—CLAIM BY THIRD PARTY—NOTICE—BANK DEPOSIT—PRESUMPTION OF OWNERSHIP—MARKING OF INSTRUCTIONS—REVERSIBLE ERROR.

1. In an action against a bank for money claimed by plaintiff to have been deposited by her husband for her benefit, a defense that the money was paid to a justice of the peace in garnishment proceedings in an action against the husband was not good, where no judgment in garnishment was rendered, or consent of the owner to such payment obtained.

2. The fact that money is deposited in a bank to the individual credit of the depositor shows, *prima facie*, that it belonged to him, but not conclusively so.

3. Where a bank had been notified after garnishment that the moneys belonged to a third party, and failed to aver such notice in its answer, a subsequent payment of the fund to the justice is no defense in an action by the third party.

4. The mere fact that the trial judge did not mark "Given" on a charge which was requested by plaintiff and given was not reversible error, where defendant did not direct the attention of the court to the failure, and took no exception at the time.

Appeal from city court of Bessemér; James Trotter, Special Judge.

Action by M. E. Anderson against the Bessemer Savings Bank. Judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

Upon the introduction of all the evidence, the court at the request of the plaintiff gave the general affirmative charge in her behalf. To the giving of this charge the defendant duly excepted.

There were verdict and judgment for the plaintiff. Thereafter the defendant moved the court to grant it a new trial, upon the grounds that the verdict was contrary to the law and the evidence, that the court erred in giving the general affirmative charge in favor of the plaintiff, and "because the charge given the jury was not signed by the judge and marked 'Given' as required by law." This motion was overruled, and the defendant excepted.

Pinkney Scott, for appellant. Ward & Drennen, for appellee.

HARALSON, J. R. W. Anderson was sued in the justice's court March 28, 1900, by J. H. Johnson, and judgment was rendered against him therein March 31, 1900, in favor of the plaintiff, for \$57.51. To collect this debt, the plaintiff garnished the Bessemer Savings Bank. The garnishee, on April 5, 1900, appeared on summons, and answered an indebtedness of \$410. It did not set up in its answer, that the plaintiff in this suit, claimed said fund. The proof, on the part of plaintiff showed, without dispute, that the garnishee was notified by the defendant, R. W. Anderson, and by the plaintiff, before it made answer to the garnishment writ, that \$370 of the fund garnished belonged to the plaintiff. The garnishee, according to plaintiff's evidence, afterwards paid \$310 to the plaintiff, leaving in its hands \$60, which plaintiff claimed, and which this suit is brought to recover. The proof also showed, without conflict, that the money in the hands of the bank, had been deposited therein, by R. W. Anderson to his individual credit, but he and the plaintiff, his wife, both testified, and there is no proof to the contrary, that the money belonged to the plaintiff; and the proof also shows without dispute, that when said R. W. Anderson made the deposits, he informed the cashier, that the funds belonged to the plaintiff, except \$40 of it.

It was also shown that proceedings in bankruptcy had been instituted in the United States bankrupt court against said R. W. Anderson, but that the same had been dismissed by the order of that court, on the 7th July, 1900, at said Anderson's cost. The proof also tends to show, that these costs, amounting to \$40.15, were paid to the clerk of that court by the garnishee, on the 12th July, 1900, but it is not shown that the same were paid by any judgment against the garnishee, nor by the order of said R. W. Anderson. It further appears, that the garnishee paid to the justice of the peace in said garnishment proceeding against it, on the 10th July, 1900, the sum of \$59.85, these two amounts making \$410, the sum admitted by garnishee to be in its hands belonging to said defendant R. W. Anderson, but it appears, that no judgment in said justice's court had been rendered against garnishee for that, or any other sum, nor did it appear, that the same was paid with the knowledge, or by the direction of the plaintiff, but the same was a voluntary payment so far as is made to appear.

The plaintiff's evidence tended to show, that the \$310 paid by the garnishee, after garnishment, out of the deposits made by defendant, was paid to plaintiff. The president of the garnished bank testified, that it was paid to the husband of the plaintiff. But this is immaterial. There was left in the hands of the garnishee, without any question, the sum of \$60, claimed by the plaintiff, and here sued for. The garnishee admitted that it had \$410 in its hands deposited there by defendant, and seeks to defend this suit on the

¶ 3. See Garnishment, vol. 24, Cent. Dig. §§ 261, 397, 404, 452.

grounds, that the money in its hands was not the money of plaintiff, and she has no right to sue for and collect the same, in any event; and that, the money paid to the justice of the peace in said garnishment proceeding, and the costs paid to the clerk of the United States court, in said bankruptcy proceeding, constitute a discharge of liability for said fund. But this defense cannot avail it. To protect it, the fund must have been paid on a judgment in garnishment rendered against it, or, as against the garnisher, that it was paid with her consent. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Ross v. Pitts*, 39 Ala. 306; 8 Am. & Eng. Enc. Law, 1197.

It is true, that when said R. W. Anderson deposited the money in bank to his individual credit, that fact, without more, showed, prima facie, that it belonged to him, but not conclusively so. If it really belonged to plaintiff, the fact that her husband, to whom she entrusted it, to be kept for her, deposited it in bank to his own credit, did not change her title to it. That it did belong to her, he and she both swear, and he, that he so notified the bank at the time he made the deposit, and there is no evidence to the contrary. It is also undisputed, that after the writ of garnishment was served, and before the garnishee answered, garnishee was notified that plaintiff claimed \$370 of the fund in its hand. It was the duty of the garnishee in making answer, to make known that it had been notified that plaintiff claimed the fund or a part of it in its hands, and if it failed and paid after notice of such claim, it did so at its peril. Such failure precluded plaintiff from asserting her claim to the fund in the justice's court. *Saller v. Insurance Co.*, 62 Ala. 221; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Woodlawn v. Purvis*, 108 Ala. 513, 18 South. 530.

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(Supreme Court of Alabama. June 28, 1902.)
RAILROADS—INJURIES TO ANIMALS—NEGLIGENCE.

1. Where the evidence in an action for the killing of a cow on defendant's road showed that the track east of where the cow was found was straight for at least a quarter of a mile, and that there was a curve about 200 yards west of that point, the general charge for defendant was properly refused, as the jury might have found that the engineer, by the exercise of due diligence, might have seen the cow in time to avoid killing her.

Appeal from circuit court, Walker county;
A. A. Coleman, Judge.

Action by W. A. Childers against the Kansas City, Memphis & Birmingham Railroad Company for the killing of a cow. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee against the appellant, to recover damages for the alleged negligent killing of a cow. Issue was joined upon the plea of the general issue. The plaintiff proved the ownership of the cow killed.

The evidence tending to show negligence on the part of the defendant is set forth in the opinion.

The defendant requested the court to give to the jury the following written charges, and duly excepted to the court's refusal to give the same as asked: "If the jury believe the evidence in this case, they must find for the defendant."

There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the refusal of the court to give the charge requested by it.

Walker, Tillman, Campbell & Porter and Nesmith & Nesmith, for appellant. M. L. Leith and D. A. McGregor, for appellee.

HARALSON, J. The proof on the part of the plaintiff tended to show, that the cow was killed by a train on defendant's road running from east to west; that the track of the road east of where she was found, was straight for at least a quarter of a mile, and that there was a curve in the road about 200 yards west of that point. If this was true, in view of the fact that persons running a train are charged with the duty of keeping a lookout for animals and using diligent efforts to avoid injuring them, the character of the road, at and on each side of the place of the accident, left it open to the jury to infer, that by the exercise of due diligence on the part of the engineer, the animal might have been seen in time to avoid killing her. In such a state of case, it cannot properly be affirmed, that there was no evidence tending to show negligence on the part of those operating the train. *Railroad Co. v. Boyd*, 124 Ala. 525, 27 South. 408; *Railroad Co. v. Davis*, 103 Ala. 661, 16 South. 10; *Same v. Gentry*, 103 Ala. 635, 16 South. 9. The general charge for defendant was properly refused.

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BENNEFIELD v. STATE.

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WITNESSES—IMPEACHMENT.

1. Where a prosecution for giving intoxicating liquor to a minor was instituted by him, and he is the only witness against defendant, he, though testifying that he is friendly to defendant, may be asked whether his father is friendly to defendant.

Appeal from Cleburne county court; T. J. Burton, Judge.

Charles Bennefeld was convicted of giving intoxicating liquor to a minor, and appeals. Reversed.

On the trial of the case, Marvin Farlow testified that he was 17 years old; that a short time before he made the affidavit under which this prosecution was commenced, the defendant gave him, while he was at the defendant's house, a drink of whisky. Upon the cross-examination of said Farlow, and after he had testified that his feelings towards the defendant were friendly, he was asked the following question: "What is the feeling of your father towards the defendant, friendly or unfriendly?" The state objected to this question, the court sustained the objection, and the defendant duly excepted.

Merrill & Merrill, for appellant. Chas. G. Brown, Atty. Gen., for the State.

MCCLELLAN, C. J. On the authority of *Lodge v. State*, 122 Ala. 97, 28 South. 210, 82 Am. St. Rep. 23, it must be held that the trial court erred in sustaining the solicitor's objection to the question: "What is the feeling of your father towards the defendant, friendly or unfriendly?" propounded by defendant to the state's witness Marvin Farlow, the witness being a minor. The charge was giving whisky to this minor, and he was the only witness for the state on the trial. He testified that he himself was friendly to the defendant, and yet he made the affidavit for the warrant against the defendant, charging him with a crime for an act which seems to have been one of mere hospitality in defendant's own house. The defendant himself was the only witness in his behalf, and he positively denied giving the witness any whisky at any time. The case seems to illustrate the soundness of the doctrine declared in *Lodge's Case*, and to call for its application here.

Reversed and remanded.

HELENA COAL CO. et al. v. SIBLEY.

(Supreme Court of Alabama. June 28, 1902.)

JUDICIAL SALES—SUIT TO SET ASIDE—GROUNDS—INADEQUACY OF PRICE—FRAUD AND SURPRISE—ESTOPPEL—CREDITOR'S CONDUCT AT SALE.

1. When at a judicial sale the property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there is some unfair practice at the sale, or some surprise not attributable to the fault of the parties interested.

2. Where a creditor attends the sale of his debtor's property, made under order of court, by the assignee in insolvency of such debtor, but refuses to bid after being invited so to do, and gives public notice, before any bids are offered, that a petition in bankruptcy has been filed against the debtor, and that the title of the purchaser from the assignee will be affected thereby, he cannot thereafter maintain a suit to set the sale aside for inadequacy of price, on the ground of surprise, accident, or mistake; his own conduct having tended to produce the result of which he complains.

Appeal from city court of Birmingham; Charles A. Senn, Judge.

Creditors' bill by Charles S. Sibley against the Helena Coal Company and others. From a decree overruling exceptions to the commissioner's report of sale of defendant coal company's property, and confirming such sale, F. J. McNamara, for himself and other creditors, appeals. Affirmed.

On October 20, 1900, the appellee Charles S. Sibley filed a general creditors' bill in the city court of Birmingham against the Helena Coal Company, Sibley P. King, F. J. McNamara, L. T. Brasswell, W. T. Johnson, and W. F. McNamara, to administer a trust under a general assignment for the benefit of creditors. The bill alleged that on October 10, 1900, said Helena Coal Company had made a general assignment for the benefit of creditors to Sibley P. King, conveying to him all of its property, consisting of a leasehold interest in a coal mine, with a coal mining plant and machinery, and a stock of merchandise; that defendants McNamara, Brasswell, Johnson, and McNamara had been since the execution of said assignment, and were at the time of the filing of the bill, committing trespasses on the property assigned; that said Sibley P. King, assignee, had failed and refused to take legal steps to prevent said trespasses; and that unless the court took jurisdiction of said trust, and administered same, complainant, who is a creditor of said Helena Coal Company, and the other creditors of said Helena Coal Company, would lose the debts owing to them by it. The bill prayed that the court take jurisdiction of said assignment trust, and proceed to administer same, and that said McNamara, Johnson, Brasswell, and McNamara, said trespassers, be enjoined from trespassing on the property assigned. Temporary injunction was issued, as prayed for in the bill, and served on the defendants, against whom same was issued. On November 5, 1900, defendants Helena Coal Company and Sibley P. King filed answers to the bill, admitting the allegations thereof. On November 15, 1900, a sale of the property assigned was ordered to be made by King, the assignee. On November 26, 1900, King, assignee, filed his report of sale under the last-named order, that he had sold the property assigned, in compliance with the terms of the order, to appellee Richard Randolph for the sum of \$400, and that said price was not inadequate to the value of the property sold. The report prayed a confirmation of said sale. On November 26, 1900, appellant F. J. McNamara filed exceptions to the report of same, and objected to the confirmation of same, stating that he claimed to own one-fourth of the capital stock of the Helena Coal Company, and that he was a creditor of said company, and objected to the confirmation of said sale, on the grounds that the time for which said sale was advertised was unreasonably short, and that the price for which

said property was sold was grossly inadequate. On December 1, 1900, said cause came on to be heard on the report of sale and objections of appellant thereto, and was submitted on the report and the exceptions and affidavits offered. It was shown by some of the affidavits that at the sale of said property under the order of the court, and before any bids had been made on said property, the attorneys of F. J. McNamara and the other creditors gave public notice, on behalf of McNamara and all the other creditors, that a petition in involuntary bankruptcy had been filed against the Helena Coal Company, and that the title of the purchaser at said sale would be affected thereby; that there were two bids at said sale, the one of Richard Randolph for \$400 being the second and last bid; that after Randolph had made his said bid, the auctioneer called on said F. J. McNamara, and the other creditors of the said Helena Coal Company who were present, to bid on said property, and raise the bid of said Randolph, but that each of said parties declined and failed to do so; and that, after receiving no other bid, the auctioneer knocked down the property to said Randolph, he being the last and best bidder therefor. On the submission of the cause, the court rendered a decree finding the facts against the truth of the exceptions, overruled the same, confirmed the sale, and ordered a conveyance to be made by King, the assignee, to Richard Randolph, the purchaser. From this decree McNamara, for himself and the other defendants, prosecutes the present appeal, and assigns the rendition thereof as error.

J. W. Bush and Lane & White, for appellant. Randolph & Huddleston, for appellee.

TYSON, J. The only ground urged to set aside the sale is inadequacy of price. *Littell v. Zuntz*, 2 Ala. 256, 36 Am. Dec. 415, is the leading case in this state upon the question here involved. The rule as there laid down, which has been uniformly adhered to, is that when the property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there is some unfair practice at the sale, or unless there is surprise, without fault on the part of those interested. See, also, *Parker v. Wheel Co.*, 108 Ala. 140, 18 South, 938; *Lowe v. Gulce*, 69 Ala. 80. While it is true that a judicial sale may be set aside on the ground of surprise, mistake, or accident, this power will not be exercised to relieve a party from his own inexcusable neglect. 17 Am. & Eng. Enc. Law (2d Ed.) pp. 997, 998, 999, and note 1. In this case it is without dispute that the sale was made in strict compliance with the decree of the court ordering it, and that the appellant was present, and refused to bid upon the property after being invited to do so. Furthermore, by his conduct on that occasion, he was instrumental in preventing the property from

bringing a better price, for it is shown by the evidence, without dispute, that he, through his attorney, gave public notice at the sale, before any bids were offered, that a petition in involuntary bankruptcy had been filed against the Helena Coal Company, the party from whom the assignee making the sale derived title, and that the title of the purchaser would be affected thereby. It is clear that he is in no position to insist that the property failed to bring its full value. He cannot be allowed, after bringing about or contributing to the result he now complains of, to undo it; for certainly any act of his tending to produce the result which he at that time seems to have desired is fault on his part.

Affirmed.

McFADDEN et al. v. McFADDEN.

(Supreme Court of Alabama. June 28, 1902.)

DIVORCE—ALIMONY—DECREE FOR COMPLAINANT—FRAUDULENT CONVEYANCE—INTENT—KNOWLEDGE OF GRANTEE—FOREIGN JUDGMENT—VALIDITY—PRESUMPTION.

1. A decree in divorce awarding alimony to complainant renders her a creditor of defendant from the time of its rendition.

2. Where one who had abandoned his wife purchased land, and had title taken in the name of another, who furnished no consideration, in order to defeat any pecuniary relief the wife might obtain in divorce, the transaction was fraudulent and void as to her claim for alimony, though she was not at the time a creditor by decree, and though the grantee had no participation in the covinuous intent.

3. Where in divorce a wife obtains a decree for alimony in Indiana, and she sues in Alabama to subject to its payment land which she claims was purchased by her husband, but fraudulently placed in the name of another, so as to defeat any alimony decree she might obtain, the foreign decree is presumptively valid, and between complainant and defendant and the latter and the grantee conclusive evidence of a debt at time of the rendition of the decree.

Appeal from chancery court, Madison county; Wm. H. Simpson, Chancellor.

Suit by Margaret McFadden against David A. McFadden and others. From a decree for complainant, defendants appeal. Affirmed.

It was averred in the bill that on March 4, 1884, the complainant intermarried with the defendant David McFadden in the county of Posey, state of Indiana, and lived together as husband and wife until July 20, 1899, when David A. McFadden abandoned the complainant, and moved to Madison county, Ala.; that on February 22, 1900, in response to a bill filed by the complainant, the circuit court of Posey county, Ind., rendered a decree dissolving the bonds of matrimony existing between the complainant and the said David A. McFadden, thereby granting her a divorce a vinculo matrimonii from said David A. McFadden, "and granting her alimony in the sum of one thousand dollars and attorney's

¶ 2. See Divorce, vol. 17, Cent. Dig. §§ 749-751.

fees," which decree was entered of record; that at the time of the abandonment, the respondent David A. McFadden owned a large estate in Posey county, Ind., and after so abandoning his wife he converted said estate into money, with the "preconceived intention to so dispose of his property that the same could not be reached by complainant in proceedings at law for her support and maintenance, or for the payment of any alimony in divorce proceedings." It was then further averred in the bill that "in the execution of said preconceived intention to deprive your oratrix of any means of support and maintenance, the said David A. McFadden fraudulently invested the sum of money realized from the property so held by him in the county of Posey, state of Indiana, in lands situated in the county of Madison, state of Alabama, and with the fraudulent intent aforesaid, and for the purpose of hindering and delaying your oratrix in the collection of any decree that might thereafter be rendered against him, and for the purpose of preventing your oratrix from instituting any proceeding requiring the said defendant to so maintain and provide for her, as he is by law required so to do, on or about the 3d day of August, 1899, purchased from Henry H. Sugg, Jr., and others" certain lands specifically described in the complaint. It was then averred that said David A. McFadden paid the purchase money for said real estate out of the money realized by him from the sale of said property in Posey county, Ind., but that the title to such real estate was taken in the name of Susannah Duckworth, the daughter of said McFadden, for the purpose of concealing his said property, and for the purpose of defrauding complainant, and for the purpose of defeating the liability then existing upon him for her said support and maintenance, as decreed by the decree in the divorce proceedings; that said McFadden owns no other property than that described in the bill, and held by him in the name of Susannah Duckworth, out of which the decree in favor of complainant can be collected. The prayer of the bill was that the lands described in the bill be declared to be the property of David A. McFadden, and as such that they be subjected to the payment of the decree in favor of complainant. To this bill the defendants demurred upon the following, among other, grounds: "(1) The bill shows that the court assuming to grant the divorce and render the decree for alimony was without jurisdiction to decree the divorce, the parties both being citizens of Alabama, wherefore the decree of divorce is void, and the bill is without equity. (2) The bill is without equity in that it is a bill for alimony, and shows upon its face that a divorce a vinculo has been granted for the complainant against the respondent McFadden. (3) The bill is fatally defective, because it is a bill merely for alimony, and sets out no grounds of complaint on the part of the complainant entitling her to alimony of the respondent Mc-

Fadden. (4) The bill seeks to enforce a decree for alimony, and is without equity, in that alimony is not a debt, or a decree for alimony cannot be enforced as a debt. (5) The bill is a suit upon a judgment or decree, and fails to set out the judgment or decree substantially. (6) The bill seeks to set aside an alleged fraudulent conveyance, whereas it shows that the complainant is not a creditor of the defendant, wherefore the bill will not lie. (7) The bill is wanting in equity in that it seeks to set aside an alleged 'fraudulent conveyance because the money that was used in the purchase of the property was the money of a married man, whose wife had a prospective claim for alimony against him. (8) The bill shows that when the lands were purchased, not only no suit for divorce or alimony was pending, but that no grounds for divorce or alimony existed, wherefore fraud cannot be predicated upon the use of the funds in the manner alleged in the bill. (9) The bill fails to show that the respondent Duckworth knew of or participated in the alleged fraudulent purposes of the respondent McFadden, wherefore the transaction sought to be impeached was not fraudulent as to her." Upon the submission of the cause upon these demurrers, the court rendered a decree overruling them.

Tancred Betts, for appellants. Cooper & Foster, for appellee.

MCOLLELLAN, C. J. Under the decree of the circuit court of Posey county, Ind., rendered on February 22, 1900, in favor of the complainant in that suit and this, Margaret McFadden, against the respondent David A. McFadden, of divorce and for alimony and counsel fees, the complainant became a creditor, as of the date of its rendition, of the respondent McFadden. In respect of the conveyance by the Suggs to the respondent Susannah Duckworth, alleged to have been made on a consideration paid by the respondent McFadden, the complainant was and is a subsequent creditor. The bill thus showing that Duckworth paid nothing, and was the grantee in a voluntary conveyance, further alleges that David McFadden entered into this transaction, paid the consideration for the land, and had the same conveyed to Duckworth, with the intent to hinder, delay, or defraud the complainant, and with a purpose to defeat her in the assertion of any claim she might subsequently perfect and reduce to judgment for her support and maintenance as his wife by way of alimony or otherwise; he having, according to the averments of the bill, abandoned her. On the facts thus presented, the conveyance was fraudulent and void as against this complainant, although she was not a then existing creditor; and this though Duckworth, the voluntary grantee, may not have participated in McFadden's covinous intent. *Seals v. Robinson*, 75 Ala. 363; *Dickson v. McFarney*, 97 Ala. 383, 12 South. 398, and authorities there cited; *Williams v. Spr-*

gins, 102 Ala. 424, 15 South. 247; Echols v. Peurrung, 107 Ala. 660, 18 South. 250.

The judgment or decree of the Indiana court is presumptively a valid and binding judgment, and as between the complainant and Duckworth, as well as between the former and David McFadden, it is, until impeached for fraud or collusion, conclusive evidence of a debt existing at the time of its rendition. *Pickett v. Pipkin*, 64 Ala. 520.

We deem it unnecessary to decide whether the facts averred in the bill put the complainant on the footing of an existing creditor at the time of the conveyance to Susannah Duckworth.

The bill has equity, and is not open to the objections taken by the demurrer, and the decree overruling the motion to dismiss and the demurrer is affirmed.

HARPER et al. v. REAVES.

(Supreme Court of Alabama. June 28, 1902.)

DEEDS—INTERROGATORIES—AUTHENTICATION OF DEED—ALTERATIONS—CONSTRUCTION.

1. A statement in a bill of exceptions that a deed attached to interrogatories to a witness was the original deed of the grantor was sufficient to show that the original was before the witness when he was examined; he having testified, when asked to examine the deed attached to the interrogatories, that he was present when it was executed, that he saw the grantor sign it, and that his own certificate was attached thereto.

2. The mere fact that alterations or erasures or interlineations are apparent on the face of a deed does not destroy its validity.

3. An instrument in form a deed, witnessed and probated as such, which bequeathed and conveyed land described by land office numbers, and personal property "that I now possess, or may come into the possession of during my natural life," containing no power of revocation, and not postponing title until after the death of the grantor, was a valid deed, and not a will.

Appeal from circuit court, Randolph county; A. H. Alston, Judge.

Ejectment by C. D. Reaves against W. O. Harper and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This was a statutory action in the nature of ejectment, brought by the appellee, C. D. Reaves against the appellants, to recover certain lands specifically described in the complaint. The facts of the case are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court at the request of the plaintiff gave to the jury the general affirmative charge in his behalf, to the giving of which charge the defendants duly excepted.

There were verdict and judgment for the plaintiff, and the defendants appeal; and assign as error the several rulings of the trial court to which exceptions were reserved.

B. B. & W. H. Bridges and Henderson & Rowland, for appellants. E. M. Oliver, for appellee.

HARALSON, J. Both parties claim title from the same source,—from Syrlidia Edge. She executed the instrument under which the plaintiff claims title, on the 3d of January, 1874, in the presence of two witnesses. It was probated before a justice of the peace, by one of the subscribing witnesses, on the 27th November, 1874, and was recorded on the 26th October, 1898. The introduction of this instrument, as a muniment of plaintiff's title to the land sued for, was objected to by the defendants, on the ground that it was not self-proving; that the probate of the witness was not sufficient to admit the instrument to record; that said instrument was not a deed but a will, and that it was not executed as wills are required by law to be executed. There was no evidence that it was ever attempted to be probated as a will. The court overruled these objections and admitted the paper in evidence. This ruling is not assigned or insisted on in argument as error, and is waived.

The defendants defended on the ground, that Syrlidia Edge, on the 3d day of June, 1893, executed to their grantor, G. A. Folsom, a deed to the same lands as are contained in the paper under which plaintiff claims. This paper purporting to convey to said Folsom these lands, was not attested by a subscribing witness, but it does purport to have been acknowledged by the grantor before A. B. Brookshier, a justice of the peace, on the same day it was executed. This acknowledgment, however, was insufficient as such, but it will operate as an attestation by a single witness. 3 Brick. Dig. p. 298, § 19. It was not recorded until the 20th of February, 1897. The defendants proved by the said justice, that he saw the grantor sign the instrument. The point is made, that the witness having been examined on interrogatories, did not have the instrument before him when he deposed. He was asked to examine the deed attached to the interrogatories, and to state whether or not he was present when the same was executed; if he saw the grantor sign it, and if it was his certificate attached to the same. He answered affirmatively, and it is stated in the bill of exceptions, that the deed attached to the interrogatories to the witness was the original deed of the grantor, Syrlidia Edge, to G. A. Folsom, herein above (in the bill of exceptions) set out. This was quite sufficient to show that the original was before the witness when he was examined.

Aside from the execution of the deed, the plaintiff objected to the introduction of this paper on the ground that it was executed after the deed offered in evidence by plaintiff was executed; because it does not convey any land, but only conveys a certificate of entry or land patent; because it contains an

¶ 1. See *Alteration of Instruments*, vol. 2, Cent. Dig. § 122.

interlineation,—the word, "east," being interlined after the word, "south," and before the word, "quarter," in the description of the land contained therein and because the same is mutilated. The original is before us, having been certified to this court by order of the circuit court. On an inspection of the original, we discover no interlineation in the deed such as is set out in the objection. The word, "east," is plainly written between the words, "south" and "quarter," and do not bear any suspicious appearances of being an alteration, though, as stated, the objection is not to a material alteration, but to an interlineation which does not appear. But the mere fact that alterations, or erasures, or interlineations are apparent on the face of the deed,—if either were there in this case,—does not destroy its validity. The effect of them, ordinarily, as held, depends on extrinsic evidence, and is incapable of determination upon a motion to exclude the deed as an instrument of evidence. *Ward v. Cheney*, 117 Ala. 241, 22 South. 996. The alleged mutilations in the instrument are not sufficient to destroy its validity as a deed. It is full and sufficient to convey the land described, notwithstanding the omission, here and there, of certain words, occasioned by the age, the wear and improper care of the deed.

The objections to the introduction of the deed, such as we have considered, appear, therefore, to have been without foundation. The other objection, that the deed was executed to defendants' grantor, after the one to the plaintiff was executed, was well taken, however, if the paper under which plaintiff claims is in law a deed and not a will. If a deed, the title passed thereby out of the grantor into the plaintiff, and there remained no right or title to the land which could be conveyed by said grantor by said subsequent deed to defendants' grantor, G. A. Folsom. We have examined plaintiff's said muniment of title. It is in form a deed, witnessed and probated as such, and employs the language and terms of a conveyance. There is no power of revocation reserved expressly or by implication, and the title does not appear to be postponed until after the death of the grantor. The only word in it to indicate that the party making it intended it to be a will is, that she used the word "bequeath" in connection with the word "convey," stating, I "bequeath and convey" to my son (the plaintiff), the lands she possessed, describing them by land office numbers,—the description itself being an indication, though not controlling, that she intended to make a deed. The words used in connection with the personal property described,—"that I now possess or may come into the possession of during my natural life"—while appropriate to a will, are not inconsistent with the paper being a deed. If the paper on its face were equivocal, the presumption would be against its operating as testamentary, unless it were made clearly to appear that it was executed animo testan-

di, to operate as a posthumous disposition of her property. *Abney v. Moore*, 106 Ala. 134. 18 South. 60; *Whitten v. McFall*, 122 Ala. 619, 26 South. 131; *Gomez v. Higgins* (Ala.) 80 South. 417. When properly construed, the plaintiff's muniment of title must be construed to be a deed which passed the title, certainly, of the land therein described to him, leaving no title thereto, to be conveyed afterwards to defendants' grantor, G. A. Folsom, and there was no error in overruling defendants' objection to its introduction in evidence.

For the same reason, there was no error in sustaining the objection of the plaintiff to the introduction of the defendants' deed from said G. A. Folsom and wife to them. They had, as stated, no title to convey to defendants.

Affirmed.

NEWTON et al. v. BROOK.

(Supreme Court of Alabama. June 28, 1902.)
BREACH OF CONTRACT—PLEADING—FAILURE
TO ALLEGE CONSIDERATION—EFFECT.

1. A complaint in case alleging that plaintiff engaged defendants to prepare the remains of her husband for burial, and shipment by a certain train, to leave at a specified time, and that when the hour of leaving had arrived it was discovered that defendants had made no preparation for the shipment of the remains at the time specified, was demurrable on the ground that no consideration was alleged, defendants being under no duty to perform the obligation independent of contract.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Nannie S. Brook against W. M. Newton and others. From a judgment for plaintiff, defendants appeal. Reversed.

The complaint was as follows: "The plaintiff claims of the defendant twenty-five hundred dollars damages for that on or before the 16th day of February, 1900, the defendants were engaged in the undertaking business in Birmingham, Alabama, and as such were holding themselves out for the preparation of bodies for burial and shipment; that on said 16th day of February, 1900, Benjamin F. Brook, who was the husband of the plaintiff, departed this life in said city, and the defendants were informed that plaintiff desired to ship the remains of said Benjamin F. Brooks to Dunlap, Georgia, for interment, over the Southern Railway, upon the train which was to leave Birmingham at or about 6 a. m., February 17, 1900, and the plaintiff engaged the defendants to prepare the remains of said Benjamin F. Brook for burial and for shipment over said Southern Railway on said train, which was to leave Birmingham at or about 6 o'clock, as above stated, on the morning of February 17, 1900, it also being made known to the defendants that preparations had been made for the interment of said remains at Dunlap, Georgia, at 10 a. m., Feb-

ruary 18, 1900; and the plaintiff avers that on said morning of February 17, 1900, she went to the Union Passenger Station at Birmingham, Alabama, for the purpose of boarding the train to accompany the remains of her deceased husband to Dunlap, Georgia, when it was found that the body had not reached the station, and the plaintiff procured a few minutes delay in the departure of said train, and sent to the defendants' establishment to hurry up the remains, when it was discovered that the defendants had made no preparation for the shipment of deceased's remains at the time specified; and plaintiff avers that she was unable to have said remains shipped at the time specified, and said remains could not be shipped until the next train, which was at 4:45 p. m., February 17, 1900, and in consequence of said delay in the shipment of said remains the interment of said remains had to be postponed, and the plaintiff was put to great inconvenience by being delayed at Union Point, Ga., from 2 o'clock a. m., February 18, 1900, where she was compelled to wait without any fire, and while waiting there she suffered from cold and inclement weather; and the plaintiff avers that it was the duty of the defendants to have said remains prepared and placed at the Union Depot at Birmingham, Alabama, for shipment at or about 6 a. m., February 17, 1900, and by reason of their failure to do so the plaintiff suffered great mental agony and distress, and was subjected to great inconvenience and physical pain, as hereinabove stated, and was put to five dollars additional expense in and about said burial,—all to her damage as aforesaid; hence this suit." The defendants demurred to the complaint upon the following grounds: "First. The complaint fails to show by its averments that the plaintiff has any cause of action against the defendants in this: (1) The defendants can only be held liable on a breach of contract for work, labor, and services agreed to be performed by defendants for the plaintiff at her special instance and request, for a consideration then and there agreed to be paid by the plaintiff to the defendants, and the complaint fails to allege any consideration paid or agreed to be paid to the defendants by the plaintiff for such services, and the agreement without this would be nudum pactum. (2) There are no allegations in the complaint showing the defendants were under any duty to render services or became liable to the plaintiff for any breach of duty required by law. (3) Because the action is founded on a tort or breach of duty alleged to spring out of a contract, when the law does not infer or impose such duty upon the defendants." This demurrer was overruled. Under the opinion on the present appeal it is unnecessary to set out any of the other facts of the case. There were verdict and judgment for the plaintiff, assessing her damages at \$750. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

W. H. Denson, for appellants. Lane & White, for appellee.

TYSON, J. Counsel agree that the complaint is in case, and not in assumpsit; that its gravamen is for a breach of duty growing out of a contract. It counts, as we will show when we consider its averments, not upon a misfeasance or malfeasance of the defendants, but a nonfeasance. The contract attempted to be alleged as an inducement out of which the supposed duty arose is shown by the evidence to have been oral. Independent of the evidence, however, and looking alone to the averments of the complaint, applying the rule of construing pleading most strongly against the pleader, we are constrained to hold that the contract as there shown was an unwritten one, and imports no consideration. Section 1800, Code; Maury v. Olive, 2 Stew. 472; Phillips v. Scoggins, 1 Stew. & P. 30; 4 Enc. Pl. & Prac. p. 928. If the form of this action were assumpsit, instead of trespass on the case, it cannot be doubted that it would be necessary for the complaint to state truly the consideration for the promise of the defendants. There is no principle of the common law better settled than that a promise, to be binding, must be made upon a legal and valid consideration; and without such consideration no action will lie. The consideration, therefore, being essential to the right to maintain an action upon a promise, must be alleged, unless it be in a case where the promise is evidenced by a writing which imports a consideration. This common-law rule is stated by Mr. Chitty to be: "In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration,—as a bill of exchange, or promissory note,—or expressly to state the particular consideration upon which it was founded." 1 Chit. Pl. (16th Am. Ed.) p. *300 (bottom page 382). In the note it is said: "The want of a statement of the consideration of a promise is a capital defect in a declaration, not to be supplied by intendment, but by amendment." Again, it is said: "The consideration must be truly stated, and with substantial certainty, and proved as laid." See, also, 4 Enc. Pl. & Prac. p. 930, and note 1; Maury v. Olive, supra. It may be said that these principles have no application to this case, because the action is not for a breach of the contract, but for a breach of duty. It is clear, under the allegations of the complaint, that the defendants were under no duty to perform the obligation, out of which their duty is alleged to have arisen, independent of a contract; in other words, no such duty, the breach of which is complained of, originated either in a general obligation of law or in an obligation thrown upon them by reason of their vocation. So then, if the duty of performance was upon them at all, it must have been imposed by contract. This being true, the contract must be a binding one upon them, and this must be shown

by the allegations of the complaint. To this end it is just as important to state expressly the consideration for defendants' promise as if the action were in assumpsit. 1 Chit. Pl. p. *397; 21 Enc. Pl. & Prac. pp. 913, 914; Whitall v. Morse, 5 Serg. & R. 358; Thorne v. Deas, 4 Johns. 84; Elsee v. Gatward, 5 Term R. *144 (top page 86); Jones v. Powell, 15 Ala. 824; Moseley v. Wilkinson, 24 Ala. 411. The averment in the complaint under consideration is, "the plaintiff engaged the defendants to prepare the remains of said Benjamin F. Brook for burial and shipment" over a certain line of railroad, to leave Birmingham at a specified time; that, when the hour of leaving had arrived, it was discovered that "the defendants had made no preparations for the shipment of deceased's remains at the time specified." The allegation amounts to nothing more than the defendants' promise to the plaintiff to prepare the body of Brook for burial and shipment. Clearly, there is no express statement of a consideration to support the promise of the defendants. For aught appearing, the promise of defendants may have been gratuitous, or upon consideration moving to them from another other than the plaintiff; or it may be that they were to be compensated for their services, when performed, out of the assets of the estate of the dead man. It will also be noted that there is no averment that defendants entered upon the execution of the preparation of the remains for burial and shipment as promised by them before the hour arrived for its shipment. On the contrary, it is inferentially shown by the averments that they did not undertake the carrying out of their promise until after the hour alleged had passed. Nor is it alleged as a fact that they ever took possession of the body under their promise. If it be conceded that this inference may be drawn from the recitals in the complaint, it is wholly insufficient as an averment. Gould, Pl. c. 3, §§ 27, 35; Prigmore v. Thompson, Minor, 420. In Elsee v. Gatward, supra, the first count of the declaration was in case, counting on a nonfeasance, as here, and strikingly analogous in its allegations. The action was against a carpenter for neglect in not completing certain buildings within certain specified periods named in the declaration. Lord Kenyon, C. J., said: "If this had been an action of assumpsit, it could not have been supported for want of a consideration; it would have been nudum pactum. * * * Now, I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him; and therefore the amount of this is that the defendant has merely told a falsehood, and has not performed his promise;

but for his nonperformance of it no action can be supported." Whether, if the complainant had alleged the fact of defendants' partial execution of their promise, it would be necessary to allege a consideration for their promise, we do not decide.

Before concluding, we wish to be understood as not committing ourselves pro or con as to the right of the plaintiff, upon the evidence, to maintain this suit.

Since the complaint, as framed, is entirely defective, we will not go further than to pass upon the demurrer interposed to it. It follows, from an application of the principles announced, that the demurrer was well taken, and should have been sustained.

Reversed and remanded.

JOHNSON v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

CRIMINAL—FORMER JEOPARDY—PLEAS—MOTION TO QUASH—VENIRE—NAMES OF TALESMEN—REMARKS OF PROSECUTING ATTORNEY.

1. Former jeopardy furnishes no ground for quashing an indictment, but should be specially pleaded before the plea of not guilty.

2. Motion to quash should be before plea to indictment.

3. Defendant, being entitled to have served on him only a list containing the names of the special jurors ordered for his case, and the regular jurors drawn and summoned for the week for which his case was set, cannot have the venire quashed because the list served on him did not contain the name of a talesman, brought in to fill the place of a regular juror drawn and summoned, but who failed to attend, or was excused.

4. That 12 of the special venire are engaged in consideration of another case is no ground for objection to going to trial.

5. That defendant has been convicted two or three times in a police court, and had once been convicted of a felony, and sent to the penitentiary, warrants the remark of the solicitor to the jury, "This oft-repeated criminal should be severely dealt with."

Appeal from criminal court, Jefferson county; D. A. Greene, Judge.

Ed. Johnson was convicted of robbery, and appeals. Affirmed.

When the case was called for trial, and before the jury was impaneled, the defendant moved the court to quash the indictment upon the following grounds, as set forth in the bill of exceptions: "That this defendant has been heretofore indicted for this same offense, and that on the trial of said indictment, on, to wit, May 21, 1901, it appeared that there was a variance between the proof and the allegations, and that said indictment was quashed by the court, and the defendant held for a new indictment, and that the indictment to which the defendant is now called to plead is the indictment which was found and returned in lieu of said indictment, quashed, as aforesaid, and defendant says that this indictment was not authorized

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 473.

by law, in this: There is no order of court, as is authorized by law, authorizing the grand jury to present the indictment now pending in this court against the defendant, and because the same is illegal, and the grand jury had no authority to further investigate the case, or to present the indictment which the defendant is now called on to answer." To support this motion the defendant introduced the former indictment preferred against him, and the minutes of the court for May 21, 1901; the trial of the defendant being on June 12, 1901. The minutes of the court of May 21, 1901, after stating the title of the case, was in words and figures as follows: "This the 21st day of May, 1901, came H. P. Heflin, solicitor, who prosecutes for the state of Alabama, and also came the defendant, in his own proper person and by his attorney, and the said defendant, being duly arraigned upon said indictment, for his plea thereto says that he is not guilty, and, issue being joined thereupon, the evidence showing that the party charged to have been robbed is named Frank Gress, and the indictment alleges Frank Gress, this indictment is quashed, and it is ordered by the court that the defendant be held for a new indictment." The court overruled the motion to quash the indictment, and to this ruling of the court the defendant duly excepted. The defendant then moved the court to quash the venire, upon the ground that the venire served upon him did not contain the name of one F. W. Dunham, who had been summoned and impaneled to serve as a talesman to fill a vacancy on the regular venire for the week, caused by the court excusing a juror for sickness. In support of this motion, there was evidence introduced showing that the court had excused one of the jurors who had been drawn and summoned as a juror for the week, upon the ground that he was sick, and that said Dunham was regularly drawn and impaneled as a talesman to supply the vacancy on the venire caused by excusing said juror, and that the name of said Dunham was not on the venire served on the defendant. The court overruled the motion to quash the venire, and to this ruling the defendant duly excepted. The defendant then objected to going to trial, upon the ground that 12 of the jurors drawn and impaneled as regular jurors for the week, and constituting a part of the regular venire for the week, which was served upon the defendant, were at that time out engaged in the consideration of another case. The court overruled this objection, and the defendant duly excepted. On the trial of the case, the state introduced one Frank Gress, who testified that he was robbed of a watch by the defendant, and there was other evidence introduced showing that the defendant was guilty of the offense charged in the indictment. The defendant, as a witness in his own behalf, testified that he did not assault Gress, nor take the watch from him. On the cross-examination of the

defendant, he admitted that he had been convicted in the police court of Birmingham two or three times, and had been once sent to the penitentiary. It was shown by the records of the court that the defendant had been formerly sentenced to the penitentiary for grand larceny. In his argument to the jury the solicitor used the following language: "This oft-repeated criminal should be severely dealt with." The defendant objected to the use of this expression by the solicitor in his argument, and moved the court to exclude the same. The court overruled this objection and motion, and to this ruling the defendant duly excepted. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they cannot find the defendant guilty of robbery. (2) That if the jury believe the evidence, they will find the defendant not guilty."

Chas. G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. The indictment was sufficient in averment. It had been regularly returned and presented by a duly constituted grand jury. On being arraigned, the defendant entered his plea of "not guilty" to it. No plea of former jeopardy or of former acquittal was ever presented or filed, or offered to be made or filed. If it be conceded that the defendant had been in jeopardy, or, in legal contemplation, acquitted under a former indictment for the same offense by reason of the facts that he had been put to trial on a former indictment; that in the course of that trial the evidence developed a variance as to the name of the person alleged to have been robbed; that the solicitor had thereupon dismissed the prosecution, under section 4918 of the Code, with a view to the preferment of another indictment; and that the proper order to that end was not entered by the court (*McClellan v. State*, 121 Ala. 18, 25 South. 725),—such jeopardy or acquittal furnished no ground for quashing the present indictment, but should have been specially pleaded, and the special plea or pleas should have been interposed before the plea of "not guilty," else the point is waived. *Rickles v. State*, 68 Ala. 538; *Jordan v. State*, 81 Ala. 20, 30, 1 South. 577, and cases cited. So if the facts had involved matter proper for a motion to quash, the motion should have been made before pleading to the indictment; and had the facts been such as would have justified the quashing of the indictment, and the motion to that end had been seasonably made, yet it would seem that it was in the unrevisable discretion of the trial court to overrule the motion, and put the defendant to his demurrer or plea in abatement. *State v. Jones*, 5 Ala. 666, 670; *Nixon v. State*, 68 Ala. 535; *Bryant v. State*, 79 Ala. 282. The appellant can take nothing for the overruling of his motion to quash the indictment.

The cause being set down for trial on a day

of a subsequent week, the defendant was entitled to have served upon him a list containing the names of the special jurors ordered for his case and the names of the regular jurors who had been drawn and summoned for such subsequent week. A talesman brought in to fill the place of a regular juror, who, having been drawn and summoned for that week, failed to attend or was excused, had no place on the special venire for defendant's trial, nor, consequently, on the list served on him. The motion of defendant to quash the venire on the ground that the copy served on him did not contain the name of one such talesman was therefore properly overruled. *Johnson v. State* (Ala.) 31 South. 951.

Equally without merit was the defendant's objection to going to trial based on the ground that 12 of the special venire were at the time engaged in the consideration of another case. Violations of municipal laws are quasi criminal offenses. Moreover, the police court of Birmingham has jurisdiction of minor offenses against state laws. The facts that defendant had been convicted two or three times in said court, and had once been convicted of a felony, and sent to the penitentiary, supplied ample predicate for the solicitor's remark, "This oft-repeated criminal should be severely dealt with."

The refusals of the court to give the affirmative charges requested by defendant were so obviously proper as not to admit of discussion. Affirmed.

MCKINNEY v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY—PROVINCE OF JURY—INSTRUCTION.

1. On a criminal prosecution, the admissibility of a confession in evidence is a question for the court. What weight shall be accorded it, when admitted, is for the jury.

2. On a prosecution for arson, the sheriff testified that he had arrested accused for another offense, and while taking him to jail spoke to him about the crime for which he was on trial, stating that a reward had been offered, and that it was his custom to divide rewards with those who helped to locate the guilty parties, and that afterwards, while accused was under arrest, and without the sheriff making any threats or inducements, accused confessed to him. *Held*, that the confession was admissible.

3. On a criminal prosecution, defendant requested the court to charge that before the defendant could be convicted on a confession, the confession must be shown to have been made voluntarily, without having been influenced by threats, inducements, or promises of reward. *Held* properly refused, because it referred the admissibility of the alleged confession to the jury.

Appeal from Clay county court; M. N. Manning, Judge.

William McKinney was convicted of arson, and he appeals. Affirmed.

The appellant in this case was indicted, tried, and convicted of arson in the second degree in setting fire to and burning a storehouse containing a stock of goods of the value of \$3,000. On the trial of the case the burning of the storehouse and the ownership thereof was proved as laid in the indictment. Upon the introduction of W. D. Mayo, he testified that he was the sheriff of Clay county at the time the defendant in this case was arrested; that he was arrested on a charge for burning a ginhouse owned by one Richards; that while he was in jail, on the charge for burning said ginhouse, the witness had a conversation with the defendant; that he did not offer him any inducements whatever, nor did he make any threats to get him to make a settlement; that he (the witness) went to the jail to feed the defendant, was alone, and unarmed; that in this conversation the defendant told the witness that he set fire to and burned the storehouse of Mr. Wilson, the burning of which was charged in the indictment in the present case. The witness then gave in detail the confession of the defendant as made at that time. On the cross-examination of the witness Mayo, he testified that after he had arrested the defendant on the charge of burning Richards' ginhouse, and while he was carrying him to jail, he said something to him about the burning of Wilson's store, and in the conversation the defendant said something that made the witness believe that he knew he did the burning, and then continuing, the witness testified as follows: "I suggested that I understood there was a \$500 reward offered, and that it had been my custom, after a matter of that kind had occurred, to divide the reward with those who helped me to locate the parties." The defendant objected to the introduction in evidence of the confession of the defendant made to the witness Mayo, upon the ground that it was not shown to have been voluntary, and, after the cross-examination of the witness, the defendant moved to exclude the testimony of the witness Mayo as to the confession made by the defendant, upon the ground that it was shown to have been involuntary. The court overruled the objection and the motion, and to each of these rulings the defendant separately excepted. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe from the evidence that any inducements were offered to the defendant to procure a confession from the defendant, then the jury must not consider such confession against the defendant. (2) If the jury believe from the evidence that any threats were made against the defendant to induce him to make confessions, then the jury must not consider such confessions against the defendant. (3) The court charges the jury that before the defendant can be convicted on a confession, the confession must be shown to have been made voluntarily,

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 1219, 1229, 1702, 1714.

without having been influenced by threats or promises of reward."

Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. In a criminal case, a confession that is made on a promise of some collateral benefit to the defendant, no hope or favor being held out in respect to the criminal charge against him, is not considered involuntary, and is therefore admissible in evidence. 1 Greenl. Ev. (16th Ed.) p. 359, § 2206; McIntosh v. State, 52 Ala. 355; Stone v. Same, 105 Ala. 60, 17 South. 114. The admissibility of the confession in evidence is a preliminary question, and is addressed to the court. What weight shall be accorded it, when admitted in evidence, is a question for the jury. Burton v. State, 107 Ala. 108, 18 South. 284; 1 Brick. Dig. p. 509, § 858 et seq. The statement made by the sheriff in a conversation with the defendant, while the latter was in his custody under a charge for another and different offense, and before any charge had been preferred against him in the present case, that he (the sheriff) understood that a reward of \$500 had been offered, and that it was his custom to divide the reward with those who helped him to find out the guilty parties, if considered as a promise to the defendant, it held out to him no hope of escape from a conviction or of lessening his punishment in the particular case. The benefit to be derived was simply collateral, and, as was said in McIntosh v. State, supra, the confession was voluntarily made, without the appliances of hope or fear.

The charges requested by the defendant were properly refused, as they referred the admissibility of the confession to the jury; a question exclusively for the determination of the court. Bob v. State, 32 Ala. 560; Washington v. Same, 53 Ala. 29; 1 Brick. Dig. p. 509, § 858 et seq.

We find no error in the record, and the judgment must be affirmed.

Ex parte BOGATSKY et al.

(Supreme Court of Alabama. June 28, 1902.)
APPEAL FROM JUSTICE COURT—ONE OF SEVERAL DEFENDANTS.

1. Under Code 1896, § 481, providing that "any party" may appeal to the circuit court from any judgment rendered against him before a justice of the peace, one of two defendants against whom the judgment is rendered may remove the cause by certiorari.

Petition by Bogatsky Bros. & Co., for mandamus to the judge of the Tenth judicial circuit. Denied.

The return made by the constable on the summons and complaint before a justice was as follows: "Executed by personal service on A. B. & N. Fleisher, this the 11th day of March, 1902. Judgment was rendered against

the defendants, and upon this judgment execution was issued. Thereafter A. B. Fleisher filed his petition in the circuit court of Jefferson county, addressed to Hon. A. A. Coleman, judge of the Tenth judicial circuit, in which he asked for a certiorari to bring up the proceedings in the justice court for review by the circuit court. One of the grounds of the petition for certiorari was that said petitioner was not served with process, and therefore judgment rendered against him was void. The writ of certiorari was issued as prayed for. Thereupon Bogatsky Bros. & Co., plaintiffs in the said suit before the justice of the peace, moved the court to dismiss the writ of certiorari upon the following grounds: "1. That the facts set forth in said petition and on which the same is predicated are untrue in this, that there is no judgment in said lower court against said A. B. Fleisher alone. 2. That the said defendant, by his said petition, has misled and deceived this court, in that the said judgment in the lower court is against a partnership, and also against the said parties, of which said A. B. Fleisher is one. 3. That the said defendant, in his said petition, has set up a fact that occurred subsequently, for reason that the same was improperly rendered. 4. That there is no judgment in said lower court against said A. B. Fleisher, alone, wherefore return of said writ is impossible, or if made, erroneous." Upon the hearing of this motion the court overruled the same.

Bogatsky Bros. & Co. now file their petition in the supreme court asking for the issuance of a mandamus directed to the judge of the Tenth judicial circuit commanding him to set aside his former order overruling the motion of the plaintiffs, and to dismiss the writ of certiorari heretofore issued by him.

Sterling A. Wood, for petitioners. L. J. Mark and Lomax, Crum & Well, for respondent.

HARALSON, J. The petitioners insist that their motion to dismiss the writ of certiorari in the lower court should have been granted, because the judgment in the justice's court was against the partnership of A. B. & N. Fleisher, and also against A. B. Fleisher, and that the certiorari was sued out by A. B. Fleisher alone; or, in other words, because the judgment in the justice's court was against two defendants,—A. B. & N. Fleisher, a partnership under that name, and against A. B. Fleisher individually,—the cause could not be carried to the circuit court by certiorari, as was here done, by A. B. Fleisher, one of the defendants.

Formerly (Toulm. Dig. 510, § 8) the statute as to appeals and writs of certiorari from a justice's court to the circuit court provided, that "any person aggrieved by the judgment of any justice of the quorum, or of the peace, may within five days thereafter appeal to the next superior court sitting for his county." A similar statute appears in Clay, Dig. 446, § 11.

1. See Justices of the Peace, vol. 31, Cent. Dig. § 777.

In the Code of 1852 (section 2864) it was provided "that either party aggrieved by the judgment rendered * * * may prosecute an appeal thereon," etc., and in the Code of 1896 (section 481), that "any party may appeal" etc. In construing the act of 1814, appearing in Toulmin's Digest, it was held in *Craig v. Atwood*, 1 Stew. & P. 86, that where an action is brought against several defendants in a justice's court, one of them without the concurrence of the others, may prosecute an appeal or sue out a writ of certiorari. The court said: "If any person aggrieved has the right to have that grievance redressed, he would be deprived of that right, if a co-defendant should refuse to join with him in the appeal, and thereby defeat what the legislature has made ample provision for, and fasten an unjust judgment, in many instances, upon one of several defendants. This could not be consonant to reason and to justice. Hence, I conclude that one of several defendants has the right to appeal and execute a bond independent of his co-defendants, and by that means remove the proceedings from the justice jurisdiction into a higher tribunal."

The word "person" as formerly used in the statute, is one, it may be of larger significance than the word "party" as used in the later one, but it certainly includes a party. The two words, in common discourse, are used often synonymously. A person not a party to judicial proceedings, is not generally concluded by them, and has no right of appeal from any judgment or decree rendered therein. In some instances, he may propound his interest by petition to the court below, and, after notice to the party having an interest, have himself made a party for the purpose of an appeal. *Reese v. Nolan*, 90 Ala. 203, 13 South. 677. The construction given to the earlier statute in the case referred to, is as applicable, therefore, to the present statute as if it had been rendered thereon. Indeed, it is difficult to see, how the use of the word "person," in the one, and party, in the other, makes any difference in them.

The former statute provided, as does the present one, that cases taken by appeal or certiorari from the justice's to the circuit court, must be tried *de novo*. Whether the appeal or certiorari by one of two or more defendants, has the effect to transfer the entire cause to the circuit court, or only the case of the one appealing, there to be tried *de novo*, it is, perhaps, unnecessary now to decide; but, however that may be, it cannot be questioned, without disregarding the very terms of the statute, and the decision of the court in construction of it,—a construction which has received legislative adoption in the repeated reenactment of it,—that one of several defendants may appeal or take his case by certiorari to the circuit court, and as to himself, at least, if not as to the others, have his case tried anew.

Section 426 of the Code, as to appeals to the supreme court from judgments and de-

crees of lower courts, and the construction placed on it, has no application to the statute in question.

The motion to dismiss the certiorari was properly overruled.

Petition for mandamus denied.

NIEHAUS et al. v. COOKE.

(Supreme Court of Alabama. June 28, 1902.)

CONSTITUTIONAL LAW—TAKING OF PROPERTY—COMPENSATION—INJUNCTION—ANSWER—DENIALS—SUFFICIENCY.

1. Const. 1875, art. 14, § 7, provides that a municipal corporation shall make just compensation for property taken or injured by construction or enlargement of its highways, works, etc., which compensation shall be paid before the taking or injury. *Held*, that a city taking up a sidewalk in front of premises for the purpose of putting down a new one has no right to injure a stone wall inclosing the lot without first making compensation for the injury.

2. Where a city is about to take up a sidewalk for the purpose of putting down a new one, which work would injure the abutting owner's wall inclosing his premises, he has a right to an injunction to effectuate his constitutional right to compensation for the injury.

3. A bill alleged that the defendant city was about to take up a sidewalk in front of complainant's premises, which would injure a wall inclosing the premises; that the contractors were nonresidents, had no property in the state, and were unable to respond to a judgment; nor could the process of any state court reach any of their property. The answer admitted their nonresidence and that they had no substantial property in the state, but denied their inability to pay any judgment. *Held*, that the denials did not warrant a dissolution of an injunction restraining the work.

4. Where a motion to dissolve an injunction is joint, as are also the appeal from a decree overruling the motion, and the assignments of error on such appeal, the decree being proper as to certain of respondents, it must be held proper as to all.

5. Chancery Practice Rule 32 (Code, p. 1209) provides that, before a motion can be entertained to dissolve an injunction on the denials of the answer of the equity of the bill, the answer must be sworn to. *Held*, that the answer of a corporation must be sworn to before a motion to dissolve, etc., can be entertained.

6. Chancery Practice Rule 32 (Code, p. 1209) provides that, before a motion can be entertained to dissolve an injunction on the denials of the answer of the equity of the bill, the answer must be sworn to. In a suit against a city and contractors to enjoin the contractors, acting for the city, from taking up a sidewalk so as to injure a wall inclosing the premises, the bill alleged that the contractors had no property in the state, were nonresidents, and could not respond to any judgment in damages. The answer, which was sworn to by the mayor, denied that injury to the wall was threatened and that the contractor could not respond to any damages. The answer did not disclose who was the representative of the city in making the statements contained in the bill, or that he was acquainted with the facts, and did not show that the mayor had knowledge of the facts. *Held*, that a motion to dissolve the injunction on the equity of the bill was properly denied, inasmuch as the answer was no stronger than one on information and belief.

¶ 2. See *Eminent Domain*, vol. 18, Cent. Dig. §§ 744, 762.

Appeal from chancery court, Colbert county; W. H. Simpson, Chancellor.

Suit by Stockton Cooke against B. Niehaus & Co. and another. From a decree overruling a motion to dissolve an injunction, defendants appeal. Affirmed.

It was averred in the bill that the complainant was the owner in fee of two certain described lots in the city of Sheffield, which fronted upon what is known as "Montgomery Avenue," in said city; that at the time he purchased said lots there had been constructed by the former owner thereof, in accordance with the requirements and ordinances of the city of Sheffield, a sidewalk in front of said lots on Montgomery avenue, on the grade established by the authorities of said city, properly curbed, and covered with chert and gravel; that after the complainant became the owner of said property, in compliance with the ordinance of said city, he covered the sidewalk at his own expense with additional chert or gravel; that said sidewalk has been ever since, and is now, a proper and convenient sidewalk for the use of the public and the owner of said property, and is sufficient and proper for all uses and purposes; that when said sidewalk was constructed by the owner of said lots it became necessary for said owner to construct on one of the lots, and contiguous and along the side of said sidewalk, for the full front of said lot, a stone wall at great expense, which said wall was being used as a means of inclosing complainant's lot; that some time in the year 1901 the city of Sheffield, by its city council, passed an ordinance whereby the owners of certain property, including the lots described in the bill, were required to lay concrete pavement in front of their property in accordance with certain specifications in said ordinance; that in order for the complainant to comply with said ordinance it would be necessary to destroy and greatly injure the sidewalk theretofore built by the complainant and the former owner of the property, and the construction of said sidewalk "will also greatly injure, and, in case of caving, partially destroy, the said stone wall inclosing the lot of complainant, upon which it is built, and will otherwise greatly injure the complainant's property." It was then averred in the bill that the said city of "Sheffield and the city council thereof are wholly without authority to pass and enforce the ordinance referred to; that the same was beyond the authority and powers of said city, was in violation of the constitution of the state and the constitution of the United States, and was wholly null and void; that the city of Sheffield is seeking by and under said ordinance to take, injure, or destroy the said property of complainant in said sidewalk and stone wall inclosing its premises, without compensation to complainant in such injury or destruction, and without any proceeding having been taken to ascertain what compensation to your orator would be just therefor." It was then averred in the bill that in the

year 1902 the city of Sheffield entered into a contract with the defendant B. Niehaus & Co. for the construction and laying with concrete of the sidewalks mentioned in said ordinance, at the expense of the owners of the property before which the sidewalks were proposed to be laid, which included the property of the complainant; that no resident security has been taken for Niehaus & Co., and the persons who composed said firm are all nonresidents of the state, "having no substantial property in said state, and are unable to respond in said state to any judgment against them for damages, nor could any final process from any of the courts in and of this state reach any property of the said defendants." It was then averred that said Niehaus was threatening to go upon the property in front of complainant's property with labor and teams, and destroy or injure said complainant's sidewalk, remove the gravel and chert which had been placed thereon, and injure the stone wall inclosing the complainant's said lot, without any compensation to said complainant, and unlawfully and in violation of the complainant's rights, and are seeking, under their alleged contract with the city of Sheffield, to create and fasten a charge or lien or incumbrance on the complainant's said lots; and that complainant is wholly remediless at law. The prayer of the bill was for an injunction restraining and enjoining the defendants, and each of them, or their servants, agents, and officers, "from injuring or destroying the sidewalk in front of said lots, * * * or the curbing thereof, or the stone wall inclosing the premises of your orator." There was also a prayer for general relief. Upon the filing of this bill a preliminary injunction was issued, upon the complainant giving bond as required by law. The defendants, B. Niehaus & Co., and B. Niehaus and J. G. Piraldo, individually, and the city of Sheffield, filed a joint answer to the bill. In this answer they admitted the passage of the ordinance of the city, the making of the contract between the defendants, and that the sidewalk of chert or gravel had been built in front of the complainant's lots, and that there was a stone wall around one of said lots; but the defendants deny that said sidewalk was built according to the established grade and was a proper and convenient sidewalk. They further deny that the changes required by said ordinance in front of said lots would in any way "destroy or injure said sidewalk or the interest of complainant therein, but they allege the fact to be that a compliance with said ordinance would greatly improve the sidewalk," and will enhance the value of complainant's property. Defendants further deny that the city of Sheffield was without authority to pass and enforce said ordinance, or that the same was in violation of the constitution of the state and of the United States; and they further deny that the defendants are seeking to take, injure, or destroy any of the property of the complainant, or that complainant is entitled to any compensation growing

out of the work contemplated for such ordinance. This answer was sworn to by an affidavit made before a notary public, which was in words and figures as follows: "Before me, Joseph R. Coleman, notary public in and for the state and county aforesaid, personally appeared R. J. Thurmond, Jr., mayor of the city of Sheffield, who, being by me duly sworn, deposes and says that the statements contained in the foregoing answer that are stated as of knowledge he knows to be true, and that those stated on information and belief he believes to be true. [Signed] R. J. Thurmond, Jr., Mayor." There was a motion made to dissolve the injunction for want of equity in the bill and upon the denials in the answer, and, upon the submission of the cause upon this motion, the chancellor rendered a decree overruling it.

Kirk, Carmichael & Rather and Jas. H. Nathan, for appellants. Thos. R. Roulhac, for appellee.

TYSON, J. This appeal is prosecuted from a decree overruling a motion to dissolve the injunction because of want of equity in the bill and upon the denials in the answer. There is much averred in the bill challenging the right of the respondents to tear up the chert and gravel upon the sidewalk fronting the property of complainant, which was placed there by him and his predecessor in ownership of the lots. Whatever may be the rights of the respondents with respect to this matter,—a question we do not decide,—if it be conceded that they have such a right, it is entirely clear that they have no right to injure the stone wall inclosing the lot belonging to the complainant in the prosecution of the construction or enlargement of the improvements proposed to be put upon the sidewalk, without first making just compensation for such injury. Const. 1875, art. 14, § 7; Const. 1901, art. 12, § 235; City Council of Montgomery v. Maddox, 89 Ala. 181, 7 South. 433; Town of Avondale v. McFarland, 101 Ala. 381, 13 South. 504; City Council of Montgomery v. Lemle, 121 Ala. 609, 25 South. 919. And to the effectuation of preserving the complainant's right to the compensation, guarantied to him by the constitution, to be paid to him before the injury is done, he has a remedy in equity, "by invoking the injunctive aid of a court of chancery, wholly regardless of the solvency or insolvency of the municipal corporation, and of the inquiry whether or not he could recover and realize compensatory damages in an action at law." City Council of Montgomery v. Lemle, *supra*. The bill is not without equity.

Should the injunction have been dissolved upon the denials in the answer? "When a bill avers facts, the burden of proving which is entirely on complainant, if the sworn answer is made on knowledge and contains an unequivocal denial of the charges on which the right to an injunction rests, the general rule is that the injunction must be dissolved

on the denials in the answer." 3 Brick. Dig. p. 352, § 303. But even this rule is not universal. *Jackson v. Jackson*, 91 Ala. 294, 10 South. 31. In cases of this character this rule is more flexible, yielding more to the particular circumstances, and the chancellor has a large discretion over the subject, and, notwithstanding the denials of the answer, may retain the injunction until a final hearing of the cause. *Chambers v. Iron Co.*, 67 Ala. 353; *Mabel Min. Co. v. Pearson Coal & Iron Co.*, 121 Ala. 567, 25 South. 754; *Birmingham Traction Co. v. Birmingham Ry. & Electric Co.*, 119 Ala. 129, 24 South. 368. In *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3, the exception to the general rule was recognized and enforced, and in weighing the relative degree of injury or benefit to the parties which would probably ensue from the maintenance of the injunction on the one hand, and its dissolution on the other, the court was controlled to a large extent by the fact that one of the respondents was a nonresident of this state. In the bill in this cause it is averred that the two respondents, who were about to actively begin the tearing away the chert or gravel on the sidewalk and to injure the complainant's lot, "are nonresidents of the state of Alabama, have no substantial property in this state, and are unable to respond in this state to any judgment against them for damages; nor could any final process from any of the courts of and in this state reach any property" of theirs. The answer admits their nonresidence and the allegation that they have no substantial property in this state. It is true it denies their inability to respond to any judgment that may be rendered against them. We are of the opinion that this circumstance is a sufficient justification of the discretion exercised by the chancellor as to those respondents. As the motion to dissolve was joint, as is likewise the appeal and the assignments of error, the decree being proper as to two of the respondents, it must be held proper as to the other respondent, without regard to whether it is right or wrong.

But another reason may be assigned justifying the action of the chancellor. It is undoubted that the motion to dissolve the injunction on the denials in the answer could not be entertained by the chancellor unless the answer was sworn to. Rule 32, *Chancery Practice* (page 1209, Code). And the answer of a corporation is not an exception to the rule. *Mobile & M. Ry. Co. v. Alabama Midland Ry. Co.*, 123 Ala. 163, 26 South. 324. The manifest purpose of this requirement is to give to the denials in the answer relied upon to defeat the equities of the bill the weight and credence of evidence of their truth, upon which the chancellor is called upon to act. The credence which is to be given this evidence necessarily depends upon the knowledge possessed by the affiant making the verification, of the facts alleged. It is apparent from the allegations of the answer that facts, without reference to whether they were within the

knowledge of one respondent and not in the knowledge of the other, except upon information gained from the other, are indiscriminately alleged as upon the knowledge of all the respondents. To illustrate, to the charge made in the bill that Niehaus and Piraldo are threatening with laborers and teams to injure the stone wall inclosing complainant's lot, the respondents' answer, after admitting that Niehaus and Piraldo intended to go upon the sidewalk in front of complainant's property with laborers and teams, denies that they threatened or intended in any way to injure the wall. It was impossible for the city, or rather its representatives, to know these facts, except upon information derived from Niehaus and Piraldo. The agent of the city representing it in the preparation of the answer could not, therefore, state positively and primarily the existence of those facts. Furthermore, the respondent the city of Sheffield, being a corporation, and acting, of necessity, in all matters, by and through an agent or agents, can have no knowledge of any fact, except through its properly accredited agent, and, for that matter, could not make an answer in any other way. The answer does not disclose who its representative was, in making the statements contained in it, or that he was acquainted with the facts stated. Nor are we aided in this matter by the affidavit. If the affiant who made the verification represented the municipality in making the statement of facts contained in the answer, this is not shown by the affidavit, nor is it shown by the affidavit that he was acquainted with the facts. It was said in *Fulton Bank v. New York & S. Canal Co.*, 1 Paige, 311 (cited approvingly in *Griffin v. Bank*, 17 Ala. 258): "The case of a corporation defendant is an anomaly in the practice in relation to the dissolution of an injunction. In most cases the injunction is dissolved as matter of course, if the answer is perfect and denies all the equities of the bill in the points upon which the injunction rests. It is not, however, a matter of course to dissolve the injunction where the defendant acts in a representative character, and founds his denials of the equity of the bill upon information and belief only. * * * But no dissolution of the injunction can be obtained upon the answer of a corporation which is not duly verified by the oath of some officer of the corporation, or other person who is acquainted with the facts contained therein."

The fact that Niehaus or Piraldo, who are charged as being actively engaged in the work which, if carried out, would result in injury to complainant's lot, and who knew better than any one else what they intended to do, did not also make oath to the answer, is a circumstance worthy of consideration in giving weight and credence to the denials contained in it. Furthermore, they should not be allowed to support their denials, for the purpose of giving probative force to them, by hearsay evidence. Especially is this true when each of them is fully acquainted with facts alleged in

the bill, and can depose primarily to their existence or nonexistence. And so far as the respondent the city of Sheffield is concerned, we feel that we are authorized in saying that the answer discloses that the affiant knew nothing, of his own knowledge, of the facts upon which the denials are predicated, going to the equity of the bill pointed out by us. It, too, relied upon a mere hearsay affirmation when primary evidence was attainable. Upon the question under consideration, the case cannot possibly be stronger than one in which the answer denies the equity of the bill upon information and belief. *Calhoun v. Cozens*, 3 Ala. 508; *Railway Co. v. Witherow*, 82 Ala. 194, 3 South. 23. With this dubious proof in support of the denials of the answer, it cannot be said that the court cannot see a good reason in the facts disclosed why the injunction should be retained. *Rembert v. Brown*, 17 Ala. 671.

Affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. ALABAMA CITY.

(Supreme Court of Alabama. June 28, 1902.)

RAILROADS—LICENSE TAX—REASONABLENESS—INTERSTATE COMMERCE—PLEADING ORDINANCE.

1. Complaint to recover license tax provided by ordinance need not set out the ordinance, but merely state its substance and aver its violation.

2. A railroad company's liability to pay a license tax required of a company running cars through it, for transporting freight or passengers to or from it, is not affected by its not having an agent or office in the city.

3. A city ordinance imposing a privilege tax on a railroad company running cars through the city, for the business of transporting freight or passengers between the city and other points in the state, does not interfere with interstate commerce.

4. A privilege tax of \$50 a year required by a city of 2,000 of each railroad company running cars through it, for the business of transporting freight and passengers between it and other points in the state, is not unreasonable, though in the case of one company its receipts in the city do not pay its operating expenses therein.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Alabama City against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This was a suit by the city of Alabama City, against the appellant, to recover several sums alleged to be due to the plaintiff for license or privilege tax for the defendant engaging in the business in Alabama City of operating its railroad therein, for the transportation of freight and passengers, one or both, to points in the state of Alabama and from other points in the state of Alabama to Alabama City; it being averred in each of the counts of the complaint claiming the privilege tax of \$50 for each of the years in which the plaintiff failed to take out a license, that

the defendant had not paid said amount as required by the ordinance of the plaintiff.

The complaint contained three counts, setting out the facts as above stated. The third count of the complaint did not set out the ordinance of the city upon which the claim suit was based, but it stated the substance of the ordinance and averred its violation by the plaintiff. The defendant demurred to the complaint and to each count thereof upon the ground that it did not set out in full the ordinance or ordinances under which the amount sued for or claimed to be due. This demurrer was overruled, and thereupon the defendants pleaded the general issue and several special pleas. The second plea was in words and figures as follows: "(2) That it has not been engaged in the business of running cars through or into Alabama City for the business of transporting freight or passengers one or both from Alabama City to other points in this state, and from other points in this state to Alabama City, but that it runs its trains through the corporate limits of said Alabama City for the purpose of transporting freight and passengers from points outside of Alabama City to other points in this state and other states, (and that it has neither an agent nor an office in said Alabama City, and has not had since the enactment of the ordinances referred to in the complaint)."

By the third plea, the defendant set up that the ordinance was in violation of the fourteenth amendment of the constitution of the United States, in that the enforcement of the ordinance would deprive the defendant of its property without due process of law, because the defendant has not since the enactment of the ordinance referred to derived a sufficient revenue from the transportation of freight and passengers from Alabama City to other points in the state, and from other points in the state to Alabama City to pay its actual operating expenses.

In the fourth plea the defendant set up that the enforcement of the ordinances referred to in the complaint against the defendant would be in violation of article 1 of section 10 of the constitution of the United States, because it would impair the obligation of the contract, in that the defendant had obtained through the legislature of Alabama the right to run its trains through the territory embraced within the corporate limits of Alabama City, and the enforcement of said ordinance would prohibit the exercise of the privilege granted it by its charter.

In the fifth plea the defendant pleaded that the plaintiff has no authority under its charter to exact a license tax from this defendant for running its trains through the corporate limits of said city.

In the sixth plea the defendant set up that the enforcement of said ordinance was an interference with interstate commerce.

Plaintiff moved to strike out that portion of the second plea which is within the parentheses, upon the ground that it seeks to pre-

sent an immaterial and irrelevant issue, and because it was frivolous and impertinent. To each of the other pleas, the plaintiff demurred upon the ground that no one of said pleas set up an answer to the complaint, and that they presented an immaterial issue and that the facts therein set up were not in violation of the constitution of the United States, nor was it an interference with interstate commerce. These demurrers were sustained. The cause was tried by the court without the intervention of a jury, upon an agreed statement of facts. In this agreed statement of facts it was admitted that the defendant was operating a railroad through Alabama City, and was engaged in both state and interstate commerce, and that the defendant had no agent within the corporate limits of Alabama City, nor has it ever had, nor has it had a depot building there for the reception of its freight or passengers; that no tickets are or have been sold to passengers to or from Alabama City, but passengers holding tickets or paying fare to the next regular stations beyond are received or are permitted to get off trains at Alabama City. That all freight shipped for Alabama City both from points within and without the state, is billed to Gadsden, Ala., and delivered from Gadsden with the exception, that freight for the Dwight Manufacturing Company at Alabama City or its employes is taken by the defendant to Alabama City and delivered to said Dwight Manufacturing Company without additional charge; that the receipts of defendant from passengers and freight at Alabama City as detailed above, would not pay the actual operating expenses of defendant's railway within the corporate limits of Alabama City, that no license as required by the ordinances named in the complaint, or either of them, was ever taken out or paid for by defendant; that during the years named in the complaint, Alabama City contained some 2,000 inhabitants. The ordinances of the city were then set out in the agreed statement of facts, and the charter of the defendant specially referred to. The other facts of the case are sufficiently stated in the opinion.

On the submission of the cause, the court rendered judgment in favor of the plaintiff. The defendant appeals, and assigns as error the rulings of the court upon the pleadings and the rendition of judgment for the plaintiff.

Oscar R. Hundley, for appellant. Dortch & Martin, for appellee.

HARALSON, J. 1. There was no error in overruling the demurrer to the third count of the complaint,—the only one insisted on in argument,—on the ground that it did not set out in full the ordinance alleged to have been violated. It did state the substance of the ordinance, and averred its violation. It was only necessary to state its purpose and date, so as to identify it and aver its violation. *Goldthwaite v. City Council of Montgomery*, 50 Ala. 496.

2. In plea 2, the defendant averred that it had neither an agent nor an office in Alabama City, and had not had, since the enactment of the ordinance referred to in the complaint. The plaintiff moved to strike this averment out of the plea, because it was immaterial and irrelevant to the issue, and frivolous, which motion was granted, and in this there was no error. The fact averred did not negative defendant's liability to pay a license to do business in the municipality. *Railroad Co. v. Tapia*, 94 Ala. 228, 10 South. 236.

The defendant does not insist on errors assigned on ruling of the court sustaining demurrers to pleas 4, 5 and 6.

3. The remaining grounds insisted on are, that the ordinance is void, for that, as alleged, it is violative of interstate commerce laws and of the fourteenth amendment of the federal constitution, in that the revenue derived by the company on business done within the town, did not exceed \$200 per annum, a sum not equal to the expenses incurred in operating the railway within the city, and for that reason, a tax of \$50 for a business license was unreasonable.

The act chartering Alabama City (Acts 1890-91, p. 816), bestows on the mayor and aldermen all the powers usually found in the charters of cities, and among them the power (section 12), "to ordain and pass such ordinances and by-laws, not inconsistent with the laws of this state, as shall be needful for the government, police interest, welfare and good order of said city; * * * to have and exercise police power in said city" etc.; and by section 15, "That said city council shall have authority to levy and collect from all persons, firm or corporation trading or carrying on any business, trade, or profession by agent or otherwise in said corporate limits, a license tax, which shall be fixed and declared by ordinance."

Under the agreed statement of facts on which the case was tried, it appears that for each year for which the license tax in this case is claimed, the mayor and aldermen had passed an ordinance making it unlawful for any person, firm or corporation to engage in or carry on any business, trade or profession in said city, for which a license is required by law, without having paid for and taken out a license therefor as required by ordinance. The clause of the ordinance as to railroads was as follows: "Railroads, each company having an office in, or running cars through or into this city for the business of transporting freight or passengers from Alabama City to other points in this state and from other points in the state, to Alabama City, \$50."

The ordinance by its terms invades no provision of interstate commerce regulations. It applies solely to business carried on by railroads, done exclusively within the borders of the state, and if our former adjudications on the subject are to be adhered to, from which we have no reasons to depart, the ordinance does not interfere with interstate commerce.

City of Anniston v. Southern Ry. Co., 112 Ala. 557, 20 South. 915; *Holt v. City of Birmingham*, 111 Ala. 369, 19 South. 735.

Our eyes have not been opened to any violation of the fourteenth amendment to the federal constitution, by the ordinance, nor do we regard the privilege tax as imposed, unreasonable and void on that account. "The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition, or negligence on his part, or other considerations affecting the extent of the business." *Nashville, C. & St. L. R. Co. v. City of Attalla*, 118 Ala. 368, 24 South. 450.

We have passed on the questions requiring consideration, and under the agreed state of facts, conclude that the court below did not err in the judgment rendered.

Affirmed.

MUTUAL BEN. LIFE INS. CO. v. LEHMAN et al.

(Supreme Court of Alabama. June 28, 1902.)
LIFE INSURANCE—WARRANTIES—PLEADING—
WAIVER OF BREACH.

1. Statements in application for insurance not being warranties unless made so by the policy, a plea in suit on a life policy discloses no warranties by showing that the application contained the provision, "I agree that the answers given herewith, * * * which I declare and warrant to be true, shall be the basis of my contract," and alleging "breach of warranties which formed the basis of said contract as follows," following which are answers in the application alleged to be false.

2. Payment by the insurer of part of the insurance money to insured's administrator in collusion with him to defeat claims of insured's creditors is a waiver of breaches of warranty by insured; but a part payment to him, in good faith, as a compromise, is not such waiver as to the balance unpaid.

Appeal from chancery court, Jefferson county; John C. Carmichael, Chancellor.

Bill by Charles T. Lehman and others against the Mutual Benefit Life Insurance Company. From decree holding plea insufficient, defendant appeals. Affirmed.

A. Latady, for appellant. Jas. A. Mitchell, John W. Tomlinson, and Henry Kirke White, for appellees.

McCLELLAN, C. J. This bill is prosecuted by Lehman and others, creditors of the estate of George T. Winton, deceased, to enforce the payment by the insurance company of a policy of insurance issued by it on the life of the debtor. The respondent pleaded, in bar of the relief sought: that Winton made an application for said insurance. That in his application is this provision: "I agree that the answers given herewith to the questions of the agent or examiner, which I declare and warrant to be true, shall be the basis of my contract with the company;" and "respondent

¶ 2. See Insurance, vol. 23, Cent. Dig. §§ 1084, 1086.

pleads * * * breach of warranties which formed the basis of said contract, as follows: (1) That in answer to the question, 'Have you any disease or disorders?'—one of the questions the answer to which the said George T. Winton warranted to be true,—the said Winton answered, 'No.' And this respondent says that said answer was untrue, in that, as respondent avers, that said Winton, at the time he made the answer set out, suffered from disorder of the kidneys, dyspepsia, headache, and muscular pains. (2) That in answer to the question, 'How often, and for what, have you sought medical advice during the past seven years? Dates of each, duration, physician consulted?'—one of the questions the answer to which said Winton warranted to be true,—the said Winton answered: 'Once for la grippe, in February, 1891; Dr. J. E. Griggs, Birmingham, Alabama. Once for mumps, in June, 1893; Dr. T. L. Robertson, and that the disorder continued in each instance for one week.' And this respondent says that the answers so given to the question above set out were untrue, in this: that at the time of making said answers the said Winton knew that in the fall or winter of 1894 he had consulted physicians for disorders from which he suffered, and that he likewise sought medical advice in the spring or summer of 1895. (3) That in answer to the question, 'Are you, or have you been, subject to dyspepsia? Dates, duration, and severity?'—one of the questions the answer to which the said Winton warranted to be true,—he answered: 'Yes, in February, 1880. Three months; not very severe. Was never confined to bed, and able to attend to business.' And this respondent avers that the answer so given to the question herein set out was untrue, for that respondent says that at the time said Winton made the answer averred to be untrue he knew that in the fall or winter of 1894 he suffered from dyspepsia, and that in the spring or summer of 1895 he had to leave the city of Birmingham on account of his state of health, and that he remained away at mineral springs for two weeks under the advice of a physician; that he was, just before leaving for the springs, suffering from an attack of dyspepsia, headaches, muscular pains, and scanty urine, and that he had been confined to his bed for several days, and that during the year preceding his death he had received sundry prescriptions from his physician for these complaints." This plea being set down for hearing on its sufficiency, the chancellor held it insufficient on grounds clearly stated in his opinion, which we adopt: "The plea, as amended, of the Mutual Benefit Life Insurance Company, attempts to set up some breaches of warranties alleged to have been made by the decedent, George Winton. The contention that the plea does not disclose any breach of the alleged warranties was carefully argued at the bar upon the trial of the sufficiency of the plea. I shall not go into that question, as I think the plea is to be

held insufficient upon another ground, anterior in point of the development of the trial to the one argued. The plea does not disclose any warranties made by Winton. For aught that appears in the plea, the statements alleged to have been made by Winton were mere representations. It is only stated by way of recital, and not by positive averment, that even the representations were made. The plea does not allege that the warranties were in writing, that they were incorporated into the contract of insurance, or that they were referred to therein in any manner, or in such manner as to make them a part of the contract. It would establish the plea if the respondent company should prove that Winton made the statements recited in the plea, even by parol [oral evidence]. This would fall far short of the essential elements of a warranty. In *Insurance Co. v. Johnston*, 80 Ala. 470, 2 South. 128, 59 Am. Rep. 816, Somerville, J., says: "The distinction between a warranty and a representation in insurance is frequently a question of difficulty, especially in the light of more recent decisions, which recognize the subject as one of growing importance in its relations, particularly to life insurance. As a general rule, it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent." In the well-considered case of *Campbell v. Insurance Co.*, 98 Mass. 391, it is said: "The application is in itself collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of representations. They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract." See, also, *Fidelity & Casualty Co. v. Alpert*, 14 C. C. A. 474, 67 Fed. 490; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 23 C. C. A. 65, 77 Fed. 117; 16 Am. & Eng. Enc. Law (2d Ed.) p. 924. Tested by these decisions, the plea presents no defense to the bill, and is therefore insufficient. * * *

It is argued for appellant that, inasmuch as a plea in chancery, like other pleadings, is amendable, this plea should not have been held insufficient. This we take to be an inadvertent suggestion of counsel. The plea, on such hearing, is judged by what it contains, as a plea at law would be judged on demurrer, and not with reference to what might be injected into it by amendment; and the ruling of insufficiency goes upon the ground that the plea is lacking in averment, which, if the real facts admit of it, might be made by amendment.

We deem it unnecessary to pass upon other points made in argument against the sufficiency of the plea. We may remark, however, that forfeitures of policies of insurance by reason of the inaccuracy or falsity of answers to questions, even when properly made warranties, is not favored in the law, since the opera-

tion of such warranties may be, and frequently is, to defeat the policy, though neither its issuance nor the death of the assured may bear any relation to the fact concealed or inaccurately or falsely affirmed; and upon this and other considerations such warranties are strictly construed against the insurer, and liberally to the upholding of his liability under the policy. Hence it is held that a warranty arising upon questions and answers incorporated by reference or bodily into the policy may be broken in the letter without vitiating the contract, but that the breach, to that end, must be of the spirit, intent, and substance of the covenant,—as, for example, where the warranty is that the applicant is in good health, the intention is, not that he is in perfect health, but that he is free from ailments calculated or tending to shorten life and increase the insurer's risk; and we apprehend that a warranty that the applicant has no disease or disorders would not be breached by the fact that he did have a disease or disorder temporary in its nature, and involving no tendency to shorten life. Thus one may, at the time of answers made, have an acute disorder of the kidneys, due to some specific and known cause, and eradicable both as to cause and condition, so as to leave no impairment of health; or he may have a temporary dyspepsia, yielding to treatment, and not affecting the risk; and surely he may have headaches and muscular pains, none of which would be a disorder within the sense and substance of the warranty, but each of which would be a disorder within its letter. 1 May, Ins. § 295 et seq., and cases there cited.

In respect of the second and third assignments of breach, we suggest that the general averment of untruth refers alone to the answers affirmatively given, and is not supported by the specification, so to speak. To illustrate: In the second assignment it is averred that Winton, in answer to the question, "How often, and for what, have you sought medical advice during the past seven years? Dates of each, duration, physician consulted,"—said: "Once for la grippe, in February, 1891; Dr. J. E. Griggs, Birmingham; once for mumps, in June, 1898; Dr. T. L. Robertson;" and that the disorder continued in each instance for one week. Now, it is this particular statement that is averred to be false, and the specification shows that this statement is not in fact challenged at all, but that the real complaint of his answer was, not that it was untrue, so far as it went, but that it failed to go far enough, and cover the field of the question. And the same is true of the third assignment. The point as to whether an assignment of breach of warranty arising upon question and answer may be rested upon a lack of fullness in the answer, we apprehend, is not presented by these assignments.

In one aspect of the case presented by the bill the respondent insurance company is alleged to have paid a part of the money evidenced by the policy to the administrator of

the deceased insured, in collusion with him to defeat the claims of complainants and other creditors of Winton. If this is true, the payment was a waiver of the breaches of warranty sought to be set up in the plea; and it follows that the plea presents no defense to that aspect of the bill, and, of consequence, no defense to the bill as a whole. If, however, the payment to the administrator was made by the company in good faith as a compromise settlement of the claim against it, the company honestly believing it had a right to settle with the administrator, and the face value of the policy being scaled to the amount so paid in recognition and on account of the company's claim that it was not liable at all because of breaches of the insured's warranties,—as may be the case consistently with another aspect of the case presented by the bill,—the payment would not, as matter of law, constitute a waiver of the alleged breaches so far as the balance unpaid is concerned.

The decree of the chancery court holding the plea insufficient must be affirmed.

LOUISVILLE & N. R. CO. v. MITCHELL.

(Supreme Court of Alabama. June 28, 1902.)

ACCIDENT ON RAILROAD—WANTON OR WILLFUL INJURY—PLEADING—TRESPASSER—CONTRIBUTORY NEGLIGENCE.

1. A complaint alleging that defendant's engineer wantonly or intentionally caused the death of plaintiff's intestate, in that he wantonly or intentionally ran the locomotive through the town rapidly and without warning, with knowledge that persons were, or would likely be, on the tracks, does not charge a wanton or willful injury, but mere negligence; as it does not show the engineer had actual knowledge of deceased's peril.
2. A person who goes on a railroad track, though in accordance with the custom of those living near it, to walk on it, without objection from the railroad company, is a trespasser.
3. One who starts to cross a railroad track so near an approaching train, which he could have seen, that he is struck before he gets across, is guilty of contributory negligence.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Sallie Mitchell, administratrix, against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint originally contained three counts, and a fourth count was added by amendment. On the trial of the cause, the court gave the affirmative charge for the defendant as to the first, second, and fourth counts of the complaint; and the cause was tried upon issues made up under the third count of the complaint. The averments of negligence as contained in the third count of the complaint are shown in the opinion.

The defendants demurred to the third count upon the following grounds: "First. For that said count is inconsistent and repugnant. Second. For that the said count avers that the defendant wantonly or intentionally caused

the death of plaintiff's intestate, and then undertakes to state the facts under which the death was caused and said facts, so stated, fail to show wanton or intentional negligence. Third. For that it is not shown by the court that the plaintiff's intestate was lawfully upon defendant's track, and no facts are stated which show that the defendant owed any duty to plaintiff's intestate at the time and place of the alleged injury. Fourth. For that the facts, as alleged, that the defendant's agent or servant had knowledge or notice that persons were, or would likely be, upon the track of the said defendant, is not sufficient to charge the defendant with wanton or willful negligence in failing to see said persons or keep a lookout for them. Fifth. For that it appears by the count that the plaintiff's intestate was a trespasser upon the defendant's track, and the defendant owed no duty to the plaintiff's intestate to keep a lookout for him, nor is it averred or shown that the defendant knew, in time to stop the train and to prevent the accident to said intestate, that the said intestate was upon the track." This demurrer was overruled, to which ruling of the court the defendant duly excepted. Thereupon the defendants pleaded the general issue and several special pleas setting up the contributory negligence of the plaintiff.

Plaintiff demurred to the pleas setting up the contributory negligence of the plaintiff, upon the ground that such contributory negligence was no answer to the wantonness or intentional wrong as claimed in the third count of the complaint. These demurrers were sustained. The other facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently shown in the opinion.

There were verdict and judgment for the plaintiff, assessing her damages at \$9,000.

Thos. G. & Chas. P. Jones, J. M. Falkner, and Walker, Tillman, Campbell & Porter, for appellant. C. P. Beddow and Bowman & Harsh, for appellee.

HARALSON, J. 1. Count 3 of the complaint was intended to be one for wantonness or willfulness, and was so treated on the trial. Against it, as a count of this character, a demurrer on several pertinent grounds was interposed, which was overruled.

The count alleges, that "defendant through its servant or agent in charge or control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz.: Said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or vil-

lage with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said intestate in said town or village, and so injured him that he died."

While the count avers that the servant or agent of the company in charge of the engine wantonly or intentionally caused the death of plaintiff's intestate, it sets out in particularity in what the wantonness, and the intention to inflict the injury, consisted. The whole count must be construed together, and when so construed, the wantonness which in the first part of the count was averred in general terms, will be found to consist, if at all, in the facts particularly set up and relied on to show it. This averment of facts undertakes to point out specifically in what the wantonness, or intention of the servant or agent of the defendant to inflict the injury, consisted. Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer "wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning or notice of the approach of the engine," with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer.

In *Railroad Co. v. Martin*, 117 Ala. 382, 23 South. 237, it was said: "The mere intentional omission to perform a duty, or the intentional doing of an act contrary to duty, although such conduct be culpable and result in injury, without further averment, falls very far short of showing that the injury was intentionally or wantonly inflicted. Unless there was a purpose to inflict the injury, it cannot be said to be intentionally done; and unless an act is done, or omitted to be done, under circumstances and conditions known to the person, that his conduct is likely to, or probably will result in injury, and through reckless indifference to consequences, he consciously and intentionally does a wrongful act, or omits an act, the injury cannot be said to be wantonly inflicted." So, again, in *Railroad Co. v. Orr*, 121 Ala. 489, 26 South. 35, under a count which alleged that a train by which the killing was done, was, at the time, running at a dangerous rate of speed, through an incorporated city or across a public street, along which persons in large numbers were continually passing, and that no whistle was sounded or other danger signal given, and that the death of the intestate was the result of the carelessness, negligence and recklessness of the defendant, the court said: "The run-

ning of a train [under the conditions mentioned] does not necessarily involve an intention on the part of the trainmen to kill, or such reckless disregard of probable consequences as would amount to wantonness."

"It is only when the employes of the company operating the train fail to exercise reasonable care, to avoid injuring him, after the trespasser has been discovered and his peril of injury becomes apparent, that they are held to be guilty of wantonness or recklessness such as will overcome the contributory negligence of the trespasser." *Haley v. Railroad Co.*, 113 Ala. 649, 21 South. 360.

From this review of the count, it appears that it falls short of averring wantonness or willfulness in inflicting the injury complained of; that it charges no more than that the engineer wantonly or intentionally ran said engine through said town or village of Elmore, without proper or sufficient warning or notice of the approach of said engine, and is, therefore, no more than a count for mere negligence.

2. As to persons walking on or crossing a railroad track, it is held, that "the mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon (or across) without any objection on the part of the railroad company, does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers" (*Glass v. Railroad Co.*, 94 Ala. 586, 10 South. 217); and "one who is injured in consequence of being negligently on a railroad track cannot recover, unless the railroad employes are guilty of such gross negligence or recklessness as amounts to wantonness or intention to inflict the injury; and that this wantonness and intention to do wrong can never be imputed to them, unless they actually know (not merely ought to know) the perilous position of the person on the track, and with such knowledge, fail to resort to every reasonable effort to avert disastrous consequences. And this doctrine applies to densely populated neighborhoods in the country, and to the streets of a town or city, as to the solitudes of the plains or forest." *Nave v. Railroad Co.*, 96 Ala. 267, 11 South. 391; *Railway Co. v. Lamb*, 124 Ala. 172, 26 South. 969; *Railroad Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153; *Railroad Co. v. Crawford*, 89 Ala. 240, 8 South. 243; *Railway Co. v. Foshee*, 125 Ala. 199, 27 South. 1006.

In the case last cited, after announcing the well understood doctrine, that it is the duty of a person approaching the track of a railway for the purpose of crossing it, to stop and look and listen if need be, for the approach of a train, and that the omission of this duty followed by injury in collision with a train, locomotive or car, while attempting thus heedlessly to cross over the track, is a matter of law negligence on the part of the person so contributing to the result, as to defeat his ac-

tion counting on the injury as having been produced by the simple negligence of the company or its employes, the court states what seems to be axiomatic, that "It is not possible to conceive that any foot traveler need or could with the proper use of his senses ever go upon a railway in ignorance of the approach of a train sufficiently near to strike him before he crosses over it. No curve even with a deep cut that a train can be operated upon, can be so acute as to deprive him of the opportunity while standing beside the track, to refrain from attempting to cross in front of it."

3. The facts of this case without conflict are, that Elmore station is a village of about 300 inhabitants, and is not a scheduled station for the train that passed,—the fast mail. The crossing at which plaintiff's intestate was killed, was not a street or public thoroughfare. The public crossings, of which there were two, were above and below the depot, some 200 yards or more. The tracks of the railroad, running north and south at this point, were fenced; the fences opened by two gates, one on the east and the other on the west, and a pathway from one gate to the other ran across the railroad tracks, which path was used without objection on the part of the railroad company, so far as appears, by people, generally, of Elmore or from the country, who desired to go from one part of the village to the other, and was much frequented for such purposes. At no time was it used, so far as appears, as a matter of right but only for convenience without objection on the part of the railroad company. The train, as the evidence tends to show, ran through, at from 40 to 60 miles an hour, as estimated by different witnesses; that one coming in at the east gate, could see up the track, north, about half a mile, and not so far when outside of the gate; that there is a curve eastward in the track coming from the north, before reaching the depot, which curve was some 200 or 300 yards from the depot. Intestate approached the track from the east gate, and the evidence tends to show that he looked up the track north as he crossed the switch track,—which is a few feet away, on the east from the main line. One witness testified, that he told him to look out or the train would kill him, but intestate made no reply and went on and was caught and killed just before he got across the main line. There was no evidence that the engineer saw the deceased before the collision occurred, or knew that he was in proximity to the track.

Treating the third count, as we must, as one for simple negligence, and not for wantonness or intentional injury of the deceased, it is apparent that under the principles above stated, the plaintiff's intestate was guilty of negligence, which proximately contributed to his own death, and, on the case if tried upon such a count, the affirmative charge might have been properly given for defendant.

Reversed and remanded.

KILLIAN et al. v. COX.

(Supreme Court of Alabama. June 28, 1902.)

FRAUDULENT CONVEYANCE—PLEADING—JOINT ASSIGNMENTS OF ERROR.

1. Joint assignments of error to decree subjecting to a judgment various tracts of land in none of which appellants are jointly interested, not being sustainable as to one appellant, are bad as to all.

2. Where bill to subject land conveyed to respondents to complainant's judgment against the grantor alleges the conveyance was for a fictitious consideration, with intent to defraud, when the grantor was insolvent, to respondents' knowledge, and the evidence shows the insolvency and respondents' knowledge, averments of the answer that the sale was for the purpose of paying a debt of the grantor's to V. on account of his suretyship for F., and that a fair consideration was paid, and the proceeds applied to payment of such debt, are too indefinite, and insufficient, in view of the burden of proof on respondents, to overcome the presumption of unfairness and bad faith.

Appeal from chancery court, De Kalb county; Wm. H. Simpson, Chancellor.

Bill by James Cox against G. W. Killian and others. Decree for complainant. Respondents appeal. Affirmed.

Davis & Haralson, for appellants. Howard & Isbell, for appellee.

TYSON, J. The bill in this cause was filed by a judgment creditor to subject several parcels of real estate, the proceeds of a tract of land, and a stock of goods, alleged to have been conveyed by his debtor in fraud of creditors. One of the appellants, Kenneth Killian, is only interested in the subjection by the decree of the proceeds of the tract of land described in the ninth paragraph of the bill. It is true his brother, Monroe, another appellant, has also an interest in the same matter. But the other appellant, Mrs. Killian, has none whatever. Nor has the appellant Kenneth any interest whatever in the several pieces of property subjected by the decree claimed by Mrs. Killian alone or those pieces claimed by her and Monroe jointly or in common.

The assignments of error are two in number, and are joint. The first of these relates to the overruling of the demurrer to the bill. This assignment is not insisted upon in argument, and is therefore waived. 3 Brick. Dig. p. 40, § 125.

The other assigns as error the final decree condemning the several items of property, some of which is held by Mrs. Killian in severalty, others in common or jointly by her and Monroe, and the proceeds of the lands described in the ninth paragraph, sought to be subjected, in the hands of Monroe and Kenneth. The assignment of errors is, in effect, the complaint of the appellants in this court, and where several unite in one assignment they encounter defeat unless the assignment is good as to all. If the error affects the appellants separately, and not jointly, they

should assign errors separately. Elliott, App. Proc. §§ 300, 318; 2 Enc. Pl. & Prac. 933; Kimbrell v. Rogers, 90 Ala. 246, 7 South. 241; Bowling v. Railway Co., 128 Ala. 550, 29 South. 584. See, also, cases cited in first rule of practice of supreme court (Code, p. 1187); Beachman v. Manufacturing Co., 110 Ala. 555, 18 South. 314. The case last cited is directly in point. It is shown both by the bill and the evidence that complainant's debt was in existence when the conveyance for a recited consideration of \$800 was made by the debtor to the lands described in the ninth paragraph of the bill, which it is alleged was conveyed upon a recited fictitious consideration, with the intent to hinder, delay, or defraud, when the grantor was insolvent; and that his insolvency was known to the other respondents. The evidence fully establishes the insolvency of the grantor, and a knowledge of it by the other respondents. The answer of the respondents denies the fraud charged, and alleges that the sale of the land was made for the purpose of paying a debt which the grantor was due one Vann on account of his suretyship for one Parish; that all the proceeds of the sale of said land were applied to the payment of the debts of the grantor, and a fair consideration paid for the land. These averments, in view of the fact that the burden of proof was upon the respondents, were insufficient to overcome the presumption of unfairness and mala fides of the transaction. Affirmative allegation of facts relied on as constituting the consideration is as essential as satisfactory proof of their existence. Such allegation must be definite, clear, and concise in its statement of facts, in order that the complainant may be apprised of the defense he is called upon to meet. It is of no moment what the evidence proves, if the facts are not sufficiently alleged. Gamble v. C. Aultman & Co., 126 Ala. 372, 28 South. 30, and cases there cited. Clearly, there is no error in the decree in respect to this property.

The appellant Kenneth having no interest in the other property condemned by the decree, and the assignment of error being joint, there being no error of which he can complain, the decree must be affirmed.

ANDREWS et al. v. MATHER.

(Supreme Court of Alabama. June 28, 1902.)

BANKRUPTCY—SUIT BY TRUSTEE TO SET ASIDE FRAUDULENT CONVEYANCE—JURISDICTION OF STATE COURT.

1. Bankr. Act 1898, § 70, "e," providing that the trustee may avoid any transfer by the bankrupt which a creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, does not limit the trustee to an action at law; but he may, at least in the state court, maintain a suit in equity, under Code, § 818, authorizing suit by a creditor to subject to his debt property fraudulently conveyed by the debtor.

* 1. See Appeal and Error, vol. 3, Cent. Dig. § 2985.

* 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 421, 446.

2. Suit by trustee in bankruptcy to recover property fraudulently conveyed may be brought in the state court, under Bankr. Act 1898, § 23, entitled "Jurisdiction of the United States and State Courts," and providing (a) the United States circuit court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner, and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants; and (b) suits by trustees shall only be brought in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted.

Appeal from chancery court, Lauderdale county; Wm. H. Simpson, Chancellor.

Suit by Joseph S. Mather, trustee in bankruptcy, against James A. Andrews and others. From decree overruling demurrer to bill, defendants appeal. Affirmed.

On the 18th day of April, 1898, James A. Andrews conveyed to his wife, Tabitha M. Andrews, "in consideration of the love and affection which the party of the first part has and bears for the party of the second part, and the further consideration of one dollar in hand paid, receipt whereof is hereby acknowledged" a tract of land lying in Lauderdale county, Ala., described in said deed by metes and bounds, and containing about 187 acres more or less. On the 9th day of August, 1899, James A. Andrews filed his petition in bankruptcy in the United States court for the Eastern district of Louisiana, in bankruptcy, and was duly adjudicated a bankrupt, and thereafter the complainant was appointed trustee in bankruptcy of the said Andrews. On the 18th day of April, 1898 (the date of the alleged fraudulent conveyance) the said Andrews was indebted to the Smith Bros. Co., Limited, in the sum of \$1,803.48, which is still due and unpaid, and on said date he was likewise indebted to Sherbourne & Schlater in the sum of \$762.71, which is still due and unpaid; both of said sums were due on the date of said conveyance by Andrews to his wife.

On June 12, 1900, the appellee, Joseph S. Mather, as trustee in bankruptcy of James A. Andrews, filed in the chancery court of Lauderdale county, the present bill, seeking to set aside the conveyance made by Andrews to his wife as being fraudulent and void. The bill averred the facts as above stated, and in reference to the conveyance contained the following averments: "That on the 18th day of April, 1898, the said James A. Andrews, then being indebted to the complainants in the manner and form as hereinbefore set out, and then being insolvent and with intent to hinder, delay and defraud his creditors made and executed a deed of conveyance to his wife, attempting to convey to her a large and valuable tract of land in" Lauderdale county. Then follows a description

of the land. It was averred in the bill that "said conveyance was purely voluntary and was made to the said Tabitha M. Andrews without consideration, and complainant alleges that the same is fraudulent and void, and that said deed should be canceled, set aside and held for naught, and that your honor should decree that said lands should be sold for the payment of the debts of the said James A. Andrews." The bill further averred "that said Joseph S. Mather is over the age of twenty-one years and resides in New Orleans, Louisiana; that at a meeting of the creditors of the bankrupt defendants held at the office of Hon. F. D. Chretien, referee in bankruptcy, on the 5th day of March, 1900, the creditors unanimously recommended that the said Joseph S. Mather be authorized to institute suits as may be necessary to recover property supposed to belong to the said bankrupts, and more particularly certain real estate situated at or near Florence, Alabama, and to that end to employ counsel as may be necessary and to incur the necessary costs therein. * * * That upon such recommendation the court gave judgment accordingly authorizing the said Joseph S. Mather as trustee to institute all necessary suits for the recovery of property fraudulently conveyed by said bankrupts."

The prayer of the bill was that a decree be rendered declaring the said conveyance made by James A. Andrews to his wife, as being fraudulent and void; that the same be set aside and canceled; that the lands described therein be sold under a decree of the court, and the proceeds of such sale, after paying the costs of the court, be paid over to the complainant as trustee in bankruptcy of the said James A. Andrews to be by him applied to the payment of the debts of said Andrews under an order of the court wherein said bankrupt estate was being administered. There was also a prayer for general relief.

To this bill the defendants demurred upon the following grounds: "(1) That the complainant has a plain, adequate and complete remedy at law for the recovery of the property described in the bill. (2) That if the complainant has any remedy at all it is at law, and the same is plain, adequate and complete. (3) That the act of congress relating to bankruptcy if it gives the complainant any remedy at all gives him the right to recover the property in the bill described, or its value, and does not give him the right to file a bill in the chancery court to set aside the conveyance from James A. Andrews to the defendant Tabitha M. Andrews and subject the property in the bill described to the payment of the debts described in the bill and other debts of James A. Andrews. (4) That whatever right complainant has to file his bill in the chancery court to set aside the conveyance of the lands described in the bill from James A. Andrews to Tabitha M. Andrews is only such right as the creditors of said James A. Andrews have and had under

the acts of congress relating to bankruptcy, and the bill does not allege or show that the creditors in the bill mentioned or any other creditor of said James A. Andrews had or have any right to file a bill to set aside said conveyance. (5) That the bill does not allege or show that the creditors in the bill described or any other creditor of the said James A. Andrews are judgment creditors. (6) That the bill and exhibits thereto show that the conveyance from James A. Andrews to Tabitha M. Andrews was made prior to the acts of congress relating to bankruptcy. (7) That the bill shows that the conveyance from James A. Andrews to Tabitha M. Andrews which the bill seeks to set aside and annul was made prior to the passage of the acts of congress relating to bankruptcy. (8) That the bill shows that the conveyance from James A. Andrews to the defendant Tabitha M. Andrews on the 18th day of April, 1898, and the bill in this case was filed on the 12th day of June, 1900. (9) That the bill does not allege or show that the creditors of James A. Andrews mentioned in the bill or any other creditor of said James A. Andrews have proven their claims in bankruptcy in the said proceeding in which said James A. Andrews was adjudicated a bankrupt. (10) That the bill does not allege or show any fact or facts which show the conveyance from said James A. Andrews to Tabitha M. Andrews to be fraudulent in fact. (11) That the bill alleges that the conveyance from said James A. Andrews to Tabitha M. Andrews was made with intent to hinder, delay, and defraud the creditors of said James A. Andrews, and does not allege or show the facts which stamp said conveyance as fraudulent."

On the submission of the cause upon the demurrers, the chancellor rendered a decree overruling them. From this decree the defendants appeal, and assign the rendition thereof as error.

Simpson & Jones, for appellant. John B. Weakley, for appellee.

HARALSON, J. 1. Section 818 of the Code provides, that a creditor without a lien may file a bill in chancery to subject to the payment of his debt, any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor.

The averments of the bill in this case are full and sufficient to show that the conveyance sought to be set aside was fraudulent against the creditors of the grantor. They fully advise the defendant that the bona fides of the conveyance is assailed for fraud, and in what the fraud consists. *Burford v. State*, 80 Ala. 147.

2. The bankrupt law approved July 1, 1898, vests in the trustee of the estate of the bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appoint-

ment and qualification, among other things, "property transferred by him in fraud of his creditors." Section 70a, subd. 4; *Lovel. Bankr.* p. 825.

This law, as seems to be well settled in federal and state courts, gives to the assignee or trustee the right to sue to set aside conveyances made by the debtor in fraud of his creditors, and vests in him the title to the property recovered, in order that it may be applied to the claims of creditors, and makes it his duty to do so. Such conveyances may be avoided although made more than six months before bankruptcy. 16 Am. & Eng. Enc. Law (2d Ed.) 732, 746, and authorities there collated; *Brandenb. Bankr.* 444-446; *Lovel. Bankr.* pp. 296, 297, §§ 157, 158; *Black, Bankr.* 265; *Coiller, Bankr.* 420; *Pratt v. Curtis*, Fed. Cas. No. 11,375. Although property which has been fraudulently conveyed ceases to belong to the grantor, so far as any claim he himself can set up is concerned, yet the law regards property which has been fraudulently conveyed, as still the property of the grantor, so far as creditors are concerned. The assignee in bankruptcy is an officer created for the benefit of creditors, and he is permitted to regard property fraudulently conveyed in the same way in which creditors are permitted to regard it. *Ashley's Adm'r v. Robinson*, 29 Ala. 112, 125, 65 Am. Dec. 387. "Whenever the creditors could have contested the validity of a conveyance, the trustee, as their representative, can and should do so. No lien or conveyance which is invalid as to creditors, has any validity as against a trustee. As the representative of creditors, the trustee of the bankrupt may sue debtors of his bankrupt whose claims have been preferentially and collusively released. The trustee is in no way affected by the illegal or fraudulent acts of the bankrupt, if creditors would not be affected by them." *Coll. Bankr.* 420.

3. It is contended by the appellant, that because the act provides (section 70 "e") that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value, prior to the date of the adjudication, —that this provision confines the trustee to a suit at law for such recoveries, and precludes him from a suit in chancery to set aside a conveyance for fraud, and have the property sold to pay creditors. But this contention is without foundation. Such a suit is by statute maintainable in equity in this state. Code, § 818. Whatever may be the rule of practice on the subject in the federal courts, this right, under the laws of this state, is nowhere denied. This is a new, equitable right created by the state, not opposed to the federal constitution or laws. As to whether a simple contract creditor may maintain a suit of this character in the federal courts, the supreme court of the United States say: "The

general proposition, as to the enforcement in the federal courts of new equitable rights created by the states, is undoubtedly correct, subject, however, to this qualification,—that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the constitution or laws of the United States. Neither such right, nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the states by whose legislation it is created. The constitution, in its seventh amendment declares, that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ In the federal courts, this right cannot be dispensed with, except by the assent of parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact. * * * Whatever control the state may exercise over proceedings in its own courts, such a union of legal and equitable relief in the same action, is not allowable in the practice of the federal courts.” *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1118.

So it was held in the case first cited,—and that was as far as the principle announced extends,—that the circuit court of the United States in Mississippi could not, under the operation of the statutes in that state, take jurisdiction of a bill in equity to subject the property of a defendant to the payment of a simple contract debt, in advance of any proceedings at law, either to establish the validity and amount of the debt, or to enforce its collection, in which proceeding the defendant, under the constitution of the United States is entitled in a federal court to a trial by jury. But it is not there, or elsewhere, decided, so far as we are aware, that such state statutes, in their enforcement in the state courts, offend the federal constitution or laws.

4. It is again contended, that the chancery court of the state, has no jurisdiction of the bill in this case, and that complainant’s remedy, whatever it may be, must be sought in a federal bankrupt court. Section 23 of the bankrupt act is headed “Jurisdiction of the United States and State Courts,” and provides: “(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversies had been be-

tween the bankrupts and such adverse claimants. (b) Suits by trustees, where brought. Suits by trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.”

Mr. Loveland in discussing these provisions, in the light of other bankrupt acts, and the adjudications on them, says: “The title of section 23 in the act is, ‘Jurisdiction of United States and State Courts.’ There was no express recognition of jurisdiction in state courts in the act of 1867. The courts, however, construed that act as not taking away any jurisdiction of the state courts at law or in equity. The title and section 23 undoubtedly recognize a similar jurisdiction in the state courts. Section 23 does not purport to take away any jurisdiction in law or equity which would otherwise exist in the United States circuit or state courts. It is in the nature of a recognition of it,” etc.—citing *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Lovel. Bankr.* p. 72.

Again, the same author observes (pages 490, 491), as to proceedings to set aside fraudulent conveyances, “Such proceedings are not, ordinarily speaking, strictly proceedings in bankruptcy. Such cases are in the nature of actions at law of ejectment, trover, etc., or suits in equity to set aside a fraudulent conveyance, etc. * * * Suits of this character may be brought in the state courts.”

Upon the same subject, *Brandenburg* states the rule to be: “Where the property in controversy at the time the debtor is adjudged bankrupt is in the actual possession of a third person claiming absolute title to the same, the question of ownership, if the same is claimed by the assignee, must be determined by a suit in equity, or by an action at law. * * * A state court passing upon claims of an assignee is not a proceeding under the bankrupt act, but simply recognizes that act as the source of the assignee’s title, in like manner as it would if such title were derived from a contract or deed.” *Brandenb. Bankr.* 445; *Black, Bankr.* 124, 125.

5. The trustee in this case is proceeding in the state court to set aside the alleged fraudulent conveyance, on an order granted by the district court of the United States for the Eastern district of Louisiana, for the trustee to institute this suit for the recovery of the property in question. There is, and can arise, therefore, no conflict of jurisdiction between the federal and state court in the proceeding. *Turrentine v. Blackwood*, 125 Ala. 436, 28 South. 95, 82 Am. St. Rep. 254.

The demurrer to the bill was properly overruled.

Affirmed.

BEYER et al. v. FIELDS.

(Supreme Court of Alabama. June 28, 1902.)

CHATTEL MORTGAGES—SALE BY MORTGAGOR—TROVER—PRIOR MORTGAGE—EVIDENCE—JUDGMENTS—COLLATERAL ATTACK—ESTOPPEL.

1. In trover by a mortgagee against a purchaser from the mortgagor it was competent for defendant to prove that K. held a mortgage prior to plaintiff's mortgage, and that the mortgagor carried the goods to K., who directed him to sell, and account for the proceeds, and that defendant then purchased.

2. In trover by a mortgagee against a purchaser from the mortgagor the mortgagor testified for defendant that the mortgagee had obtained a judgment on the mortgage, which had been compromised, and paid to the mortgagee's agent. *Held*, that defendant was precluded from objecting to oral evidence of the amount and nonpayment of the judgment and execution.

3. Defendant was likewise precluded from questioning collaterally the jurisdiction of the court rendering the judgment.

4. Assignment of error not referred to in briefs is presumed to be waived.

Appeal from circuit court, Cullman county; Osceola Kyle, Judge.

Trover by A. E. Fields against F. Beyer & Son. From a judgment for plaintiff, defendants appeal. Reversed.

It was shown by the evidence that Mrs. S. J. McAlpine had given to the plaintiff a mortgage upon her crop for the year 1896; that Mrs. McAlpine carried the bale of cotton, which was involved in this controversy, to the city of Cullman, in November, 1896, and sold the same to the defendants. Mrs. McAlpine, as a witness in her own behalf, testified that prior to giving the mortgage to the plaintiff she had given a mortgage on her crop for the year 1896 to one P. H. Kinney. The defendants then sought to introduce evidence to show that when Mrs. McAlpine brought the cotton involved in the suit to Cullman she carried it to the defendants, and upon her telling them that Kinney had a mortgage upon the cotton the defendants told her to take it to Kinney; that she carried the cotton to Kinney, who told her he would not buy cotton, and instructed her to carry the bale of cotton and sell it to the defendants, and bring him the money; that Kinney wrote the defendants an order to buy the cotton; that Mrs. McAlpine did as she was instructed, sold the cotton to the defendants, and, after dividing the proceeds with one William Shed, who had a one-fourth interest in the cotton, she carried the remainder of the purchase money to the said Kinney, and paid it to him. The plaintiff objected to the introduction of this evidence. The court sustained the objection, refused to allow the defendants to introduce such evidence, and to this ruling the defendants duly excepted. Mrs. McAlpine, while being examined as a witness, testified that she had paid the mortgage held by the plaintiff; that the plaintiff had recovered a judgment against her on the mortgage, which she had agreed to com-

promise with her, and that she had paid the amount agreed upon to the agent or representative of the plaintiff. The plaintiff introduced in evidence the representative or agent who had the collection of the judgment which the plaintiff recovered against Mrs. McAlpine, and upon his offering to show the amount of said judgment, and that Mrs. McAlpine had never paid the amount thereof, the defendants objected to the introduction of such evidence, and duly excepted to the court's overruling such objection. There were verdict and judgment for the plaintiff. The defendants appeal, and assign the rendition thereof as error.

Brown & Curtis, for appellants.

SHARPE, J. The decision in *Belser v. Youngblood*, 103 Ala. 545, 15 South. 863, shows the trial court was in error in rejecting defendants' offer to prove that Kinney held a first mortgage on the cotton in question, and that they bought the cotton from the mortgagor after she had carried it to Kinney, and had been directed by him to sell it, and bring him the money. Kinney, if he had such a mortgage, was entitled to receive the cotton, and, with the mortgagor's consent, to dispose of it by private sale, subject to accountability for so much as its value exceeded the sum secured by his mortgage; and evidence of the kind defendants sought to introduce was relevant as tending to show the cotton was, in effect, delivered to Kinney, and that the mortgagor, in selling to them, was acting rightfully by authority of and as agent for Kinney. Such is the theory upon which, in *Belser v. Youngblood*, supra, a case like this in principle was distinguished from *Keith v. Ham*, 89 Ala. 590, 7 South. 234.

By first introducing oral evidence of the existence and payment of plaintiff's judgment and execution against the mortgagor, defendants opened the way for the opposite party to prove the amount of the judgment and execution by evidence of the same grade; and by the same course they were precluded to question the court's jurisdiction to render the judgment, even if it would otherwise have been subject to collateral attack.

Assignment of error No. 1, not being referred to in briefs, is presumably waived.

Reversed and remanded.

BRADFORD v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

PERJURY—INDICTMENT—VARIANCE—EVIDENCE.

1. The words "failing or refusing to work on the public road after legal notice," in an indictment charging perjury on a trial under a prosecution on a charge of "failing or refusing to work on the public road after legal notice," sufficiently designates the offense provided by Code, § 5392, stating that any person liable to road duty, who willfully fails or refuses, after legal notice, to work the public roads, without

a sufficient excuse therefor, shall on conviction be fined.

2. There is no variance between an indictment charging "Jim" B. with perjury on a trial of said "Jim" B. in the county court, and evidence that "James" B. was the name of the party on trial in the county court; the evidence identifying defendant as the person who was tried in the county court, and who there testified in his own behalf.

3. There is no variance between an indictment charging defendant with perjury in testifying that the reason he did not go to work on the road, when he was warned to, was because he was sick, and evidence that he testified that it was because of an injury to his back.

4. On a trial for perjury committed in the county court, it is enough to prove substantially what defendant said.

5. Proof of any one of the assignments in an indictment for perjury is sufficient.

6. On a trial for testifying that the reason defendant did not work on a road when warned to was that he was sick, and unable to work, and did not arise till 9 or 10 o'clock, testimony is admissible that witness saw him out between 7 and 8 o'clock in the morning, and saw nothing about him that indicated he was sick or unable to work.

Appeal from circuit court, St. Clair county; John Pelham, Judge.

James Bradford was convicted of perjury, and appeals. Affirmed.

The appellee in this case was tried and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Jim Bradford, on his examination as a witness duly sworn to testify on the trial of the said Jim Bradford in the county court of St. Clair county, under a prosecution upon a charge of falling or refusing to work on the public road after legal notice, which said court had authority to administer such oath, falsely swore that on a certain morning, being the time or day when he had been warned to work the public road, he (the said Jim Bradford) was sick, and unable to work the road, or to go to the road to work; that he did not get up from bed until 9 or 10 o'clock; and that the reason he did not get up from bed sooner, and go to the road, was that he was sick,—the matters so sworn to being material, and the testimony of the said Jim Bradford being willfully and corruptly false, against the peace and dignity of the state of Alabama." There was evidence introduced for the state tending to show that the defendant was guilty as charged. The state introduced Mrs. McCormack, who testified that she was the wife of Will McCormack, who worked on the road the day the defendant was summoned to work on the road and failed to go; that on said day, when the defendant failed to work the road, between 7 and 8 o'clock in the morning, she saw the defendant take her husband's mule off, and he did not return until about 2 o'clock; that she did not see anything about the defendant that indicated that he was sick, or unable to work; that she judged of the time of day at which the defendant got her husband's mule

by the fact that it was only about a half hour after her husband had gone to work on the road. The defendant moved the court to exclude the evidence of this witness from the jury, upon the ground that it was illegal, irrelevant, and incompetent. The court overruled the motion, and the defendant duly excepted. The other facts of the case are sufficiently stated in the opinion.

Smith & Herring, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The indictment is in the Code form, except only in the averment designating the character of the proceeding in which the oath was taken (form 67, p. 333, Cr. Code); and as to the proceeding with which the false oath is connected, it is sufficient to state its substance (section 5199, Cr. Code). The averment in the indictment in respect of the matter of proceeding in which the alleged false oath is connected is as follows: "On the trial of the said Jim Bradford in the county court of St. Clair county, under a prosecution upon a charge of falling or refusing to work on the public road after legal notice," etc. The point taken is there is no such offense known "as falling or refusing to work on the public road after legal notice," and a prosecution and trial founded upon an affidavit designating an offense in this language would be void; and therefore an indictment for perjury predicated upon testimony given in such a proceeding cannot be sustained, for the reason that the oath administered to defendant as a witness on that trial was unauthorized by law. The point would undoubtedly be well taken if the affidavit upon which the case was tried by the county court alleged no offense. *Collins v. State*, 78 Ala. 433. But the language quoted above did sufficiently designate, and therefore sufficiently charge, an offense. Section 5392, Cr. Code; *Brown v. State*, 63 Ala. 97; *Id.*, 109 Ala. 86, 20 South. 103; *Spear v. State*, 120 Ala. 351, 25 South. 46; *Adams v. Coe*, 123 Ala. 664, 26 South. 652; *Williams v. State*, 68 Ala. 551.

The next contention is that there was a variance between the allegations of the indictment as to the proceedings in the county court and the evidence offered upon the trial. This contention is based upon two considerations. The first of these is that the indictment charges that Jim Bradford, on his examination as a witness, etc., on the trial of said Jim Bradford in the county court, etc., falsely swore, etc., whereas the affidavit upon which the trial was had in the county court shows that James Bradford was the name of the party on trial. The evidence fully identifies the defendant in this case as the person who was tried in the county court, and as the same person who testified in his own behalf in that court. Clearly there is no variance here. The next is: The indictment charges that defendant, as a witness upon the trial in the

county court, "falsely swore that on a certain morning, being a time or day when he had been warned to work the public road, he (the said Jim Bradford) was sick, and unable to work the road, or to go to the road to work; that he did not get up from bed until nine or ten o'clock; and that the reason he did not get up from bed sooner, and go to the road, was that he was sick." It must be conceded that the witness who testified to what Bradford swore in the county court did not use the word "sick," but he did say that Bradford swore that he was unable to work the road on account of suffering from an injury to his back, which he received, which hurt confined him to his house the day preceding he was to work on the road, and to his bed until between 9 and 10 o'clock on the morning of the day he was to work. Again we must hold there was no variance here, nor a failure to prove the material assignment of perjury, alleged in the indictment, that defendant was sick. The inference was clearly afforded by the evidence for the jury to conclude that he swore he was sick, as alleged in the indictment. The state was not bound to prove what the defendant swore orally as a witness in the county court *ipsis verbis*; it was sufficient to prove substantially what he said. *Taylor v. State*, 48 Ala. 157. Furthermore, the state was not bound to prove every assignment of perjury laid in the indictment. Proof of any one or more of them is sufficient. *Smith v. State*, 103 Ala. 57, 15 South. 866.

The admission of the testimony of Mrs. McCormack was clearly proper, as tending to show the falsity of defendant's testimony in the county court.

Since there was evidence tending to support every material averment of the indictment, the affirmative charge requested by defendant was correctly refused.

What we have said disposes of all the errors insisted upon by counsel. We have, however, examined the other matters to which exceptions were reserved, and find no error in the rulings of the court.

Affirmed.

KANSAS CITY, M. & B. R. CO. v. WAGAND.

(Supreme Court of Alabama. June 28, 1902.)
RAILROADS—INJURY TO TEAM WORKING ON TRACK—NEGLIGENCE—EVIDENCE—KEEPING LOOKOUT—DUTY OF FIREMAN—TROVER—ABANDONMENT.

1. Where plaintiff's mule was injured by defendant's train while plaintiff was employed with his team on defendant's roadbed, plaintiff was entitled to recover for any failure of defendant's servants to perform the general duty of keeping a lookout for stock trespassing or rightfully on the track, even though such servants had no knowledge that road work was in progress.

2. Defendant's freight train came in sight of plaintiff and his team on the track when the train was 500 or 600 feet away, and running, heavily loaded, down grade at a speed of 20

miles per hour. Defendant's engineer testified that he did all a skillful engineer could do to prevent the accident, but that it was not possible to stop the train. *Held* that, as the circumstances of the accident might have afforded ground for an inference opposed to the testimony of the engineer, the question of negligence was properly submitted to the jury.

3. In an action against a railroad company for negligently running its train against plaintiff's mule, where there was no evidence that the engineer alone was charged with the duty of keeping a lookout, the jury were entitled to consider the fault in the conduct of the fireman, as well as the engineer.

4. Plaintiff's mule was injured by defendant's train, and plaintiff told defendant's section foreman that he did not want the mule, and would not do anything for it; that it would always be crippled, and had better be killed. The foreman told plaintiff to lead the mule away, and he would kill it, or have it killed. Plaintiff did so, and did nothing further for the animal, and the foreman, claiming to be authorized by defendant to do so, sold the mule to a third person. *Held* to show, as a matter of law, that plaintiff abandoned the mule, so that he was not thereafter entitled to maintain trover against defendant therefor.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by C. H. Wagand against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

In the first count of the complaint, the plaintiff sued to recover in an action of case for the negligence of the defendant or its employes, and the negligence, as alleged therein, was as follows: "Plaintiff avers that at the time aforesaid the defendant was filling in a trestle at or near Coal Creek, in Jefferson county, Alabama, and on the line of said railroad, and while he was engaged in said work, the defendant, by its servants and employes, did carelessly and negligently run one of its trains upon and against a mule owned by plaintiff, and did thereby bruise, maim, and injure said mule, to plaintiff's damages, as aforesaid." The other counts of the complaint and the circumstances of the accident are sufficiently stated in the opinion. It was shown that the train which was attached to the engine that caused the accident was a freight train; that at the time the train was coming around a curve, which was 500 or 600 feet away from the place of the accident, and it was running at the rate of 20 miles an hour, and was heavily loaded; that from said curve to the place of the accident was a down grade. The engineer who was in charge of the engine testified, as a witness for the defendant, that he saw the plaintiff and his team on the track as soon as he came around the curve; that he did all things in his power, and everything that could be done by skillful engineers, to prevent the accident; that it was not possible, at the speed the train was going, to stop it, after the mule was seen, before the train reached the place of the accident. The other facts of the case are sufficiently stated in the opinion. The defendant requested the court, among others, to give to the jury the following written charges, and separately ex-

cepted to the court's refusal to give each of the said charges as asked: "(1) If you believe from the evidence that the engineer in charge of the train was guilty of no negligence, your verdict cannot be for the plaintiff under the first count of the complaint." "(3) If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint. (4) If you believe the evidence, you cannot find for the plaintiff under the second count of the complaint." There were verdict and judgment for the plaintiff, assessing his damages at \$125. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant.

SHARPE, J. Being employed by defendant's contractor, plaintiff was using his team to draw a wheeled scraper on a high part of defendant's roadbed when a train came around a curve and into sight 500 or 600 feet away. Plaintiff turned the team off the track, but a wheel of the scraper was struck by the train, and as a result of the jerk, or in some other way, the train also struck one of the mules, breaking a bone of its hip. Afterwards plaintiff told defendant's section foreman he would not do anything with the mule, or anything for it, and did not want it; that if it lived it would still be crippled, and that it would be better "to kill it out of its misery." The foreman then told plaintiff to lead the mule over the hill, and he would kill it, or have it killed. Thereupon plaintiff carried the animal to the place so designated, left it there, and there is nothing to show he ever afterwards did anything for or with it. The next day after plaintiff so left the mule, the section foreman, claiming to have authority from his company to do so, sold the mule for \$5 to a third person, who subsequently cured and kept it. In his complaint the plaintiff counts, first, in case; second, in trover; and, third, for a willful injury to the mule; but as to the latter count the jury were charged affirmatively for the defendant.

1. Though defendant's servants who were running the train may not have known the road work was in progress, they were under the general duty to keep a lookout, in order to avoid injury to stock whether trespassing or rightfully on the track; and since plaintiff was using his team rightfully, he is in position to complain of any failure to keep such lookout, as well as of any neglect of the further duty which rested on defendant to use diligent efforts to avoid injury to the team after its perilous position was discovered. The space over which the train had to pass before reaching the team after it came within range of the trainmen's vision, together with the train's velocity at the place of accident, were circumstances in evidence which may have afforded an inference opposed to testimony of defendant's witnesses concerning both the lookout and the efforts made at checking

speed, and therefore the question of negligence was properly left to the jury.

2. Without evidence that the engineer was alone charged with those duties, especially that of looking ahead, the jury had the right to consider of fault in the conduct of the fireman, as well as of the engineer.

3. The owner of personal property may divest himself of title by abandonment, and, after doing so, he cannot maintain trover against one who thereafter assumes the ownership. *Wyman v. Hurlburt*, 12 Ohio, 81, 40 Am. Dec. 461; 1 Am. & Eng. Enc. Law, 2. This can be only where the owner has intended to relinquish his property rights, and where the evidence on the point is conflicting, or leaves room for contrary inferences, the question of abandonment *vel non* is for the jury. Here, however, the evidence is without conflict, and the plaintiff's declarations and conduct, above referred to, lead solely to the conclusion that the plaintiff both entertained and carried out the intention of abandoning his property in the animal. In view of such proof, defendant was entitled to have the jury charged upon the assumption that the plaintiff had no interest in the animal when the suit was brought, and therefore no right to recover under the second count of the complaint. For the refusal of charge 4, requested by defendant, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

LOUISVILLE & N. R. CO. v. MARBURY LUMBER CO.

(Supreme Court of Alabama. June 28, 1902.)

RAILROAD COMPANIES—SETTING FIRES FROM LOCOMOTIVES—SPARK ARRESTER—EVIDENCE—OPINIONS—CROSS-EXAMINATION—HARMLESS ERROR.

1. Plaintiff, in an action for the negligent setting of fire by sparks from a locomotive, makes out a *prima facie* case by proof that the fire was set by such sparks, putting on defendant the burden of showing that the engine was properly constructed and equipped and in repair, and was properly managed.

2. On the issue whether fire was set by sparks from a locomotive, the evidence being circumstantial, testimony that it was dry weather is competent.

3. On the issue whether a locomotive which emitted sparks was properly equipped and handled, evidence that the train it was hauling was a short one, and that the sparks were many and large, is competent.

4. A witness testifying for a railroad company, to show that a locomotive was equipped with a proper spark arrester, having testified that sometimes the netting had to be cleaned, and a man would pound it with a piece of iron, was asked on the cross-examination if the iron was not liable to increase the size of the spaces, and answered, "Not unless it is punched; they merely take a piece of iron, and jar it out of the netting, and this would not affect the netting, unless they punched a hole through it." *Held*, if there was error in allowing the question, it was harmless; there being no proof that the netting had been punched.

5. Even if an engineer, who had testified that the more force that is used the greater number of sparks are emitted by a locomotive,

and that the train was running 25 or 30 miles an hour, should not have been asked on the cross-examination if it was not a fact that his train was behind time, and he was running faster to make up time, allowing the question was harmless, he having answered simply that he was late.

6. One witness having testified that sparks as large as the end of his little finger were emitted by the locomotive, and another that they were as large as a cowpea, an experienced engineer, who had heard all the testimony, may testify that no engine in proper condition should have thrown sparks as large as a cowpea or as large as a pea head.

Appeal from circuit court, Autauga county; W. D. Denson, Judge.

Action by the Marbury Lumber Company against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant pleaded the general issue and contributory negligence. The assignments of error were based upon the evidence and upon the refusal to give the charges requested by the defendant. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the refusal to give them as asked: "(B) The court charges the jury that the plaintiff having failed to show the velocity of the wind or the condition of the atmosphere, the jury cannot infer from the fact of the fire, that the defendant was guilty of negligence." "(O) The testimony of Engineer Woods that when the engine passed the cotton pen it was handled in a careful and skillful manner, is uncontradicted." "(L) The court charges the jury that evidence which merely tends to show that the cotton was fired by sparks escaping from the engine, does not cast on the defendant the burden of showing that the engine was properly equipped with the appliances for the prevention of escaping sparks, in use on the best equipped railroads, and was carefully and prudently managed." "(K) The burden is on the plaintiff, under evidence in this case, to show some positive act of negligence on the part of the defendant in the equipment or management or condition of engine at the time of the fire." "(C) The court charges the jury that there is no evidence in this case of any unusual fall of sparks at or opposite the place where the cotton was stored." "(N) I charge you, gentlemen of the jury, as matter of law that the mere fact that the fire originated from sparks emitted from an engine is not sufficient to cast the burden on the defendant to show that its engine was properly equipped and carefully and skillfully managed."

There were verdict and judgment for the plaintiff, assessing its damages at \$2,678.86. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. & Chas. P. Jones and Alex. C. Birch, for appellant. Watts, Troy & Caffey, for appellee.

HARALSON, J. 1. The principle is well established in this court as a rule of evidence, that in an action against a railroad company to recover damages resulting from fire alleged to have been caused by the negligent escape of sparks from a locomotive running on defendant's road, the burden is on the plaintiff, in the first instance, to show that the fire was caused by sparks emitted from defendant's locomotive, and when it is shown that the fire was thus caused, which is, when disputed, always a question of fact for the jury, the mere communication of the fire from the railroad engine, is of itself sufficient to raise a presumption of negligence against the company. With this *prima facie* proof of defendant's liability raised in plaintiff's favor, the burden is then devolved upon the defendant, of showing that the engine alleged to have caused the fire was properly constructed, was equipped with approved devices and appliances to prevent the escape of fire and sparks, was in good repair and prudently managed and controlled; and upon proof of these facts by the defendant, the presumption arising from the mere communication of fire from the engine is rebutted, and the plaintiff cannot recover, without making proof of other specific acts of negligence or want of care on defendant's part. Railroad Co. v. Reese, 35 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; Louisville & N. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 South. 438, 50 L. R. A. 620.

2. The cotton destroyed was situated in a pen on the right hand or north side of the railroad running towards Birmingham from Montgomery, at which point, it appears the track ran east and west. The pen was about 50 feet 6 inches from the center of the track. A freight train had, only a few minutes before, passed up, when the cotton was discovered to be on fire. The train, as the evidence tended to show, was a short one, consisting of about 15 cars attached to the engine, the grade was ascending at the point, the train was moving rapidly, and the engine was emitting an unusual quantity of sparks, larger than engines generally emit; that the day was clear and rather windy, the wind blowing in the direction of the cotton,—from a southeastern direction and in a northwesterly direction, and there was no fire in any of the houses or structures near the cotton. Here, the witness testifying to these facts for plaintiff, was asked, "Had it been raining the day before the accident, or had it been dry weather?" to which question, he replied, that the weather had been clear for several days. The defendant objected to the question, on the ground that it was irrelevant, incompetent and inadmissible, shedding no light as to what condition the engine was in. The objection was properly overruled. The

burden was on the plaintiff, to introduce evidence, to show that the fire originated from the passing engine, and any circumstance tending to show that it did thus originate, was competent. The proof of how the fire originated was entirely circumstantial. If the weather had been clear and dry and not rainy, for several days previous to the accident, it was a circumstance competent to be considered, in connection with the other evidence, as tending to show, that the fire might have originated more readily from the engine, and did so originate, and that if the weather had been rainy and damp, the fire might not have so readily been communicated to the cotton by sparks, the distance it was away from the engine.

3. The witness, Bledsoe, testified that he was within 6 or 8 feet of the track when the engine passed; that there were a good many sparks coming out when the train passed, and a heap of them fell on the platform of the store near by, and were about the usual size. He was asked, "Was it a light train or a heavy train?" He answered that it was a light train, and in answer to another question, he said, he did not count the cars, but there seemed to be 14 or 15 of them. The defendant objected to the question, on grounds, that it called for incompetent and irrelevant evidence, and because the character of the train had nothing to do with the condition of the engine. While the latter objection,—the one relied on to show the incompetency of the evidence,—may in point of fact have been true, whether the train was a light or heavy one, in the number of cars of which it consisted, yet if it was a heavy train, consisting of a great number of cars, it is common knowledge, that it would have required a greater expenditure of effort, so to speak, on the part of the engine, and a greater exhaust of steam by it, especially when moving rapidly, up grade, than would have been the case, if the train were a short one, requiring less power to move it, a condition when fewer and smaller sparks would likely be emitted, than if the engine were drawing a heavy train. The number and size of the sparks, was a circumstance to be considered in determining whether the train was properly equipped and handled.

4. Becket, as an expert witness for defendant, testified as to the construction of engines and appliances for preventing the escape of sparks—stating that there had been some changes in material in them during the past 20 years, and they had been trying to better them but had not succeeded; said that what he called standard netting was the same as it was, the first time he saw a spark arrester, about 20 years ago; that sometimes the netting had to be cleaned, and a man would pound it with a piece of iron. He was asked on the cross by plaintiff in this connection, "Is not that iron liable to increase the size of the spaces?" He answered, "Not unless it is punched; they mere-

ly take a piece of iron and jar it out of the netting, and this would not affect the netting unless they punched a hole through it." There was no proof that the netting had been punched, and if there was error in allowing the question, it was error without injury, since the question as asked was not answered, and the answer given, was entirely without prejudice to defendant.

5. Woods, the engineer who handled the train at the time of the accident, testified for defendant, that the more force that was used, the greater the number of sparks, and that he was running 25 of 30 miles an hour, when he passed Bozeman—the place the fire occurred. He was asked by plaintiff in this connection,—“Now is it not a fact, that your train was running behind time, and that you were running faster to make up that time?” The defendant objected, on the ground that the evidence called for was incompetent, irrelevant and inadmissible. In *Perdue v. Railroad Co.*, 100 Ala. 539, 14 South. 366, the court stated, that as a matter of law, it cannot be said that any rate of speed of a railroad train, away from those places where the statute regulates it, is negligence per se, and that, whether or not rapid running, at points not regulated by statute, would be negligence, would depend upon the conditions under which it might be maintained. Nor was the fact of being late and running behind time evidence per se of negligence. *Railroad Co. v. Ferguson*, 79 Va. 241; *Railroad Co. v. Kellam's Adm'r*, 83 Va. 851, 3 S. E. 703. But it has been held, in an action for damages for fires alleged to have been caused by a locomotive, that the excessive use of steam is a fact competent to be considered, in determining whether or not the company exercised due diligence in the operation of the train, and on the question as to whether the fire occurred by reason of sparks from the engine. *McCormick v. Railroad Co.*, 41 Iowa, 193; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182; *Railroad Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221. The witness did not answer the question in full, but replied, simply, “I was late,” without stating, that he was “running behind time,” and was “running faster to make up that time,” as he was asked. The answer he made, did not, without more, imply that he was making up time and running faster in order to do so. It was neither favorable nor unfavorable to either party, and, even, if the question ought not to have been allowed, it was without injury to defendant.

6. Thornton, a witness for plaintiff, had testified, that the engine when it passed, emitted sparks as large as the end of his little finger, and Billingslea, that the sparks were as large as a cowpea. Gross, a witness for the plaintiff, an experienced engineer, testified, that he had heard all the testimony in the case about the fire, and how the engine was equipped. He was asked, “If the net-

ting to that engine was such as had been testified to here, and it was in good repair and condition, would it throw out sparks as large as the end of your little finger?" The defendant objected, on the ground, that there was no testimony, that the sparks were as large as the little finger of witness. Thornton and Billingslea were allowed to be recalled, each of whom exhibited his little finger to the witness. The witness did not answer the question. But, he was asked another question—"Do you know what size sparks would emit?" He answered, that no engine in proper condition should have thrown sparks as large as a cowpea, and as large as a pin head, and to this question and answer no objection was made. We find no error here.

7. The court gave several charges requested by defendant, and refused several. The vices of those refused, without reviewing them separately will appear. We have examined them, and conclude they were properly refused.

A motion was made for a new trial, based on rulings assigned as errors and which we have been considering. It was overruled and we find no occasion for disturbing the verdict and judgment.

Affirmed.

WORTHINGTON et al. v. MILLER.

(Supreme Court of Alabama. June 28, 1902.)

ACTION TO QUIET TITLE—REMAINDERMAN OUT OF POSSESSION—DEMURRER—TITLE UNDER JUDICIAL SALE—COLLATERAL ATTACK—PRIOR EXECUTION PURCHASER—JOINDER OF DEFENDANTS—ASSIGNMENT OF ERROR—CUMULATIVE AVERMENTS—OFFER TO REDEEM—OFFER TO ACCEPT AMOUNT OF JUDGMENT.

1. A remainderman, pending possession by the life tenant, can maintain an action to quiet title.

2. A demurrer to the entire bill, in an action to quiet title, by a party out of possession, claiming title to a part of the land as remainderman, pending possession of the life tenant, was properly overruled.

3. Title to realty acquired under a judicial sale cannot be collaterally assailed for inadequacy of price.

4. One claiming title to realty under a judicial sale, to satisfy a judgment obtained through collusion with the debtor, cannot complain of the inadequacy of the price paid by another creditor at a subsequent execution sale of the same land.

5. In an action to quiet title, where the cloud consists of a sheriff's deed, alleged to have been obtained through collusion with the debtor, it was proper, though not essential, to make the collusive debtor a party defendant.

6. Even if the joinder was improper, the debtor alone could raise that question.

7. An assignment of error by a party who did not join in the appeal cannot be considered.

8. A complaint in an action to quiet title, alleging that a sheriff's deed was obtained through collusion with the debtor, was not objectionable because it further set up facts showing that there could have been no indebtedness without a breach of a trust.

9. Where the complaint in an action to quiet title alleged the invalidity of a prior sheriff's deed for want of consideration, it was not necessary to offer to redeem.

10. A complaint, in an action to quiet title, by one claiming under a second execution sale, alleging the invalidity of the first execution sale, was not objectionable because complainant did not offer to accept the amount of her judgment, as it had already been satisfied to the extent of the amount bid by the judgment creditor, and whatever title the debtor had passed by the sheriff's deed.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by Mrs. Eliza F. Miller against Mrs. Caroline Worthington and another. From a decree overruling demurrers to the complaint, Mrs. Worthington appeals. Affirmed.

The bill alleges that on the 19th of April, 1895, and for a long time prior thereto, the firm of Rosenstihl Bros., composed of William and John Rosenstihl, were creditors of W. H. Worthington in the sum of \$259.44; that the debt had been due for a long time, when on the 19th of April, 1895, the Rosenstihl Bros. brought suit, and on the 11th day of June, 1895, they recovered judgment; that a certificate of such judgment was, on June 22, 1895, duly filed in the office of the probate judge of Jefferson county, as provided by the statute, and became a lien on the property of W. H. Worthington; that execution was issued, and returned "No property found," and an alias execution, being issued on the 23d of February, 1897, was levied on the real estate described in the bill, which real estate consisted of several distinct parcels; that said property was duly sold by the sheriff in all respects as provided by law to satisfy said judgment, at which sale William and John Rosenstihl became purchasers of all of said property, and received a sheriff's deed, conveying to them the title and interest of W. H. Worthington in and to said property; that afterwards, on the — day of —, 1899, said William and John Rosenstihl were duly adjudged bankrupt, and such proceedings were had by the district court of the United States; that said property was sold, by proper order of said court, at which sale the complainant became the purchaser of the interest of the Rosenstihls in the property, and also in the judgment against W. H. Worthington, upon which a balance remained unsatisfied, and said property was conveyed to her by the trustee of the said bankrupt. The bill alleges that, but for the matters complained of in the bill, W. H. Worthington had the full title to all the lots described in the bill except lot 19 in block 99, in which he had an undivided one-fourth interest, subject to the life estate of his mother, the said Mrs. C. Worthington, and that by the sales made by the sheriff and trustee in bankruptcy the complainant became entitled to the property. The title and interest of the complainant being thus shown, the bill then avers that on the 26th day of April, 1895, and while W. H. Worthington was so indebted to Rosenstihl Bros., and while he was heavily

involved in debt, and after Rosenstihl Bros. had brought their suit, and after divers other creditors had sued said Worthington, he, the said W. H. Worthington, and Mrs. C. Worthington, for the purpose of hindering, delaying, and defrauding the creditors of W. H. Worthington, and of putting his property beyond the reach of his creditors, and especially beyond the reach of said Rosenstihl Bros., and other creditors whose suits were pending, colluded and connived, each with the other, and as the effect of such scheme and collusion the said Mrs. C. Worthington, on the 26th of April, 1895, filed suit against W. H. Worthington, claiming that he was indebted to her in a large sum of money, to wit, more than \$7,000; that process was served the same day, and, in pursuance of the scheme agreed on, he failed to plead, but did plead in all other cases, thereby postponing judgment in other cases, while permitting his mother to obtain judgment by default, so that judgment was entered in favor of the mother on the 27th day of April, 1895, for \$7,738.65; that on the same day that judgment was obtained by the mother, she caused to be filed a certificate of such judgment in the office of the probate judge, thus becoming a lien on all the property of W. H. Worthington, and on June 7, 1895, she caused execution to be issued and levied on all the property described in the bill, as well as on eight other lots; that she caused it to be sold by the sheriff to satisfy her judgment, and she bought in all of the property so levied for \$3,500, and received a deed from the sheriff. The bill then avers that the claim of Mrs. Worthington, on which said judgment was based, was not in truth and in fact owing to her, and was a pretended and fictitious claim, gotten up for the purpose of placing the property of said W. H. Worthington beyond the reach of creditors; that in 1884 the father of W. H. Worthington conveyed all this property, except lot 19 in block 99, to the mother of W. H. Worthington, who was then about 14 years old; that the mother, as trustee, was charged with the management and control of this property for W. H. Worthington until he should arrive at 23 years of age, or manifest such capacity as would render it safe to turn it over to him sooner, and that she executed a deed to him on August 10, 1894, he then being just 23 years old; that the pretended debt, if created at all, was while this relation of trustee and cestui que trust existed, and while she was charged as trustee with the duty of saving and preserving it for him; that during all this time the mother was in receipt of all rents, issues, and profits of the property, which rents and profits were large, the amount of which is unknown to complainant, and the account sued on shows not one dollar of credit for any receipt or income. The bill further avers that the property thus acquired by Mrs. Worthington was of value greatly in excess of the amount bid by her at sheriff's sale, and largely in excess of the entire sum claimed by her; that said

W. H. Worthington was not in law and in fact indebted to his mother, but that the claim was pretended and fictitious, and was devised as a mode and scheme by which W. H. Worthington could place his property beyond the reach of his creditors, he being then largely in debt, and could place it in the name of his mother, to hold for his use and benefit. The prayer of the bill is that the pretended judgment of Mrs. C. Worthington be declared inoperative, so far as it affects the judgment obtained by Rosenstihl Bros., and that the sale and deed made by the sheriff to her be declared inoperative and of no force, so far as the same affects the title of complainant, or the balance due on her judgment. There was also a prayer for general relief.

Bowman, Harsh & Beddow and F. D. Nabers, for appellant. Geo. A. Evans, for appellee.

DOWDELL, J. The bill in this case was filed for the purpose of removing cloud from complainant's title. The general rule in such cases is—and one too well settled by the adjudications of this court to admit of question—that a party out of possession cannot maintain the bill. *Plant v. Barclay*, 56 Ala. 581; *Smith's Ex'rs v. Cockrell*, 66 Ala. 64; *Grigg v. Swindal*, 67 Ala. 187; *Pettus v. Glover*, 68 Ala. 417; *Betts v. Nichols*, 84 Ala. 278, 4 South. 195; *Teague v. Martin*, 87 Ala. 500, 6 South. 362, 13 Am. St. Rep. 63. There are, however, exceptions to this rule, one of which being that of a bill filed by a remainderman pending the possession by the life tenant. *Lansden v. Bone*, 90 Ala. 448, 8 South. 65; *Iron Co. v. Fullenwider*, 87 Ala. 586, 587, 6 South. 197, 13 Am. St. Rep. 73. As to all of the land described in the bill, except the parcel designated as "lot 19 in block 99," the complainant has her remedy at law in an action of ejectment, or the corresponding statutory action in the nature of ejectment, and therefore the bill is without equity save as to lot 19 in block 99. The bill shows that the respondent Caroline Worthington is rightfully in the possession of this particular lot as a life tenant, and the complainant's claim of title is that of a remainderman. The demurrer, however, which raises the question of complainant's remedy at law, is directed to the entire bill, and for that reason was properly overruled, since the bill contained equity as to lot 19 in block 99. The complainant's title was acquired under a judicial sale, and cannot be collaterally assailed for inadequacy of price paid. *Howard v. Corey* (Ala.) 28 South. 683, 684. The bill alleges that the deed of Mrs. Worthington, which constitutes the cloud on complainant's title, was obtained through fraud and collusion with her son, W. H. Worthington. It is charged that Mrs. Worthington, on a pretended and fictitious claim against her son, W. H. Worthington, by collusion with the said W. H., for the purpose of defrauding his creditors, and covering

up his property, obtained a judgment against said W. H., and under execution on said judgment had the property in question levied upon and sold, she becoming the purchaser, and receiving a sheriff's deed at such sale. The charges are that the claim against her son was a pretended and fictitious one, and that in fact she paid no consideration for the property. If this be true, and these averments are taken as confessed on demurrer, she is in no position to complain of the smallness of the price bid and paid at an execution sale by a creditor against W. H. Worthington, made subsequent to her collusive judgment and execution sale. The value of the property was depreciated by her own conduct.

There is nothing in the demurrer as to misjoinder of parties respondent. Analogous to a bill to set aside a fraudulent conveyance, under the allegations of collusion and fraud in the present bill, whereby the alleged cloud was created, the collusive debtor occupies the position of the fraudulent grantor, and, though not an essential party, is not an improper party defendant. Moreover, an improper joinder of W. H. Worthington as a codefendant with Mrs. Worthington cannot be taken advantage of on demurrer by the latter. If he were improperly joined, he alone could raise the question. There is no appeal in the case by him; the appeal is taken in the name of Mrs. Worthington alone. The appeal is irregular, in that it was not sued out in the name of both defendants, but, as no point is made on this, we pass it over, since the irregularity is such a one as might have been cured by an amendment. However, as W. H. Worthington did not join in the appeal, and the appeal not having been sued out by Mrs. Worthington in his behalf, he is not a party, and assignment of errors made by him cannot be considered.

Where a bill sets forth facts which entitle the complainant to relief, it is no objection to the bill that it avers cumulative facts. Noble's Adm'r v. Moses, 81 Ala. 548, 1 South. 217, 60 Am. Rep. 175. The averments in the bill in relation to the trusteeship of Mrs. Worthington are to be taken in connection with other averments, upon which complainant bases her claim to relief, and as the statement of additional facts which tend to support such other averments; the theory being that as trustee, in carrying out the trust, no indebtedness could have arisen from the cestui que trust to the trustee during the period of the trust, that being the time alleged in the bill when it is claimed that the pretended indebtedness from W. H. Worthington arose, unless there was a breach of the trust. The bill seeks no relief on account of any breach of the trust.

There is no merit in the contention that the complainant should be required to redeem, for the reason, if for no other, that the bill avers that the defendant Caroline Worthington paid nothing for the land. If her claim was fictitious and pretended, as alleged, she would be

entitled to nothing from a redemptioner. A redemption would necessarily have to proceed upon the supposition of the validity of her judgment against W. H. Worthington.

Nor is there any merit in the contention that the complainant does not offer to do equity by offering to accept the amount of her judgment. This judgment had already been satisfied to the extent of the amount bid by the judgment creditor at the execution sale under the judgment. By the execution sale, whatever title the defendant W. H. Worthington had in the property passed by the sheriff's deed to the purchaser. This title, the bill shows, the complainant acquired under bankrupt proceedings against Rosenstihl, who obtained the judgment against Worthington, and was the purchaser under execution on the judgment, receiving the sheriff's deed.

We find no error in the decree overruling the demurrers, and the decree will be affirmed.

HALL v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

SEDUCTION—EVIDENCE—INSTRUCTIONS—FORMER ACQUITTAL OF RAPE—GRAND JURY—CONSTITUTION—COMPLETION OF PANEL—INDICTMENT—CONDUCT OF PROSECUTING ATTORNEY—PROCEEDINGS IN GRAND JURY ROOM—TESTIMONY OF GRAND JUROR—STENOGRAPHER'S NOTES ON FORMER TRIAL—ADMISSIBILITY—CORPUS DELICTI—PROOF.

1. Though no objection to the organization of the grand jury be taken in the trial court, still, if the fact that it is illegally organized affirmatively appear in the record, the court on appeal will be compelled to consider the question.

2. Under Code, § 5023, providing that if the number of grand jurors appearing is diminished to less than 15 the court shall summon twice the number required to complete the jury, and if a greater number appear than is necessary to complete the jury a sufficient number shall be drawn by lot, there is no necessity of a drawing by lot where the number drawn to complete a jury would not increase it beyond the statutory limit.

3. Under the statute the court may order the summoning of any number that would increase the jury to not less than 15, nor more than the statutory limit.

4. Where the number of grand jurors drawn was decreased to 14, and 6 more were summoned, but the jury as finally organized was composed of 17 men, it will be presumed on objection that the names of those appearing were not drawn by lot, as required by Code, § 5023, that only 3 of the 6 appeared.

5. On objection that the names of those drawn to complete a grand jury were not drawn by lot, as required by Code, § 5023, it cannot be presumed that the statute was not complied with.

6. That the prosecuting attorney and presiding judge came before the grand jury and advised the finding of an indictment, or gave information concerning the law of the case being investigated, is not a proper subject for a plea in abatement.

7. The weight or sufficiency of the evidence on which the grand jury acted in finding an indictment cannot be inquired into.

8. In view of Code, §§ 5024, 5025, requiring grand jurors to keep secret the proceedings

¶ 7. See Indictment and Information, vol. 27, Cent. Dig. §§ 54, 57.

in the jury room, and the statutory requirement that a grand juror shall disclose occurrences in the jury room in certain specified cases, a grand juror may not testify, in support of a motion to quash, that the prosecuting attorney and presiding judge were present in the jury room, and urged the jury to find the indictment, or gave information as to the law of the case being investigated.

9. While the grand jury were investigating a case, and after they had voted not to find an indictment, the prosecuting attorney entered the jury room, and urged them to find an indictment, and also suggested that the presiding judge be invited into the room to give information as to the law of the case, and this was done. *Held* not ground for quashing the indictment.

10. An acquittal of rape is not a bar to a subsequent prosecution for seduction, based on the same single act of sexual intercourse.

11. Where defendant in a prosecution for rape voluntarily testified in his own behalf, admitting the act of intercourse, but asserting that it was by consent of prosecutrix, the circumstances were not such as to raise a presumption that the admission was false, so as to render the testimony inadmissible in a subsequent prosecution for seduction, based on the same act of sexual intercourse.

12. Where defendant in a prosecution for seduction had testified on a former trial for rape, based on the same act of sexual intercourse, and had admitted the intercourse with prosecutrix, the stenographer's report of such former testimony was properly admitted in the trial for seduction, if the corpus delicti was otherwise shown.

13. Evidence considered, and *held* to sufficiently prove the corpus delicti in a prosecution for seduction to justify the admission of the stenographer's report of defendant's testimony on a former prosecution for rape, based on the same act of sexual intercourse, in which defendant admitted the commission of such act, and that it was with the consent of prosecutrix.

14. In a prosecution for seduction, a charge that "if words are spoken or an act is done by the man for the purpose of enticing the woman to the deed, and by means of such temptation she yields to sexual intercourse, it is seduction," was bad, because assuming that any act done for the purpose of enticing the girl to the doing of the sexual act amounted to a temptation, when whether it did or not was a question for the jury.

15. A charge in a criminal case that the jury may accept or reject all or a part of the evidence of any witness, as they believe it "just and right," was erroneous; the right to accept or reject depending on whether the jury believe the evidence true or untrue.

16. On a prosecution for seduction the court detailed in the charge an interview between defendant and prosecutrix, with the statement that such evidence showed the beginning of the matter that led to the act of intercourse, and that if defendant on that occasion had his passions appealed to, so that he intended to take advantage of an opportunity, if offered, to have intercourse with prosecutrix, one element of temptation, art, or deception was established, because such an intention was necessary in temptation or deception. *Held*, that the charge was erroneous, because on the effect of the evidence.

17. On a trial for seduction it appeared that prosecutrix was a pupil of defendant, who was a school-teacher, and that the subject of sexual intercourse was first discussed by them at a noon recess, when defendant had called prosecutrix back as she was going out to play, for the ostensible purpose of working a difficult problem for her. In the charge the court said: "Did defendant agree to work the example in order that he might have prosecutrix alone, to dally with her and incite in her thoughts of

evil? Was his motive in calling her back to have an opportunity of leading her on to a consummation of his purpose?" etc. *Held* to involve a suggestion to the jury that the judge thought defendant had the object suggested in the instructions.

18. On a prosecution for seduction the court charged that: "If the woman is examined as a witness, and the testimony outside and independent of hers is sufficient to establish defendant's guilt, you may convict on such other testimony." The testimony of prosecutrix, if believed by the jury, had some tendencies favorable to defendant. *Held*, that the instruction was misleading, to defendant's prejudice, in not making mention of the testimony of prosecutrix.

19. In a prosecution for seduction, where some evidence tended to show that the sexual act was by force, an instruction that, unless the evidence showed beyond a reasonable doubt that prosecutrix consented and entered into the sexual act voluntarily, defendant could not be convicted, should have been given.

Appeal from circuit court, Marshall county; J. A. Bilbro, Judge.

Beauregard C. Hall was convicted of seduction, and appeals. Reversed.

It is insisted on this appeal that the grand jury which found the bill was illegally organized. The facts relating to the organization of the grand jury are sufficiently stated in the opinion. The defendant moved the court to quash the indictment upon the following grounds: "(1) Because twelve grand jurors did not concur in finding the bill. (2) Because the presiding judge of this court, pending the investigation of this charge before the grand jury, and while the grand jury was sitting as a body, and while it was actually engaged in the investigation of this charge, entered the grand jury room, and then and there charged the grand jury concerning the law of this case. (3) Because the solicitor of this court counseled and advised the grand jury, while sitting as a body, and while the investigation of this case was pending before them, to return an indictment against the defendant for seduction. (4) That while the grand jury was engaged in the examination and investigation of this case a ballot was taken by the grand jury as to whether or not they would return a bill; that the grand jury refused to find a bill; that in a few minutes thereafter the solicitor was informed by the grand jury that they refused to find a bill; that the solicitor did then and there censure the grand jury for refusing to find a bill; that the solicitor continued thereafter to urge the grand jury to find a bill; and that thereafter the grand jury, acting under these influences, did find the indictment in this case. (5) Because the solicitor for this circuit induced the grand jury to find the bill against the defendant against their wish, by rebuking them because they failed to find a bill. The grand jury voted on the case four times, and refused to find a bill, and each time the question was brought before them by the request of the solicitor for further consideration, and that each time he by words and acts showed his displeasure at their failure to find a bill

on the evidence before them, and censured them, by severe rebuke, for their failure to find the bill. And at the solicitor's suggestion the presiding judge of this court was invited by the grand jury before them to discuss the law, and to give his opinion of the law on the facts of this case, and by this method the grand jury was induced to find a bill on the fifth ballot; otherwise they would not have found one at all against the defendant in this case." On the hearing of this motion the defendant introduced two of the grand jurors who were present on the grand jury which preferred the indictment, and they testified: That when the cause against the defendant was before the grand jury, and was being considered by them, on the question as to whether or not they should return an indictment against him for seduction, there was a vote taken, and only 10 persons voted in favor of preferring an indictment against the defendant. That the solicitor was not in the grand jury room when this vote was taken. That when he returned to the grand jury room, and was told of the failure to find an indictment, he showed his displeasure, and insisted on their considering the case again. A second vote was subsequently taken on the question, and only 11 of the grand jurors voted for the indictment. This vote was taken while the solicitor was out of the room, and when he returned, and was told of the failure to prefer the indictment, he became very angry, and remonstrated with the grand jury, and insisted that the facts of the case justified the finding of the indictment against the defendant. That upon the request of the grand jury the judge who was then presiding at the circuit court was requested to come before them, and to give them instructions as to the law relating to seduction. That this was done; the judge appearing before them in the grand jury room, and instructing them as to the law relative to seduction. That, upon another vote being taken, 12 of the jurors voted in favor of preferring an indictment against the defendant, and then the indictment was preferred. Upon the hearing of the facts the court overruled the motion to quash the indictment, and the defendant duly excepted. The defendant then filed the following pleas in abatement: "Comes the defendant, and pleads in abatement to the indictment: (1) That while the grand jury was engaged at this term of the court in the examination and investigation of this case the solicitor of this court did, while the grand jury was in session and considering the case, express to them the opinion that the evidence before them was sufficient to warrant them in finding an indictment, and that their duty required them to find a bill on said evidence, and that he could convict the defendant on the evidence they had before them, and that this influenced the action of the grand jury, and without this influence the grand jury would not have found the bill. (2) That

while the grand jury was, at this term of the court, examining and considering this case against the defendant, the judge of this court, at the request of the grand jury, did come before the grand jury while it was in session, and did then and there advise them concerning the law of seduction; the said judge having knowledge at the time that the grand jury was considering this case." To the first of these pleas the state demurred upon the following grounds: "(1) The expression by the solicitor to the grand jury was neither unlawful nor improper. (2) That the opinion of the solicitor, as expressed to the grand jury, as averred in said plea, was not such an act as is unlawful or improper for the solicitor to do before the grand jury. (3) That the opinion of said solicitor, if expressed as averred in said plea, shows no reason why said indictment should be quashed." To the second plea in abatement the state demurred upon the ground that it is neither illegal nor improper for the judge of the said court, at the request of the grand jury, to appear before said grand jury in their room, and there instruct them as to the law of crimes, or as to any particular or alleged offense being considered by them. This demurrer was sustained, and to this ruling the defendant duly excepted. The defendant then filed the following plea of *autrefois acquit*: "(1) That on February 12, 1901, defendant committed one, and only one, sexual intercourse with the said Pearl Pritchett: that he never at any other time committed an act of sexual intercourse with her; that the single act named was committed in this county; that on April 10, 1901, the grand jury of this county returned an indictment in words and figures as follows: [Then follows an indictment against the defendant for rape on Pearl Pritchett.]" It was then averred in said plea "that on April 22, 1901, defendant was placed on trial under said indictment in the circuit court of Marshall county upon his plea of not guilty, and that on said trial the state offered evidence showing said act of sexual intercourse committed on the occasion above referred to, and that said act was committed with said Pearl Pritchett in this county, and at the time and place above named, and that said act was committed by this defendant forcibly and against the consent of the said Pearl Pritchett, and thereupon the state rested; that defendant then introduced testimony on said trial tending to show that defendant did commit said act of sexual intercourse with said Pearl Pritchett, but that the same was done with her consent; that the trial proceeded until the 24th day of April, 1901, when the jury returned into open court a verdict that the defendant was not guilty of rape, and thereupon it was adjudged by this court that the defendant was not guilty of the charge of rape." There was then set out in said plea the judgment of the court finding the defendant not guilty of the charge of rape, and the plea then con-

tinues as follows: "Defendant further avers that he is the same identical Beauregard C. Hall mentioned in the above indictment for rape, and that the Pearl Pritchett mentioned in this indictment is the same identical Pearl Pritchett mentioned in the above indictment for rape, and that the act of sexual intercourse in the above indictment for rape, and for which defendant was tried at the last spring term of this court, is the same identical act of sexual intercourse charged in this indictment; and this plea defendant is ready to verify." To this plea of former acquittal the state demurred upon the following grounds: "(1) That said plea shows on its face that the offense in the former indictment set out in said plea, and the one charged under the present indictment, are not the same. (2) That the indictment for rape, and the trial and acquittal therefor, is not a bar to the trial for seduction. (3) That the plea shows on its face that the defendant could not under the said former indictment have been convicted of the offense of seduction, said offense not being in any way included in said indictment. (4) That said plea shows on its face that the defendant has never been in any way put upon trial for seduction, nor has he in any way been put in jeopardy under the charge for seduction. (5) That the evidence which will sustain an indictment for seduction would not authorize a conviction for rape." This demurrer was sustained, and the defendant duly excepted.

On the trial of the case, Pearl Pritchett, who it was admitted was an unmarried woman, and at the time of the offense committed upon her was 14 or 15 years old, was introduced as a witness; and she testified that, at the time of the commission of the offense for which the defendant was being prosecuted, he was a school-teacher, and she was going to school to him, and had been going to school to him for nearly three months; that on the day of the occurrence her class was working examples in arithmetic, and the defendant told the class that they were coming to an example that he did not expect any of the class could work, and that he would work it for the class; that she then said she would get the defendant to work it for her at dinner time; that she was out at play at recess, when the defendant sent for her to come in and let him work the example for her; that she continued to play, and did not go to the school-room as requested by the defendant; that later in the day, at the evening recess, the defendant came out and called her into the schoolhouse and said he would work the example for her; that he went in and told her to set the example down on her slate and then began to talk to her. Continuing, said witness, Pearl Pritchett, testified as follows: "He began to talk, and asked me who I took to be my friend, and asked me if I didn't take him. He took hold of my right hand, and said he would never tell on me. He turned round and said he would give me his right

hand that he would never tell it on me. He told me to go down into the woods, to where they had been cutting saw logs, and when I got down there he was there. He took hold of me and threw me down. He threw me down, and unfastened my clothes, and got down on top of me and hurt me. I tried to get loose, but could not. He did not say anything to me while down there. After he helped me up and brushed off the leaves, I went back to the schoolhouse. I went on the playground, and when I went in the house he was in there. I stayed and studied until school was out, after which I went home. He said nothing to me about his being a married man. He said nothing to me about trusting him. Nothing that way. I was not very long there in the schoolhouse with him. While down there in the thicket, Mr. Hall put his private parts in mine. When I went down there in the woods, Mr. Hall said he would choke me if I holloed, and I so testified at the other trial. That is what I testified before, and it is correct. He made me go down there in the woods. I so testified at the other trial, and it is correct. And when I got down there he threw me down, and told me if I holloed he would choke me. He put his hands around my throat and took hold of me and threw me down. He told me if I holloed he would choke me, and he had hold of my throat and did choke me. I was not willing for him to do what he did. I never did agree for him to do what he did. He made me. It was against my consent before going down there, and what he did after I got down there was against my will." One J. A. Counts was called as a witness for the state, and testified that he was present at the spring term of the circuit court of Marshall county during the trial of The State v. Beauregard C. Hall under a charge of rape alleged to have been committed on Pearl Pritchett; that during that time he took down the testimony in shorthand of Mr. Hall, who was examined as a witness; that he afterwards transcribed his stenographic notes on the typewriter. Upon being shown a paper, he testified that he recognized said paper as a copy made by him from his stenographic notes of the testimony of Hall upon his trial under the indictment for rape; that said copy was substantially what Hall testified to on that trial. It was shown by the examination of counsel for the defendant that said Hall, the defendant in the case under the indictment for rape, voluntarily went upon the stand as a witness in his own behalf. The state then offered the copy of the stenographic notes transcribed by said witness Counts in evidence. The defendant objected to its admission in evidence upon the following grounds: "(1) Because a substantially correct copy of what the defendant said on that trial is not admissible. (2) Because it is a copy from shorthand notes, and is secondary evidence. (3) Because not shown to have been made under such circumstances as authorize its use for the purpose of refreshing the mem-

ory of the witness or as a memorandum. (4) Because there is not sufficient proof of the corpus delicti of the offense charged in the indictment. (5) Because the statement was not voluntarily made, within the meaning of the law. (6) Because that statement was made by the defendant under an indictment for rape, and when he was being tried for his life, and the statement was made under the pressure of that prosecution." The court overruled the objection of the defendant, and permitted said testimony of the witness Hall in the former case in the trial of the indictment for rape to be introduced in evidence, and to this ruling the defendant duly excepted. In the testimony of the witness Hall so introduced in evidence, he stated that the act of intercourse between him and Pearl Pritchett was by her consent, and was not caused by any force or threats on his part.

The court, at the request of the defendant, reduced his charge to the jury to writing, and the defendant separately excepted to the following portions of said charge: "(dd) If words are spoken or an act is done by the man for the purpose of enticing the woman to the deed, and by means of such temptation thus presented, and in consequence thereof, she yields to sexual intercourse with him, it is seduction." "(ff) You may accept or reject all or any part of the evidence of any witness in the case according as you may believe the same to be just and right under the evidence before you. (gg) The evidence given in by the defendant shows: That the beginning of the matter which led to the act was that she came to the schoolroom. That on a Monday Pearl came back to school from dinner earlier than usual. That defendant was sitting by the stove, and spoke to her about her early return. That she replied that dinner was not ready; that her sister tried to get her to stay; that she would not do it, but took a few bites and came back. That she then said something about a boy (Burr Burgett) having left where she was living, and gone home, and that she did not care whether he ever came back or not,—a boy that would do like he had done. Defendant asked her: 'What did he do?' Pearl said: 'The night Ada got married, I think he eavesdropped the house.' The defendant asked: 'What made you think that? Where could he have got, to eavesdrop the house?' That she replied: 'Under the floor.' That she then said: 'A boy that will do that will tell on the rest of us girls, and I don't care if he never comes back, and I am in hopes he won't.' That she then went out to play. If this, as defendant says, was the beginning of the matter, it may aid you in your investigation to pause just here and inquire whether in this conversation the defendant thought he saw in the girl sexual tendencies, and whether there were then aroused in him lustful desires toward her. What was the mind of the defendant toward her? What was the mind of the defendant toward the girl?

What motive or purpose, if any, was found after this alleged conversation with her? This is a material inquiry, for in temptation or deception or arts there is a motive to an end; there is a purpose to carnally know the woman. If it be true that the defendant on this occasion had his passions appealed to in such sort that he intended to take advantage of an opportunity, if offered, to have intercourse with her, then there is established one element of temptation or of art or of deception." "(jj) If it be true that the defendant on this occasion had his passions appealed to in such sort that he intended to take advantage of an opportunity, if offered, to have intercourse with her, then there is established one element of temptation or of art or of deception. (kk) Did he, or not, agree to work the example for Pearl at 12 o'clock in order that he might have her alone in his presence, to dally with her and incite in her thoughts of evil. (ll) Was the matter of having her to come to him at 12 o'clock a subterfuge adopted by which he could make way for a gratification of his lustful desire, if he had such desire. (mm) And when, according to defendant's statement, the girl went out to play, and he called her back, was his motive in calling her back to have the opportunity of leading the girl on to a consummation of his purpose, if he had any purpose of wrong toward her." "(qq) If the woman is examined as a witness, and the testimony outside of hers and independent of hers is sufficient to establish the defendant's guilt, then you may convict on such other testimony." The court, at the request of the state, gave to the jury the following written charges: "(a) It is not a mere doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt. (b) It is not an imaginary or possible doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt. (c) The court charges the jury that it is a conceded fact or an admitted fact that the defendant had sexual intercourse with Pearl Pritchett. (d) The court charges the jury that in this case it is admitted by the defendant that the woman, Pearl Pritchett, was at the time of the act in this case an unmarried woman. (e) The court charges the jury that, if they believe the evidence beyond a reasonable doubt, they will find that the defendant had sexual intercourse with Pearl Pritchett. (f) If the jury believe the evidence beyond a reasonable doubt, they will find that at the time of the alleged sexual intercourse with the defendant she was a chaste woman. (g) The court charges the jury that if they believe beyond all reasonable doubt from the evidence that within three years before the finding of this indictment the defendant, by means of either temptations, arts, deceptions, or flattery, seduced Pearl Pritchett, in this county, that said Pearl Pritchett was then an unmarried woman, and that she was a

chaste woman, the jury must find the defendant guilty. (h) The court charges the jury that if they believe beyond all reasonable doubt from the evidence that in three years before the finding of this indictment the defendant, by means of temptations, seduced Pearl Pritchett, in this county, that said Pearl Pritchett was then an unmarried woman, and that she was then a chaste woman, the jury must find the defendant guilty. (i) The court charges the jury that if they believe from the evidence beyond a reasonable doubt that within three years before the finding of this indictment the defendant, by means of arts, seduced Pearl Pritchett, in this county, that said Pearl Pritchett was then an unmarried woman, and that she was then a chaste woman, the jury must find the defendant guilty. (j) The court charges the jury that it is the law that, in considering and weighing the evidence in this case, after a consideration of all the evidence they may accept that part which they believe to be true, and discard that which they believe to be untrue. (k) It is the law that, in considering and weighing the evidence of any witness in the case, you would be authorized to accept any part of such evidence which you believe to be true, and discard that which you believe to be untrue."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: "(1) The court charges the jury that the evidence which will warrant a conviction must be so strong and cogent that the mind of a reasonable and guarded man can entertain no reasonable doubt that he is guilty of the identical offense charged in the indictment. (2) Gentlemen of the jury, the arts, deception, flattery, or temptation which is necessary to constitute seduction, in law, must bear the relation of cause to effect, and unless they tended to cause the sexual act the defendant would not be guilty, even though he may have been guilty of arts, flattery, temptation, or deception as to some details connected with the sexual act. (3) The court charges the jury that, to authorize a conviction for seduction, the evidence must show beyond all reasonable doubt the employment by the defendant of arts, deception, temptation, or flattery, with the intent and purpose at the time to induce Pearl Pritchett to have sexual intercourse with him, and not only this must be shown beyond all reasonable doubt, but it must be shown that one or more of these means was the cause of her engaging in the act; but proof of the employment of one of these means, followed by the commission of the act, does not necessarily make out the offense. (4) Gentlemen of the jury, if Pearl Pritchett was induced by her own sexual passions to enter into the act of sexual intercourse with the defendant, then your verdict must be for the defendant. (5) Gentlemen of the jury, it is your duty to ascertain from the evidence what induced Pearl

Pritchett to enter into the act of sexual intercourse with the defendant, and, if you are not able to say beyond all reasonable doubt that she (Pearl Pritchett) did not yield to the embrace of the defendant on account of her own sexual passions, you must find the defendant not guilty. (6) It is essential, in order to constitute the crime of seduction, that the woman must be induced to surrender her chastity by the deception, temptation, arts, or flattery of the man, and, if she engaged in the act on account of the promptings of her own sexual appetite, then it is not seduction; and, if such be this case, your verdict must be, 'Not guilty.' (7) If the jury believe from the evidence that defendant took Pearl Pritchett by the hand at the schoolhouse, and met her in the woods, as disclosed by the evidence, and there felt her breast and had intercourse with her; if by reason of these things she entered into the sexual act because her passions were aroused, and not because of any deception or temptations, arts or flattery, of defendant,—the verdict of the jury should be for the defendant. (8) The court charges the jury that, if the said Pearl Pritchett engaged in the act of sexual intercourse from a prompting of her own carnal appetite, then the fact that defendant did not dissuade her, or that he encouraged her in the desire, would not constitute seduction; and, if such be the facts of this case, your verdict should be, 'Not guilty.' (9) The court charges the jury that, if the evidence of Pearl Pritchett is true, you must find the defendant not guilty. (10) If the jury are reasonably satisfied from the evidence that the testimony of Pearl Pritchett is true, then they should find the defendant not guilty. (11) If the jury believe the testimony of Pearl Pritchett, they must find the defendant not guilty; and, if they believe her testimony, they must find him not guilty. (12) The court charges the jury that, unless the evidence shows beyond a reasonable doubt that Pearl Pritchett consented and entered into the sexual act voluntarily, the defendant cannot be convicted. (13) Before you can convict the defendant, you must believe beyond all reasonable doubt that Pearl Pritchett's statement that she did not consent is false. (14) If the jury believe from the evidence that Pearl Pritchett's statement is true in this particular,—that she never consented to the sexual act with Hall, and that she was unwilling to it,—then the jury should find the defendant not guilty in this case. (15) The jury are bound to believe that the testimony of Pearl Pritchett that the sexual act was without her consent and against her will is false, before they can convict the defendant, for without consent there can be no seduction. (16) If the evidence of consent and of dissent on the part of Pearl Pritchett is equally balanced, you must find the defendant not guilty. (17) The court charges the jury that if the testimony tending to show consent on the part of Pearl Pritchett and that tending to show dissent on her part to the sexual act are equally

balanced, so that you cannot say beyond all reasonable doubt which is true, you must find the defendant not guilty. (18) The court charges the jury that the fact, if it be a fact, that Pearl Pritchett entered into the act of sexual intercourse reluctantly, would not make, or have any tendency to make, a case of seduction. (19) If the jury believe the evidence, they should find the defendant not guilty. (20) The court charges the jury that there is no evidence that defendant employed deception in order to accomplish his desire of having sexual intercourse with Pearl Pritchett. (21) The court charges the jury that there is no evidence that the defendant employed any temptation in order to accomplish his desire to have sexual intercourse with Pearl Pritchett. (22) The court charges the jury that there is no evidence that defendant employed any arts in order to accomplish his desire to have sexual intercourse with Pearl Pritchett. (23) The court charges the jury that there is no evidence that the defendant employed any flattery in order to accomplish his desire to have sexual intercourse with Pearl Pritchett. (24) The court charges the jury that the statement made by defendant on the trial for rape does not tend to show the employment by defendant of temptation, deception, arts, or flattery. (25) The court charges the jury that, if Hall's testimony on the rape trial is true, then you must find the defendant not guilty. (26) The court charges the jury that there is no evidence in this case that defendant did or contemplated anything wrong during the conversation on the day before the commission of the act of sexual intercourse. (27) The court charges the jury that there is no evidence that the defendant entertained any purpose of having sexual intercourse with Pearl Pritchett at the time he called her in, saying that he would work the example for her. (28) The court charges the jury that there is no sufficient corroboration of the testimony of Pearl Pritchett, within the meaning of the statute, that will warrant a conviction. (29) The court charges the jury that the state, by putting Pearl Pritchett on the stand, vouched for her credibility, and it cannot be heard to say that her testimony is not to be believed. (30) The court charges the jury that, when the state put Pearl Pritchett on the stand, they vouched for her veracity, and they cannot be heard to say that she has made a willfully false statement as to any fact. (31) Sexual intercourse is not necessarily either rape or seduction, and because a jury has heretofore acquitted the defendant of rape does not have any tendency whatever to show that the act was seduction. (32) The court charges the jury that the accusation of seduction is one easily made, hard to be proven, and harder to be defended by the party accused, though ever so innocent. (33) The court charges the jury that if defendant took hold of Pearl Pritchett's hand, and asked her if she was willing to enjoy the act of sexual intercourse with him, this would not, without

more, be the employment of arts, temptation, deception, or flattery. (34) The court charges the jury that taking Pearl Pritchett by the hand, and telling her that he would not tell if she would submit to his embraces, would not be the employment of deception, temptation, arts, or flattery. (35) The court charges the jury that if the defendant called the said Pearl Pritchett into the schoolhouse under the pretense of working an example for her, but if his real purpose was to have sexual intercourse with her, this would not be the employment of deception, within the meaning of the statute of seduction. (36) The taking Pearl by the hand is not such temptation as would constitute cohabitation, which followed soon after, seduction. This is not the temptation which the law contemplates in a criminal act. (37) The court charges the jury that telling Pearl Pritchett to go down in the woods is not deception, within the meaning of the statute on seduction, and this would be true even if she did not understand what he wanted her to go down in the woods for. (38) The court charges the jury that, if defendant did say to Pearl Pritchett that he would never tell it if she had sexual intercourse with him, this would not constitute temptation, deception, arts, or flattery, within the meaning of the statute. (39) The court charges the jury that, if the said Pearl Pritchett gave her consent to have sexual intercourse with the defendant before she left the schoolhouse, then his laying his hand on her breast, down in the woods, would not constitute temptation, within the meaning of the law."

J. E. Brown and Street & Isbell, for appellant. Chas. G. Brown, Atty. Gen., and John A. Lusk, for the State.

TYSON, J. No objection was taken to the organization of the grand jury, in the court below, that preferred the indictment upon which the defendant was convicted. But this is of no consequence, if the illegality of its organization affirmatively appears in the record, since this court would be compelled to take the point, as no valid conviction can be based upon a void indictment. *Finley v. State*, 61 Ala. 201. The record discloses that the number drawn to serve on the grand jury was 18, that only 15 of this number appeared, and that, by reason of an excuse allowed by the court, one other was not required to serve, thus reducing the number to 14. Thus "a contingency existed in which the court had power, and it became a duty, to complete the jury by ordering the summons of a sufficient number of qualified citizens to supply the deficiency. In the exercise of this power, the court could order a summons of only such number as would increase the jury to fifteen, or of such number to increase it to twenty-one or to an intervening number, as, in its discretion, was deemed best for the administration of justice. Either number would, under the statute, complete the grand

jury, when impaneled and sworn, and the selection of either is not an excess of the power conferred upon the court." *Kilgore v. State*, 74 Ala. 1. The court ordered the summoning of 6 persons, and, if all had appeared, this would not have increased the number to 21. Presumptively, only 3 appeared who were placed upon the jury, making the grand jury composed of 17 persons. There was therefore no necessity, under the terms of the statute, of having the names of those 3 persons written on separate slips of paper, folded, placed in a box, and drawn. Section 5023 of Code. Besides, we cannot affirm that this was not done. There is therefore no merit in the contention that the grand jury was illegally organized.

The matter attempted to be set up in the plea of abatement was not proper subject for plea. There was therefore no error in sustaining the demurrer to the plea. Nor can the weight or sufficiency of the evidence upon which the grand jury acted in finding the indictment be inquired into. *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643.]

It may be doubted whether the overruling of the motion to quash the indictment upon the grounds relied upon is revisable by this court,—whether it is not a matter addressed to the discretion of the trial court. *Johnson v. State* (Ala.) 32 South. 724; *Bryant v. State*, 79 Ala. 282; *Bish. Cr. Proc.* (3d Ed.) § 761; *State v. Dayton*, 23 N. J. Law, 49, 53 Am. Dec. 270; *State v. Baldwin*, 18 N. C. 195; *U. S. v. Rosenberg*, 7 Wall. 580, 19 L. Ed. 263; and other cases cited in notes 4 and 5 in *Bish. Cr. Proc.*, under section 761. However this may be, we feel sure that there is no merit in any of the grounds of the motion. We entertain no doubt as to the correctness of the rule declared in *Spigener v. State*, 62 Ala. 383, where this court, speaking through Stone, J., to a motion to quash an indictment or to strike it from the files "because the same was not voted or preferred as a true bill," said: "The statutes require the grand jurors to take an oath that they will keep secret the state's counsel, their fellows', and their own. Code 1876, § 4755. See, also, sections 4134, 4135 [sections 5024, 5025, Code 1896]. Indictments when found are presented to the court in open session by the grand jury as a body. This is a solemn official affirmation to the court that the bills then presented, indorsed by the foreman 'True bills,' and signed by him, are the findings of at least twelve of the grand jury. The grand jurors being present, if any bill so presented was unauthorized by the requisite finding, the fact should then be made known. The indictment, being returned and delivered to the court, is then indorsed by the clerk and filed in his office, and becomes a record of the court. Code 1876, §§ 4677, 4821 [Code 1896, §§ 4914, 4916]. Indictments having these solemn sanctions thrown around them, it is not permissible to receive testimony, either of the grand jurors, or of any other person cognizant of the facts, to

show how any grand juror, or any number of them, voted on any particular finding. The record cannot be disproved in this way." It would seem as a logical deduction from the principle declared above that the conduct of the solicitor in the matter of advice to the grand jury, and of the presiding judge in giving them special instructions, cannot be allowed to impeach the record, unless their conduct amounted to a fraud of such sort as would authorize a court to go behind and set aside judgments and decrees. But independent of this consideration, in view of the imposition of secrecy laid upon the consciences of the members of the grand jury by their oath, and the public policy declared, impliedly, if not expressly, in our statutory system regulating the organization of grand juries; the conducting by them of the inquisitorial examination into all indictable offenses given to them in charge by the court, as well as those brought to their knowledge, committed or triable in the county; the secrecy of the finding of the indictment expressly enjoined upon them, the judge, solicitor, clerk, and other officers who may know of its finding, until after the arrest of defendant; the duty imposed upon every grand juror who knows or has reason to believe that a public offense has been committed to disclose the same to his fellows; and the legislative declaration relieving the juror of the obligations of secrecy, requiring him to disclose, in certain specified cases, the occurrences in the grand jury room,—seem to us to establish a rule of public policy in this state that forbids that any member of the grand jury preferring the indictment should disclose any fact or facts which entered into the consideration influencing their finding. [Certainly to permit a grand juror to testify that one or more of the jury did not vote for the finding of the bill or indictment, or matters influencing the action of members of the jury, would be not only a violation of his oath as a grand juror, but would be destructive and subversive of the grand jury as an institution of our judicial system, and destructive of that security of freedom of thought and action, and therefore of that independence, so absolutely essential to the faithful discharge of the duties imposed upon that body, which, if impaired or destroyed, would be fatal to avigorous administration of the criminal law.] >Prof. Jury, p. 89; 17 Am. & Eng. Enc. Law (2d Ed.) 1295; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *Elbin v. Wilson*, 33 Md. 135; *People v. Thompson* (Mich.) 81 N. W. 344; Ex parte Sontag, 64 Cal. 525, 2 Pac. 402. This latter case cited is very much in point, since the statutes reviewed by the court are very similar to ours. Our conclusion upon the point under consideration finds support in the decisions of our own court, which holds it to be against the policy of the law to allow a petit juror to impeach a verdict rendered by a jury of which he was a member. *City of Eufaula v. Speight*, 121 Ala. 613, 25 South. 1009; *Clay*

v. City Council of Montgomery, 102 Ala. 297, 14 South. 846. This being undoubtedly the rule as to petit jurors, much more weighty are the considerations for applying and enforcing the same rule as to grand jurors. With the testimony of the two members of the grand jury, who were examined as witnesses, to prove the facts alleged in the motion, eliminated, there is no proof of the facts alleged in it. We might stop here. But if that evidence could be considered, we do not think that it can be affirmed that it establishes the fact, to the exclusion of every reasonable doubt, that the grand jury were improperly influenced to find the indictment. *Sparrenberger v. State*, supra. Nor do we think that it shows any conduct on the part of the judge or the solicitor which would vitiate the indictment. The motion was properly denied.

The next question presented is the action of the court in holding the defendant's plea in bar, of *autrefois acquit*, insufficient. By the averments of that plea it is made to appear that the defendant had been indicted for rape upon the girl upon whom it is here charged he seduced, and that he was acquitted by a jury after trial upon the merits. It is further averred in the plea that the defendant had only one act of sexual intercourse with the girl, and that this act was involved in the charge of rape upon which he was tried and acquitted, and that the same act is involved in the charge of seduction for which he is arraigned in the present case. It is insisted that because this act of sexual intercourse was a necessary ingredient, and therefore must necessarily be proven in order to sustain both charges, the acquittal on the charge of rape is a bar to this prosecution; in other words, because this single act is common to both offenses, although each offense necessarily includes other acts entirely different, having no resemblance whatever to each other, that an acquittal of rape is an acquittal of the seduction. To see that the act of sexual intercourse is the only one at all common to both offenses, we have but to point out that, in rape, force, actual or constructive, is necessary, and the character of the female for virtue and chastity, except as bearing upon the question of consent, is utterly immaterial, as is also whether she be a married or an unmarried woman; while in seduction the female must be an unmarried woman, and her consent to the act of sexual intercourse must have been obtained by means of temptation, deception, arts, flattery, or a promise of marriage. The rule in this state is that "a former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment upon proof of the facts averred in the second." *Domlnick v. State*, 40 Ala. 680, 91 Am. Dec. 496; *State v. Standifer*, 5 Port. 523; *Bowen v. State*, 106 Ala. 178, 17 South. 335. See, also, *Stewart v. State* (Cr. App.) 32 S. W. 766, 60 Am. St. Rep. 35, and note. We have but to apply this rule to the plea to see its insuffi-

ciency, and the correctness of the ruling of the court in sustaining the demurrer to it.

The next point pressed upon our attention for consideration is that the testimony given by defendant upon his trial for rape was improperly admitted. The argument made proceeds upon the idea that the confessions or admissions made by him while testifying were not voluntary. That he was on that occasion "flattered by hope" and "tortured by fear" in to admitting the fact of the girl's consent to his intercourse with her,—one of the necessary constituents of the crime with which he is now charged and being tried, and which, it seems, he succeeded in getting the jury trying him for rape to believe. It is not contended that the rule which applies to the admission of confessions extrajudicial, requiring the prosecution to show them affirmatively to have been voluntarily made before they are competent, has any application here. The argument is, rather, that his confession that the girl consented to his intercourse with her was made under such circumstances and surroundings as to beget falsehood, rather than truth, and, therefore, being impelled by the desire to be acquitted, his admission of that criminal fact was not voluntary. The answer to all this, it seems to me, is that he was not compelled to testify at all,—to make any admissions whatever. And if he testified falsely in order to escape the punishment which the law fixes for the offense of rape, that is a matter for his conscience, but does not address itself with any degree of consideration to the conscience of a court. The evidence was not objectionable on this account. *Seaborn v. State*, 20 Ala. 15; *Bibb v. State*, 83 Ala. 84, 8 South. 711.

The stenographer's report of defendant's testimony taken by him was properly admitted in evidence if the corpus delicti was otherwise shown. 1 Greenl. Ev. (16th Ed.) §§ 439a, 439b, pp. 540-542, and notes 12 and 17; *Mims v. Sturdivant*, 36 Ala. 636; *Acklen's Ex'r v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54.

Was there evidence of the corpus delicti? It has been often decided by this court that the corpus delicti may be shown by circumstances. It need not be shown by direct proof. There was an admission (made in open court) by defendant that he had sexual intercourse with the girl, who, from the evidence, had just about arrived at the age of puberty,—that critical period when, in the process of nature, she was budding into womanhood; a period, perhaps, when she was more susceptible to the arts of the seducer than any other. Taking into consideration the age of the girl; the relation in which the defendant stood to her (her teacher); his act of selecting her for his special assistance in her studies; his persuasive insinuation that he was her best friend; his fondling her hand; his declaration to her that she could trust him; his promise and pledge, in token of which he gave to her "his right hand," that he would not betray her; her innocence and ignorance of the sexual

relation,—all of which the evidence tends to establish,—there can be little doubt that the question of the proof of the corpus delicti was for the jury, and that it was sufficiently established to authorize the admission of defendant's testimony on his trial for rape. In 2 McClain, Cr. Law, it is said: "The exact manner or kind of seductive arts cannot be defined. Every case must depend upon its own peculiar circumstances, together with the conditions in life, advantages, age, and intelligence of the parties. So, where it appeared that the prosecutrix was of tender years and under the protection of defendant, it was held that the circumstances themselves would tend to make out a case of seduction." In *Lybarger v. State*, 2 Wash. St. 562, 27 Pac. 452, it was said: "The jury heard the testimony; saw the witnesses on the stand; noted their manner of testifying; listened to the testimony concerning the age and experience of the defendant, and the tender age and want of experience of the female; the fact that she was under his roof, and to a certain extent under his protection; that she was just merging into womanhood; and that she was at that critical age when judgment is weak and passion strong, and when virtue falls an easy prey to the blandishments of the designing libertine,—artifices and blandishments which, exercised upon a woman of more mature years, would fall harmless. All these things the jury had a right to take into consideration." In *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202, the indictment charged that the defendant seduced the woman named in it by promising to give her presents if she would allow him to have sexual intercourse with her; that defendant told her that there would be no harm in her having sexual intercourse with him, and that the same was not wrong, and could not hurt or injure; the female being overcome by said false promises and said false statements, and by reason thereof yielded to defendant, etc. The court said: "The defendant demurred to the indictment upon the ground that the facts charged did not constitute seduction, and that it charged two offenses. The demurrer was properly overruled. There is no legal standard by which to determine what false promises, artifices, and deception are sufficient to constitute the crime of seduction. Of course, mere unlawful commerce, for a consideration paid, is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person to the accused. What would be sufficient to overpower the mind of one woman would be insufficient to lead away another of more mature mind and discretion. In this case the defendant was a married man of about the age of fifty years, and Nellie Ferree at the time of the alleged seduction was about twelve years old." In the eighth volume of the American Criminal Law Reports, on pages 706 et seq., is to be found a copious note on the subject of seduction. It is too lengthy to incorporate the whole of it in this

opinion. It is there said: "It is for the jury to say whether at the time the woman was of chaste character, and whether arts were practiced, and whether she was lured from the path of virtue and her reluctance to the sexual act overcome by these means. The means used are not material if the arts and persuasions were what caused her to submit. * * * The artifice or inducement need not have been concurrent with the act of sexual intercourse. * * * To constitute seduction there must have been submission; for, if the offense was rape, no conviction can be had for seduction. * * * But to constitute rape, she must not have yielded at any stage of the act; she must have resisted, persisted in her determination and wish to resist, and must have resisted to the utmost, except as she was overcome by fear of dangerous consequences or great bodily harm. * * * Even where the prosecutrix swears that defendant forced her, her statement is not conclusive upon this question." "Actions speak louder than words," is an old saying, and seems to have been illustrated in the conduct of Pearl Pritchett on the occasion of the surrender of her chastity to defendant,—inconsistent with her statement that she was forced to commit the act of sexual intercourse. Her act in leaving the schoolroom and going alone to the spot in the woods to which she was directed by defendant to go rather signifies one of two things,—either that she did so solely to satiate her own passions, or that she was influenced to go for the purpose of having sexual intercourse with defendant after her passions had been aroused by him by means of some art, deception, or temptation practiced by him upon her. In *Suther v. State*, 118 Ala. 88, 24 South. 43, the learned judge in the court below, in his oral instructions to the jury, said: "The seduction must be accomplished by means of temptation, deception, arts, or flattery. * * * Deception is the act of deceiving,—the intentional misleading of another by falsehood spoken or acted. Temptation is that which tempts to evil,—an evil enticement or allure-ment. Flattery is an effort to influence another by the use of false or excessive praise,—insincere complimentary language or conduct. Art is the skillful and systematic arrangement or adaptation of means for the attainment of some desired end. The word 'seduce,' as found in the statute, imports not only illicit intercourse, but also a surrender of the woman's chastity." These definitions were approved by this court. And we may add that temptation can be by conduct or act,—by suggestions of confidence and secrecy. If they are believed by the unmarried woman, and she is induced thereby to surrender her chastity, this would be seduction. The arts of the seducer are crafty devices, by words or acts, or both, which influence the female to yield to sexual intercourse. Of course, as we have said, they need not be concurrent with the act of sexual intercourse. It is sufficient if the intercourse was the result of the arts or deception prac-

ticed. If her consent to engage in the act is attributable to the influence of the arts or deception practiced, and the act follows as the result from the consent thus gained, this would be seduction.

Many exceptions were reserved to portions of the general charge of the court designated in the record by the letters of the alphabet. Many of these are without merit, while others were well taken. We shall only notice the latter. The first of these, designated "dd," assumed that any word or act done by defendant for the purpose of enticing the girl to the doing of the sexual act amounted to a temptation. Whether they did or did not was a question for the jury. "ff" was at least misleading, if not a clear misstatement of the rule. To authorize a jury to accept or reject any part of the evidence depends upon whether they believe it to be true or untrue, and not upon whether they may believe the same to be just and right. "gg" and "jj" was a charge upon the effect of the evidence, and therefore an invasion of the province of the jury. "kk" involved a suggestion to the jury, at least, that the judge thought that the act of the defendant in agreeing to work the example was to have Pearl alone with him, to dally with her and excite in her evil thoughts, if it did not go to the extent of a suggestion to the jury that they should find such to have been the fact. A similar fault may be found of "ll" and "mm." "qq" was misleading, perhaps to the prejudice of defendant, in not making mention of the girl's testimony, which had some tendencies, if believed by the jury, that were favorable to defendant. Written charge No. 12 requested by defendant should have been given. It was not misleading in the use of the word "voluntarily," in view of the tendency of some of the evidence that the sexual act was by force. The other written charges refused to defendant were correctly refused. It will serve no good purpose to point out the vice of each of them. These are apparent when they are read in the light of the evidence and the principles we have declared. Nor was there error in giving the written charges requested by the state.

Reversed and remanded.

FERGUSON v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

HOMICIDE—CONSPIRACY—PROOF—DECLARATIONS—INSTRUCTIONS.

1. Accused was indicted as "Buck Ferguson, alias Buck Ferguson." His appearance bond had the signature of "W. B. Ferguson." In the order setting the day for trial there was a recital that "W. B. Ferguson, alias Buck Ferguson," was in court. *Held*, that the preservation of one of the names by which defendant was prosecuted was sufficient to at least prima facie identify him as the person referred to as being present.

2. Where in an indictment the name of accused is given, followed by "alias" and another name, "alias" stands for "alias dictus," and indicates, not that the person referred to

bears both names, but that he is called by one or the other.

3. In a capital case it is not required that there shall be an interposition of a plea before the special jurors are drawn.

4. Code, § 4308, provides that all persons concerned in the commission of a felony, whether directly committing the act, or aiding in its commission, though not present, are principals. On a prosecution for murder it was the theory of the state that the fatal shot, fired by a son of the accused while defendant was two yards away, was in furtherance of a conspiracy between accused and his son. There was evidence of animosity between the parties, and a witness testified that accused had said that, if he were to kill deceased, it would be no more than shooting a dog; that "we are looking for him"; and that he did not believe that, if the son were to shoot deceased, any attention would be paid to it. There was evidence that just before the killing the attention of the son was called to the approach of deceased, and he went with a gun to a place beside the road which deceased was traveling; that defendant, armed with a pistol, left in the same direction, when the son fired, and defendant proceeded to where the body lay. *Held*, that the question of a conspiracy was for the jury.

5. Code, § 4309, provides that one who, knowing another has committed a felony, and not being the parent, etc., of the offender, aids in his escape or concealment, is an accessory after the fact. *Held*, that where, on a prosecution for murder,—the killing having been done by a son of defendant,—it was the theory of the state that accused and the slayer had conspired to commit the crime, it was proper to exclude evidence that, after the killing, accused had visited the son in the woods, and that the son had visited the house of accused after dark.

6. On a prosecution for murder (the killing having been done by a son of accused) it was the state's theory that accused and the son had conspired to do the killing. Defendant sought to show that he had asked a person to talk to his son and try and settle the difficulty between him and deceased, and that he had visited the mother of deceased after the killing. *Held* properly excluded; not being part of the res gestæ, or part of any transaction or conversation brought out by the state.

7. A question to a witness as to whether defendant could have seen the deceased as he approached along a road to where he was shot was properly excluded as calling for an opinion.

8. It was proper not to allow defendant to be asked whether he was connected with the killing; the question calling for a conclusion of law and fact, as to whether his acts had made him a conspirator.

9. It was proper to refuse an instruction that, in order to convict, the jury must find a conspiracy to kill, since, if accused was a party to a conspiracy to merely shoot and maim deceased, without killing him, and the death followed as the direct result of a shooting furthered by his so conspiring, his responsibility extended to the consequences, though not intended by him, and rendered him liable to a conviction of manslaughter in the first degree.

Appeal from circuit court, St. Clair county; John Pelham, Judge.

Burk Ferguson was convicted of manslaughter, and he appeals. Reversed.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 617.

court charges the jury that, before they can find the defendant guilty, they must find from the evidence, and that beyond all reasonable doubt, that the life of Will Andrews was taken unlawfully in pursuance of a formed design between the defendant and John Ferguson; and, if the evidence fails to convince your minds to that degree of satisfaction, then you must acquit the defendant. (2) The jury must find from all the evidence, and that beyond all reasonable doubt, that there was an agreement or understanding to kill Will Andrews unlawfully, before they can find the defendant guilty. (3) The court charges the jury that they cannot convict the defendant unless all the evidence shows beyond all reasonable doubt that the defendant either conspired with John Ferguson to unlawfully take the life of Will Andrews, or that he was aiding or abetting John Ferguson at the time Will Andrews was killed, and they cannot consider the question of the killing unless they in such way connect the defendant with the crime; and the degree of guilt as to John cannot be considered against defendant. (4) The court charges the jury that before the defendant can be convicted the state must establish from all the evidence, beyond all reasonable doubt: First, that there was an agreement between the defendant and John Ferguson to unlawfully take the life of Will Andrews; second, that the life of Will Andrews was taken unlawfully in pursuance of such agreement; and, failing in either, you must acquit the defendant. (5) The court charges the jury that they must find from all the evidence, and that beyond all reasonable doubt, that the defendant conspired with John Ferguson to take the life of Will Andrews unlawfully, and they must further find that Will Andrews was killed by John Ferguson unlawfully in pursuance of such agreement or understanding; and, failing to so find, your verdict must be, 'Not guilty.'"

James A. Embry and M. M. Herring, for appellant. Chas. G. Brown, Atty. Gen., for the State.

SHARPE, J. It is questioned whether this record contains the necessary affirmative showing that defendant was in court when his trial day was appointed. He was indicted as "Buck Ferguson, alias Buck Ferguson." His appearance bond bears the signature of "W. B. Ferguson." In the order setting the day for trial the case is styled as "The State v. W. B. Ferguson," and contains a recital to effect that "the defendant, W. B. Ferguson, alias Buck Ferguson," was then present in open court. Entire accuracy respecting the designation of defendant would have required strict conformation in this record entry to the indictment, instead of to the indictment in part and the bond in part; but the preservation therein of one of the

names by which the defendant was prosecuted is sufficient to at least *prima facie* identify him as the person referred to as being present. The word "alias" is used in the indictment as the equivalent of "alias dictus," or "otherwise called," and indicates not that the person referred to bears both names laid under the alias, but that he is called by one or the other of those names. *Evans v. State*, 62 Ala. 6.

In *State v. Hughes*, 1 Ala. 655, cited for defendant, it was considered that, in a capital case, pleas should be entered so as to form an issue before the jury was sworn to try and to render a verdict upon the issue joined. That this was done in the present case the record discloses plainly. The law did not require an arraignment or the interposition of a plea before the special jurors were drawn.

Under our statute (Code, § 4308), which abolishes the common-law distinction between accessories before the fact, and punishes and makes guilty as principals "all persons concerned in the commission of a felony whether they directly commit the act constituting the offense or aid or abet in its commission, though not present," the guilt of an accused of a felony may be established by proof that he contributed to the criminal result by words or acts intended to and calculated to incite or encourage its accomplishment, whether he was present at its consummation or not. *State v. Tally*, 102 Ala. 25, 15 South. 722; *Raiford v. State*, 59 Ala. 106; *Hughes v. State*, 75 Ala. 31; *Brunson v. State*, 124 Ala. 37, 27 South. 410; *Griffith v. State*, 90 Ala. 583, 8 South. 812. It is not essential to the incrimination of one so participating in a criminal act that it be done in respect of time, place, or mode, according to any prearranged or instigated plan. *Griffith's Case*, *supra*.

The shot which produced the homicide in question was fired by defendant's son, John Ferguson, while the defendant was from about 130 to 200 yards away; and the theory of the prosecution was that the firing was in execution of a conspiracy between him and the son, or that he was an aider or abettor in the crime. There was evidence tending to prove animosity as between the deceased, Andrews, and his father and brother, on the one part, and defendant and his son on the other part. A witness testified that, about a week before the killing, defendant said to him: "I am under bond as postmaster, and do not intend to be run out of the office. If we were to kill the Andrewses, it would not amount to anything more than the shooting of a dog; that the grand jury would pay no attention to it." This witness further testified that on the same occasion defendant asked if he had seen the deceased, and said: "We are looking for him down here, and want to be ready for him when he comes." From another witness there was testimony to the effect that,

about four days before the killing, defendant said to him that he "did not believe, if John were to shoot one of the Andrewses down, any more attention would be paid to it than the shooting of a dog; that the law would pay no attention to it; and that, if he did get into it and kill one of them, he [defendant] had 300 acres of land to spend getting him out of it." There was evidence tending to show further that just before he was killed the deceased passed along a road by defendant's store; that some one called John Ferguson's attention to his approach, whereupon John left the store with a gun, and went to defendant's stable lot, which was by the road the deceased was traveling, and between one and two hundred yards from the store; that, after the deceased passed the store, defendant closed the store, and, armed with a pistol, followed in the same direction, and had gone about 40 or 50 yards when John, firing from the stable lot, killed the deceased. When this was done, by reason of an elevation in the road, John and the deceased were not in view of defendant, but he proceeded in the direction of the firing to near the place where the deceased lay dead. There was other evidence, and some of it was in conflict with part of what we have stated; but the foregoing is sufficient to indicate that the question of whether defendant effectively conspired with, counseled, or encouraged the slayer to the commission of the crime belonged exclusively with the jury. A conspiracy may be established by evidence wholly circumstantial, and without proof of an express agreement between the conspirators. *Tanner v. State*, 92 Ala. 1, 9 South. 613; 3 Greenl. Ev. § 93.

But the accomplishment of the object of a conspiracy necessarily ends the conspiracy itself, so far as it involves that accomplishment. Subsequent happenings are not evidential of a past conspiracy unless they are such as, under all the circumstances, may afford ground for inference that such conspiracy had existed. We think the trial court should have sustained the objections to the several parts of the testimony which collectively were to the effect that after the shooting, and on the same afternoon, defendant left by the back way the store to which he and John had separately returned, and went towards the woods to which John had preceded him, and saw John between sundown and dark, and returned late in the afternoon to the store, and that about three weeks afterwards John came to the defendant's house after dark, spent the night there, and left before daylight. The same natural impulses which the statute recognizes in exempting parents of an offender from punishment for aiding in his escape (Code, § 4309) serve to account for defendant's association with his son after the killing, clandestine though it may have been, and intended to accomplish the son's concealment or escape. Neither in itself, nor in connection with any evidence

in this record, can such testimony be considered as affording any just inference that defendant was criminally connected with the homicide. The errors of its admission were probably prejudicial to defendant, and must work a reversal of the judgment.

A defendant is not entitled to exculpate himself by bringing evidence of his own acts and declarations, when not a part of the res gestæ, or of some transaction or conversation partially developed by the state. *Roberts v. State*, 68 Ala. 516; *Billingsale v. Same*, Id. 486; *Stewart v. Same*, 63 Ala. 199. This principle applies to the inquiries proposed by defendant as to whether shortly before the killing he requested Phillips "to talk to his son and the Andrewses, and to get them to drop the trouble between them," and of whether on the night after the killing defendant visited the home of the mother of the deceased.

The inquiry of Phillips, "if, in his judgment, the defendant could have seen Will Andrews or any one else coming along the road before he reached the store, as it led by the defendant's store, from the position occupied by the defendant at the time," called merely for the expression of opinion by the witness, and was therefore objectionable.

Whether the father of the deceased was sober on an occasion of a quarrel between him and defendant some days before the shooting, and whether immediately after the shooting one of the Andrews boys came with a gun from towards defendant's store, were irrelevant inquiries, calling for no part of the res gestæ.

The question addressed to defendant by his counsel, "Were you or not in any way knowing to the purpose of John to kill Will Andrews before he had killed him, or were you in any way connected with the killing?" embodied an improper invitation to the defendant to state a conclusion involving both law and fact, viz., whether what he did was sufficient to fix his status as a conspirator, and so connect him with the killing.

The charges refused to defendant each assumed that proof of an agreement, understanding, or design to actually kill the deceased was necessary to connect the defendant with the crime as a conspirator, whereas, if he was a party to a conspiracy to merely shoot and maim the deceased, without killing him, and the death followed as the direct, proximate, and natural result of a shooting furthered by his so conspiring, his responsibility extended to the consequences, though not intended by him, and rendered him liable to a conviction such as was had,—of manslaughter in the first degree,—if not for a higher offense. *Evans v. State*, 109 Ala. 11, 19 South. 535; *Tanner v. Same*, 92 Ala. 1, 9 South. 613; *Turner v. Same*, 97 Ala. 57, 12 South. 54; *Martin v. Same*, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91.

Reversed and remanded.

METCALF et al. v. ARNOLD et al.

(Supreme Court of Alabama. June 28, 1902.)

CREDITORS' BILL—PLEADING—FRAUDULENT
CONVEYANCE—STATUTES—RIGHTS
OF CREDITORS.

1. A bill by judgment creditors alleged that defendants, who had been partners, had formed a corporation to which they had conveyed the firm property, parceling out all the stock to themselves and wives, to put the property beyond the reach of creditors, and prayed that complainants be allowed to subject the property to their claims. An amended bill alleged that since it was first filed the property had been disposed of, and was not obtainable; that the partners, before the formation of the corporation, and as a part of the scheme, divided the property, and each gave a part to his wife, to whom he was indebted; and that for such property the stock was issued; and it was prayed that defendants be required to account for the property. *Held*, that there was no departure from the bill as originally filed.

2. Code, § 818, provides that a creditor without a lien may file a bill in chancery to subject to his debt property fraudulently transferred. *Held*, that a bill by a creditor to compel fraudulent transferrors and their transferees to account need not allege the grantors' insolvency.

3. Where partners dissolve, and convey part of the firm property to their wives, and all the property is turned over to a corporation for stock issued to the partners and their wives, such conduct shows an intent to defraud creditors.

4. Where partners who are indebted dissolve, and each gives his share of the assets to his wife, to whom he is indebted, and a corporation is formed, to which all the property is turned over,—stock being issued therefor to the partners and their wives,—a creditor cannot hold the wives liable to account for the property transferred to them.

Appeal from chancery court, Montgomery county; W. L. Parks, Chancellor.

Suit by Francis R. Arnold and others against H. B. Metcalf and others. From a decree for complainants, defendants appeal. Reversed.

After the remandment of the cause on the former appeal, the bill was amended. The substance of the amendment, so far as necessary to an understanding of the decision on the present appeal, is sufficiently stated in the opinion. The prayer of the bill was also amended by praying that the respondents be required to account to the complainants for so much of the goods and merchandise as was used for buying the stock issued to the respondents, respectively, and that A. P. Metcalf and M. M. Weatherly be required to pay to the complainants so much of the value of the goods, wares, and merchandise issued in paying for the stock issued to them as may be necessary to pay the amount ascertained to be due the complainants, and the costs of this proceeding. There was a motion made to strike the amendment from the file on the ground that it was a departure from the original cause of action as stated in the original bill, and that the relief prayed for in said amendment was inconsistent with the prayer for relief in the original bill. There was also

a demurrer interposed to the original bill, based upon the same grounds. On the submission of the cause on the motion to strike and the demurrers, a decree was rendered overruling them. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The final decree in the cause was as follows: "That complainants are entitled to the relief prayed for in their said bill of complaint, and that the sale of the stock of goods belonging to the firm of H. B. Metcalf by and between the partners thereof, as well as the sale of the goods by the said partners to Mrs. Metcalf and Mrs. Weatherly, and the formation of said corporation of Metcalf Drug Company, are fraudulent and void, so far as the rights of complainants and the other creditors of said firm of H. B. Metcalf are concerned, and that complainants have a lien on said stock of goods originally owned by said partnership of H. B. Metcalf, set forth and particularly mentioned in the bill. It is further ordered that the register of this court, as soon as may be convenient to him, hold a reference, ascertain and report to this court: (1) What amount of goods and effects were received by Anna P. Metcalf and M. M. Weatherly originally belonging to the firm of H. B. Metcalf, together with the interest from the date of receipt of same. (2) The number of judgment creditors, together with the amount of their judgments, with interest. It is further ordered that each creditor file with the register his claim against H. B. Metcalf, including the items composing the same, with interest, within sixty days from the rendition of this decree." The respondents appeal, and assign as error the decree overruling the motion to dismiss and the demurrers, and the rendition of the final decree.

Marks & Sayre and Jno. G. Winter, for appellants. Watts, Troy & Caffey, for appellees.

SHARPE, J. On a former appeal the bill as originally filed in this case was upheld as against a demurrer, and was defined to be "a bill by a judgment creditor, seeking the aid of a court of equity to remove obstacles and hindrances to the enforcement of their judgments which the judgment debtors have fraudulently interposed." See *Metcalf v. Arnold*, 110 Ala. 180, 20 South. 301, 55 Am. St. Rep. 24. As the bill then stood, its equity rested on grounds for raising a constructive trust in property of a mercantile partnership upon an alleged fraudulent disposition of it to a newly formed corporation in payment for shares of its capital stock issued in part to the defendants who had composed the firm, and in part to their respective wives. Since the remandment, and by way of amendment, the bill is made to allege, in substance, that since it was first filed the property has been disposed of, and is not obtainable; that H. B. Metcalf and F. G. Weatherly, who composed the firm, "before the formation of said corporation, but as

§ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 775.

part of the scheme to defraud complainants, and on or about the same day, and with a view to the formation of the said corporation, dissolved the said partnership of H. B. Metcalf, and divided the property of said partnership between themselves; that immediately after the said dissolution of the partnership and division of said partnership property, and upon the same day, the said H. B. Metcalf, being indebted to his wife, A. P. Metcalf, transferred to her a part of the property of the partnership which he had received in the division of the partnership property, and at the same time the said F. G. Weatherly, being indebted to his wife M. M. Weatherly, transferred to her a part of the property which he, the said F. G. Weatherly, received in the division of the partnership assets; that, immediately after the transfer of the said property to the said M. M. Weatherly and the said A. P. Metcalf, the said H. B. Metcalf, F. G. Weatherly, A. P. Metcalf, and M. M. Weatherly formed the said corporation, and paid for the stock issued to each of them respectively by the property of the said partnership, which was at that time held by each of them respectively, and the said corporation thus became the holder of all the property of the said partnership"; and it is further alleged "that the said transfer of property and formation of said corporation were parts of the scheme formed by the said H. B. Metcalf and F. G. Weatherly to hinder, delay, and defraud the complainants and other creditors of the said partnership." From these averments, in connection with the amended prayer, it is apparent that the amendments look to abandoning the pursuit of the specific property,—the same having been disposed of since the bill was filed,—and to holding the several transferees to account as trustees for its value. They are not objectionable as being inconsistent with, or as departing from the bill as originally filed, or as making a new case, for, according to the allegations in the amended bill, the several transfers are each part of a single fraudulent scheme,—the same that was first attacked as having been formed by H. B. Metcalf and F. G. Weatherly; and from the property first forming the subject-matter the change in subject-matter is only to that which of necessity stands in place of that property, viz., responsibility of the constructive trustees for its value. A fraudulent grantee who wrongfully places the property beyond the reach of his transferor's creditors may be held liable for its proceeds or its value. *Weingarten v. Marcus*, 121 Ala. 187, 25 South. 852; *Shoe Co. v. Torrey*, 121 Ala. 89, 25 South. 763; *Dickinson v. Bank*, 98 Ala. 546, 14 South. 550.

Nor is it a valid objection to the bill that it does not allege the partnership was insolvent. The debtors are charged with actual, as distinguished from constructive, fraud. A solvent debtor may, by conveying his property with intent to defraud creditors, be guilty of a fraud which, under section 818 of the Code, will authorize them to pursue the

property or its proceeds, regardless of whether he has other property subject to debt. *O'Neil v. Brewing Co.*, 101 Ala. 383, 13 South. 576; *Smith v. Collins*, 94 Ala. 394, 10 South. 334; *Carter v. Coleman*, 82 Ala. 177, 2 South. 354; *Lehman v. Meyer*, 67 Ala. 396. And when done with such intent the transfer by one partner to another of his interest in the firm property will place the transferee in the attitude of a fraudulent grantee. *Weingarten v. Marcus*, supra. The demurrers to the bill as last amended and the motion to strike the amendments were properly overruled. But for reasons not clearly indicated by their demurrers, the bill is not sufficient to warrant relief against Mrs. Metcalf and Mrs. Weatherly. First it was adapted to enjoin them, as stockholders and directors of the corporation, from disposing of the property, but that is not now a feature of the case. With the alleged fraud of the debtors in transferring to them in payment of indebtedness to them it fails to connect Mrs. Metcalf and Mrs. Weatherly by any averment, whether of fact or conclusion. Their debts are not impugned as lacking bona fides or as inadequate to form the consideration for the goods received by them; and it is not alleged that those defendants had notice, actual or constructive, of the alleged fraudulent scheme of their transferors. Simple-contract creditors, such as complainants were at that time, have no lien on property of a debtor partnership. There are cases in which in equity they may be availed of the lien which, when not released, exists in favor of each partner for the purpose of having the property applied to the partnership debts. But this cannot be where the partner has relinquished the lien. The alleged plan of these partners for the division and disposition of the firm property amounted to a discharge of the lien they each had, for that disposition was wholly inconsistent with the retention of the lien. Consequently the complainants cannot recover on any equity of the partners. *Goldsmith v. Eichold*, 84 Ala. 116, 10 South. 80, 33 Am. St. Rep. 97; *Howe v. Lawrence*, 9 Oush. 553, 57 Am. Dec. 68.

As against the principal debtors the case is made out both by the bill and the evidence. By decisions of this court the use of an insolvent firm's property in payment of individual debts of the partners has been held fraudulent per se. *Goetter v. Norman*, 107 Ala. 585, 19 South. 56; *Fritchett v. Pollock*, 82 Ala. 169, 2 South. 735. The effect on creditors is the same, and the law is the same, when the firm is made insolvent by such use of its property. But apart from that doctrine an intent on the part of these debtors to hinder and delay, if not to otherwise defraud, creditors, is convincingly evidenced by the course they took in diverting from the partnership all its property while making provision for its debts, whereby, besides paying their individual debts, they secured to themselves a substantial interest in

the corporation formed in consummation of their scheme.

The decree appealed from will be reversed on the assignments of error made by Mrs. Metcalf and Mrs. Weatherly, and a decree will be here rendered dismissing the bill as to them, and ordering a reference to the register for the ascertainment of the value of that part of the partnership property received by H. B. Metcalf and F. G. Weatherly, respectively, and the amounts due from them to each of the complaining creditors, including those who have been or may hereafter be admitted as parties under the bill. After the execution of the reference the chancery court will decree appropriate relief by holding defendants H. B. Metcalf and F. G. Weatherly each liable as trustees for those creditors in proportion to the amount of their respective claims, and to the extent of the value of that part of the partnership property received by those defendants respectively in the division had of that property. The last-named defendants will take nothing by their assignments of error, but will pay half the costs of the appeal, and the remaining half of said costs will be paid by appellees. The costs in the chancery court, other than those accruing on the appeal, will abide the decree to be hereafter rendered in that court.

MARX v. MILLER.

(Supreme Court of Alabama. June 28, 1902.)
MASTER AND SERVANT—DISCHARGE—PLEADING—AVERMENTS—DAMAGES.

1. Where a servant, in an action for a breach of the contract of hiring, counts on the breach alone, not attempting to recover on the contract as such, an averment of readiness and willingness to perform is not necessary.

2. In an action by a servant for breach of the contract of hiring, it is not necessary that the complaint should allege that plaintiff used reasonable diligence to obtain the same or similar employment; the question as to whether plaintiff could have obtained such employment being a matter of defense.

3. In an action by a servant against the master for damages for breach of a contract of hiring,—plaintiff counting on the breach alone, and not attempting to recover on the contract,—a paragraph of the complaint alleged that it was impossible to secure employment for the remainder of the term. *Held* not error to refuse to strike the paragraph, as it was mere surplusage.

4. The denial of a motion to strike a paragraph of a complaint which is mere surplusage is not reviewable.

5. Where a paragraph of a complaint is conceived to be material, but defective in statement, it cannot be taken advantage of by motion to strike, but only by an objection to evidence offered under it, or by a charge.

6. Where defendant employs plaintiff to take charge of defendant's "dressmaking department, as manager and dressmaker," plaintiff is not required by her contract to do work of a seamstress.

7. Where a servant, whose duties require her to act as manager of the master's dressmaking business, and not to work as a seamstress, is

discharged for refusal to do the work of a seamstress, there is a breach of the contract by the master.

8. In an action by a servant for wrongful discharge, plaintiff being entitled to a general charge, exclusion of evidence which did not produce any conflict in the evidence was harmless.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by Martha E. Miller against Ferd. Marx. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint contained but one count, which was as follows: "The plaintiff, Martha E. Miller, claims of the defendant, Ferd. Marx, \$450, with interest thereon, as damages for the breach of an agreement entered into by the defendant on the 18th day of June, 1900, in substance as follows: Defendant employed plaintiff at a salary of \$1,800 per year, to be paid weekly or monthly, at plaintiff's election, to take charge of the dressmaking department of the said defendant in his said business in Birmingham, Ala., during the period beginning September 1, 1900, and ending September 1, 1901; and plaintiff avers that she entered in the performance of her said contract on, to wit, the 1st day of September, 1900, and continued to perform her services as said manager faithfully and efficiently, though often interfered with by defendant or his employes, until, to wit, the 3d day of June, 1900, when, though plaintiff was ready, able, willing, and offered to perform and continue her said service, she was prevented by the wrongful acts of defendant from performing her contract with the defendant, and, without fault on her part, was discharged by defendant from her further service for the defendant, and her workroom closed, and most of the employes therein discharged, and she was directed that her services were not further needed, and that her contract with the defendant was ended, though there was yet three months of the time for which said contract was to continue, to wit, June, July, and August, 1901, that she has been prevented from executing by the said wrongful acts of defendant in discharging her. And plaintiff avers that at this season of the year it is difficult, if not impossible, to obtain any like services for the unexpired term of her contract, to wit, June, July, and August of 1901, and she will thereby, on account of said wrongful discharge and breach of said contract by said defendant, Marx, be damaged to the amount of four hundred and fifty and no/100 dollars, and interest thereon; hence this suit." The defendant demurred to this complaint upon the following grounds: "(1) Because it is shown in and by the terms of the contract sued upon that the wages claimed are not due. (2) Because it is shown by the averments of the complaint that the suit is prematurely brought. (3) Because it is not averred in said complaint that plaintiff has been unable to obtain like employment for the unexpired term of her contract. (4) Because

¶ 7. See Master and Servant, vol. 34, Cent. Dig. §§ 20, 31.

It is not shown by said complaint that plaintiff has held herself in readiness to perform her contract. (5) Because the plaintiff has failed to aver in her complaint readiness and willingness on her part to perform her contract throughout the time she undertook to serve." These demurrers were overruled. The defendant moved the court to strike from the complaint the last paragraph therein, commencing, "And plaintiff avers that at this season of the year," etc. The court overruled this motion, and the defendant duly excepted. The defendant pleaded the general issue, and by special plea set up that the plaintiff had refused to obey the reasonable orders of the plaintiff, her employer, in that she refused to work on garments in the dressmaking department, and that her disobedience in this respect justified the rescission of the contract of the defendant, and authorized plaintiff's discharge. The plaintiff demurred to the several pleas upon the ground that it is not averred that the work requested by the plaintiff was work which she was employed to do, and that said pleas set up no defense to the action. This demurrer was sustained. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion; it being unnecessary to set out in detail the rulings of the trial court upon the evidence, or the facts relating thereto. There were verdict and judgment for the plaintiff, assessing her damages at \$466.50. The defendant moved for a new trial, which motion was overruled, and the defendant duly excepted.

Morris Loveman, for appellant. Rudolph & Huddleston, for appellee.

TYSON, J. It is thoroughly settled in this state that when a person contracts to perform personal services for another for a specified term at stipulated wages, and is discharged, without fault on her part, before the expiration of the term, she may treat the contract as broken and at an end, and immediately sue and recover all the damages she may have sustained up to the time of the trial. But she is not compelled to accept the breach of her employer as a termination of the contract. She may elect to treat it as continuing, and keep herself in readiness to perform the contract on her part. *Davis v. Ayres*, 9 Ala. 292; *Martin v. Everett*, 11 Ala. 375; *Ramey v. Holcombe*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Holloway v. Talbot*, 70 Ala. 389; *Wilkinson v. Black*, 80 Ala. 329; *Mining Co. v. Knox*, 96 Ala. 320, 11 South. 207. It will be noted that in the case under consideration the plaintiff counts alone on a breach of the contract, treating it as broken by defendant and at an end. The complaint contains only one count, and there is no recognition of the continuing existence of the contract,—no attempt to recover upon it as such, or for wages on account of constructive services rendered un-

der it; but, as we have said, it is to recover damages arising out of a breach of it by defendant. Where this is the case the averment of the making of the contract, its terms, and its breach by the defendant, and the plaintiff's willingness and ability to perform at the time of the breach, is all that is necessary. While it is doubtless true where the plaintiff sues upon the contract for full compensation for a stipulated term, which suit cannot, of course, be maintained until after the expiration of such term, the complaint must aver a readiness and willingness on the part of plaintiff to perform the services throughout the term he bound himself to serve, this averment is not necessary where the action is, as here, for a breach of the contract by defendant, treating it as terminated. *Pierce v. Railroad Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; *De Peyster v. Pulver*, 3 Barb. 284; 2 Chit. Cont. (11th Am. Ed.) p. 1080, and note. Nor is it necessary that the complaint should allege that the plaintiff used reasonable diligence to obtain the same or similar employment after her discharge by defendant. As to whether she could have obtained the same or similar employment in the same locality is a matter of defense. *Strauss v. Meertief*, supra; *Wilkinson v. Black*, supra; 13 Enc. Pl. & Prac. 916, and notes; 1 Am. & Eng. Enc. Law (2d Ed.) 1106, 1107. The demurrer to the complaint as originally framed was properly overruled.

Nor was there any error of which the defendant can complain in the overruling of his motion to strike a certain paragraph from the complaint. It was immaterial, and should have been treated as mere surplusage. Being surplusage, the denying of the motion is not revisable. *Davis v. Railroad Co.*, 108 Ala. 662, 18 South. 687. If it was conceived by defendant to be material, but defective in averment, the defect could not be reached by motion. 14 Enc. Pl. & Prac. 91. He should have taken advantage of the supposed defect by an objection to evidence offered in support of allegations contained in it, or by charge. *Daughtery v. Telegraph Co.*, 75 Ala. 168, 51 Am. Rep. 435.

It will doubtless be said that objection was made, and an exception reserved, to the statement of plaintiff introduced to prove the allegation in the paragraph that at "this season of the year it is difficult, if not impossible, to obtain any like services for the unexpired term of her contract." This exception, however, will be disposed of later.

The contract between the parties was in writing. By its terms the defendant bound himself to pay the plaintiff \$1,800 for the year beginning September 1, 1900, and ending September 1, 1901, to be paid weekly or monthly, at the plaintiff's election; and the plaintiff obligated herself "to take charge of the dressmaking department" of defendant, "as manager and dressmaker," with power to employ and discharge the employes in

said department, and to have entire management and control of the department, but to confer and advise with defendant from time to time with reference to the best interest of said department of said business. It is entirely plain from the foregoing statement of the contract, which is a substantial copy of it, that the plaintiff was not employed as a dressmaker, but as superintendent or manager of the defendant's dressmaking department, which the evidence shows was operated by him in connection with his other mercantile business. The word "dressmaker," when taken in connection with the entire context of the contract, cannot be construed as meaning that she was employed as a seamstress. Indeed, should we confine our reading of the contract to the sentence in which it is found, to wit, "In consideration of the above employment, the said Martha E. Miller, party of the second part, is to take charge of the dressmaking department of the party of the first part, as manager and dressmaker, in his business at Birmingham, Alabama," it is entirely clear that the words "as manager and dressmaker" are merely descriptive of the position or office which the plaintiff was to fill, and imposed no obligation upon her to do the work of a seamstress. The testimony shows, without dispute, that defendant discharged the plaintiff because of her refusal to do the work of a seamstress. This, as we have said, she was under no duty to do under the contract. She therefore had the right to refuse to do it, and her discharge for this refusal was a breach of the contract by the defendant which rendered him liable in damages to her. On the undisputed facts, she would have been entitled to have had the court charge the jury affirmatively to find a verdict in her favor. This being true, the exception reserved by defendant to the introduction and exclusion of testimony which did not in the remotest degree tend to produce a conflict in the evidence under which plaintiff was entitled to recover is of no avail. If error was committed in this respect, it was harmless. *Bienville Water Supply Co. v. City of Mobile*, 125 Ala. 178, 27 South. 781; *Blass v. Meyer*, 124 Ala. 332, 26 South. 800.

It is scarcely necessary to say in conclusion that there was no error in refusing the motion for a new trial. Affirmed.

BRAGG v. STATE.

(Supreme Court of Alabama. June 28, 1902.)

PHYSICIANS AND SURGEONS—PRACTICING MEDICINE—CERTIFICATE OF QUALIFICATION—OSTEOPATHY.

1. Civ. Code, § 3261, provides that no person shall practice medicine, in any of its branches or departments, without a certificate of qualification from an authorized board of medical examiners. Cr. Code, § 5333, imposes a penalty for practicing medicine without a certificate. A course of legislation (Acts 1823, p. 45; Clay, Dig. p. 487; Code 1852, § 980; Acts

1870-77, p. 80; Code 1876, pp. 403, 461, cc. 8, 4; Acts 1874-75, p. 130; Code 1876, § 1537; Code 1886, § 1260) indicates that it has not been the legislative intent to restrict the examination of those intending to practice medicine to those prescribing drugs, but to include all who practice the art of healing, whatever the therapeutic agency employed. *Held*, that one practicing osteopathy (a system of healing by manipulations of the limbs and body) is practicing medicine, under Civ. Code, § 3261, and Cr. Code, § 5333.

2. Civ. Code, § 3261, providing that no person shall practice medicine in any of its branches or departments, without a certificate or qualification from an authorized board of medical examiners, and Cr. Code, § 5333, imposing a penalty for practicing medicine without a certificate, are constitutional.

3. Civ. Code, § 3260, provides that the board of censors of the Medical Association of Alabama, organized under the constitution thereof adopted March, 1873, and the censors of affiliated county medical societies, shall be boards of medical examiners. Id., § 3261, provides that no person shall practice medicine, in any of its branches or departments, without a certificate of qualification from an authorized board of medical examiners. Cr. Code, § 5333, imposes a penalty for practicing medicine without a certificate. *Held*, that on a prosecution under Cr. Code, § 5333, a contention that the association and board of censors were not regularly organized under the constitution of the association was of no merit; it being sufficient that the boards of examiners were de facto acting under the provisions of the statutes, and that their certificate of qualification would protect defendant from prosecution for a violation of the criminal statute.

4. On a prosecution against an osteopath under Cr. Code, § 5333, a contention that the boards of examiners, as constituted, discriminate against all save those practicing the regular system of medicine, was of no avail to defendant, since, if true, his remedy was in the civil courts, on rejection of an application for a license, and not by a violation of the criminal law.

Appeal from criminal court, Jefferson county; S. E. Greene, Judge.

E. Eugene Bragg was convicted of practicing medicine without a certificate of qualification, and he appeals. Affirmed.

The prosecution was commenced by an affidavit which charged "that E. Eugene Bragg, within twelve months before the making of this affidavit, in said county, as a profession or means of livelihood, did practice medicine, without first having obtained a certificate of qualification from one of the authorized boards of medical examiners of this state, against the peace and dignity of the state of Alabama." The cause was tried by the court, without the intervention of a jury, upon an agreed statement of facts, in which it was admitted that the defendant, within 12 months before the commencement of the prosecution, practiced in Jefferson county, Ala., what is commonly known as "Osteopathy," without first having obtained a certificate of qualification from one of the authorized boards of medical examiners of this state; that he practiced the same as a profession and means of livelihood; that osteopathy is a new method of treating diseases, commonly said and understood to have originated with one Dr. A. T. Still, of Kirksville, Mo., about the year

1371; that said Dr. Still practiced osteopathy until about the year 1890, when he established a school for instruction therein; that said school has subsequently grown until it is now a chartered college. The agreed statement of facts then set out the further following facts: "The defendant was regularly educated in and graduated from the said college, which has the name of the 'American School of Osteopathy,' and holds a diploma from that institution certifying his capacity and fitness for the practice of osteopathy. The method of treatment by the practitioners of osteopathy is a system of manipulation of the limbs and body of the patient with the hands, by kneading, rubbing, or pressing upon the parts of the body. In the treatment no drug, medicine, or other substance is administered or applied, either internally or externally; nor is the knife used or any form of surgery resorted to in the treatment. The practitioner himself performs the manipulations. The teaching and theory of those skilled in osteopathy are that it is a system of treatment of disease by adjustment of all the parts of the body mechanically. It is taught that any minute or gross derangement of bony parts, contracting and hardening of muscles or other tissues, or other mechanical derangements of the anatomical parts of the body (which must be in perfect order mechanically in order that it may perform its function aright), nerve centers, arteries, veins, and lymphatics (which must function properly in order that health may be maintained),—it is taught that such interferences tend to congestion, obstructed circulation of blood and lymph, irritation of nerves, and abnormal state of nerve centers; that the result is disease, which can be cured only by righting what is mechanically wrong. In other words, it is taught that in health the adjustment of the various parts of the body is perfect; in disease this relation is disturbed; e. g., if a muscle becomes contracted it will impinge on neighboring structures; also the force exerted thereby may produce a tension which tends to displace the bones to which it is attached. The circulation is impeded, lowered vitality resulting. Osteopathic treatment, it is taught, overcomes contracted conditions of the muscles, stimulates the nerve centers to greater activity, and increases the circulation to the parts by mechanical means, without the aid of any sort of medication; and it is claimed and taught that, when any slight bony lesion causes interference with the function of the part, osteopathic manipulations will remove the cause and cure the trouble. The essential things taught in the schools of osteopathy are anatomy, physiology, hygiene, histology, pathology, and the treatment of diseases by manipulation. The repudiation of drugs and medicine in the treatment of diseases is a basic principle of osteopathy, and a knowledge of drugs or medicines, their administration for the cure of diseases, the writing and giving of prescriptions, are not essential to the graduation of, and the issuance of di-

plomas to, students of osteopathy. It was in pursuance of and in accordance with the foregoing principles, rules, and practices that the defendant practiced osteopathy, as hereinbefore admitted, and not otherwise; and in his practice he never at any time used or prescribed any drug or medicine of any kind, but his practice consisted entirely of manipulations of the body and limbs of the patient, performed by himself. He never held himself out to the public to practice in any other way. It is admitted that physicians engaging in the practice of the regular system of medicine have never treated patients by manipulation of the body and limbs. It is further admitted that the defendant, in said county of Jefferson, and within 12 months before the commencement of the prosecution, kept and maintained an office, where he invited persons afflicted with disease to consult him and receive treatment from him during his office hours, and he called upon and treated patients at their home, and that he published and circulated literature inviting sufferers to consult him, and setting forth the superiority and efficacy of his treatment of disease, using his system of treatment herein described; that he is and was called by the title of 'doctor,' and that he received and charged a fee for his services and treatment; and that he has never applied to be examined or to have a certificate of qualification from any of the authorized boards of medical examiners of this state. It is further admitted that there are, and have been for many years since 1873, county medical societies organized under and in affiliation with the State Medical Association of the State of Alabama in the county of Jefferson and a large number of other counties of Alabama." There was also introduced in evidence the constitution of the medical association of the state, and the ordinances and laws for the government of said association. On the hearing of all the evidence, the court rendered judgment finding the defendant guilty as charged in the affidavit, and assessing a fine of \$25 and costs against him. To the rendition of this judgment the defendant duly excepted, and from this judgment he brings the present appeal.

B. M. Allen and Jas. B. Head, for appellant. Chas. G. Brown, Atty. Gen., and Canbiss & Weakley, for the State.

TYSON, J. It is admitted that defendant was engaged in the practice of osteopathy as a profession and means of livelihood, without having obtained a certificate of qualification from one of the authorized boards of medical examiners. The most important question presented is whether the practice of osteopathy is "the practice of medicine in any of its branches or departments," within the meaning of section 3261 of the Civil Code and section 5333 of the Criminal Code. The contention of defendant is that it is not. He predicates his insistence mainly (indeed, we may say wholly)

upon the fact that in the practice of osteopathy no drugs or other medicinal substances are administered or applied, internally or externally; nor is the knife used or any form of surgery resorted to in the treatment of diseases. In fact, the practitioners of that school of the healing art repudiate as remedial agents all drugs, medicinal substances, and the knife, and other surgical instruments and appliances, in the treatment or alleviation of diseases, and therefore need have no knowledge of their use. They, of consequence, know nothing of the medicinal properties of drugs and other medicinal substances, or of the compounding and administering of drugs in the cure of diseases. Their method of treatment is entirely external, consisting of "a system of a manipulation of the limbs and body of the patient with the hands, by kneading, rubbing, or pressing upon the parts of the body." However, in order to practice the profession of osteopathy skillfully and scientifically, it is admitted that the practitioner must know anatomy, physiology, hygiene, histology, and pathology. Confessedly, the requirement of a knowledge on the part of the practitioners of all of these branches of the science of healing the sick or diseased is to enable him to skillfully determine the disease with which his patient is afflicted, and to aid him in making a proper application of his system of manipulation. For it is entirely clear from the evidence that the practitioner does not make the same application of his remedy to all diseases, but that he applies such system of manipulation as is most remedial in alleviating or curing the particular disease he is called upon to treat. In other words, after a diagnosis of the disease of the patient he applies the remedy most suitable to its cure; confining it, however, to his system of manipulation as a remedial agent. So, too, a practitioner of medicine is required to know anatomy, physiology, hygiene, histology, and pathology, in order to enable him to skillfully and scientifically determine from what disease his patient is suffering; and, after so determining, he must also know how and what remedial agents should be prescribed for the alleviation or cure of the disease. So, after all, the only difference between the two is in the matter of therapeutics,—that branch of medicinal science which considers the application of remedies as a means of cure. The former, as we have shown, applies his external remedies exclusively, while the latter prescribes internal or external, or both, as the exigencies of the case may require. The result sought to be accomplished by each is the same,—to relieve the patient's illness; to cure him. Both are practicing the art of healing or curing human diseases.

But it is said the words "the practice of medicine," or "who practices medicine," as used in the statutes, should not be extended to all practitioners of the art or science of healing or curing diseases, but that their proper interpretation or construction includes only those persons who employ medical substances

or drugs as remedial agents for the alleviation or healing of diseases. This contention is based upon the proposition that the word "medicine," in its popular sense, and as commonly understood, is a remedial substance or drug, and that the practice of medicine, as popularly understood, inseparably includes as its great and overruling constituent the administration of drugs and other medicinal substances as remedial agents. Indeed, the whole superstructure of defendant's theory that as a practitioner of osteopathy he is not engaged in the practice of medicine has for its foundation that the interpretation of the words "medicine or practice of medicine" must be accepted in the sense in which these words are commonly used. With this foundation or base destroyed, his theory must fall. In other words, if his premise is shown to be fallacious, of necessity his conclusion must be false. So, then, the question is, what is the correct rule of interpretation of these words? Shall we interpret them in their popular sense or as commonly understood, or are they to be interpreted (being technical words, used in reference to a technical subject) according to the meaning or use they have when applied to the particular art or science with reference to which they are used? It cannot be well doubted that if they are technical words, having a technical meaning when applied to the particular art or science to which they refer, such use or meaning must be given to them, unless from the context of the statutes a different use or meaning is made apparent. 17 Am. & Eng. Enc. Law (2d Ed.) 13; 23 Am. & Eng. Enc. Law (1st Ed.) 324. This rule is stated by Mr. Endlich, in his work on the Interpretation of Statutes (pages 94-96, §§ 73-75), to be that: "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. That is, in the construction of a statute, as in that of other instruments, words are to be understood not according to their mere ordinary general meanings, but according to their ordinary meaning as applied to the subject-matter with regard to which they are used, unless, indeed, there be something requiring them to be read in a sense which is not their ordinary sense in the English language as so applied. * * * An obvious result of this rule is that, where technical words are used in reference to a technical subject, they are primarily interpreted in the sense in which they are understood in the science, art, or business in which they have acquired it." After showing the application of the rule in the construction of words and phrases having legal technical meanings, the author continues by saying: "But the rule giving to a word its technical meaning

holds equally good in the construction of statutes dealing with other subjects as to which words and phrases used in a statute have acquired such a meaning, whether it be a legal technical meaning or not; i. e., whether it be a technical meaning which the word or phrase has acquired in the law, or a technical meaning which it has acquired in any other science, art, or business, if the enactment relates to any of these, the technical meaning the word has in the law, in any other science, in any art, or in any business is to be given to it, accordingly as the one or the other is the subject of the enactment." It will not be doubted that the word "medicine," however, whenever, and wherever used, has reference to the subject of a science or art,—a technical word denoting the science or art of curing diseases,—and that one who engages in the practice of it is a scientist or artist, professionally known by the name of "physician" or "doctor." It may be, and doubtless is, true that it is not, and has never been, an exact science, but this is due to the fact that it has been and is a progressive science; but it is nevertheless a science or art. Nor does the fact that those who practice the science or art differ as to the administration of specific remedies for specific diseases render it any the less an art or science. These differences have always existed, and will, doubtless always continue to exist.

The word "medicine" (Latin, "*medicina*") is derived from "*medeor*,"—to heal. It is defined by the eminent lexicographer of medical words or terms, Gould, to be "the science and art of preserving health and preventing and curing disease; the 'healing art,' including also the science of obstetrics." By Dunglison, another author of a medical dictionary, to be "the healing art; physic; a science the object of which is the cure of disease and the preservation of health." Bigelow, an eminent physician and author of medical works, says: "Medicine is the art of understanding diseases, and curing or relieving them when possible." The Universal Cyclopædia, edited by Rossiter Johnson, Ph. D., LL. D., after giving the derivation of the word "medicine" from the Latin word "*medicina*," defines it to be "the art of a physician or of healing; the art and science of curing diseases." The Encyclopædia Britannica, under the title "Medicine," subtit. "Synoptical View of Medicine," says: "Medicine, the subject-matter of one of the learned professions, includes, as it now stands, a wide range of scientific knowledge and practical skill. * * * The science of medicine is the theory of diseases and remedies." Definitions might be quoted from other writers, but these will suffice to show not only that the word "medicine" is a technical word, denoting a science or art comprehending not only therapeutics, but the art of understanding the nature of diseases, the causes that produce them, as well as the art of knowing how to prevent them,—hygiene, sanitation,

and the like. These definitions are fully supported and their correctness thoroughly established by the history of medicine, and its practice as a science or art. While it is true, as we said above, there have always existed differences among physicians as to the therapeutic agencies that should be employed in the treatment of diseases, yet it has never been supposed that the disciples of any particular school of the healing art were physicians,—practitioners of medicine,—and those of a different school or sect were not. They have all been regarded by eminent scholars as engaged in the practice of medicine. Doubtless these differences have produced much good, caused advancement in the art, tended to perfect the science, and have given the profession a broader and more enlightened view or insight into this great science. Dr. Roswell Park, in his "Epitome of the History of Medicine," speaks of the origin of medicine as having been nearly contemporaneous with the origin of civilization. He points out that the earliest records of probable authenticity are perhaps to be met with in the Scriptures, from which may be gathered here and there a fair notion of Egyptian knowledge and practice. Thus we read in the fiftieth chapter of Genesis that "Joseph commanded his servants, the physicians, to embalm his father; and the physicians embalmed Israel." He also speaks of medicine as the "healing art," and traces the practice of it among the Greeks to *Æsculapius*, whom he says was the leading character in medicine of all the ancients, with the possible exception of *Hermes* among the Egyptians. He shows that this great physician cured ulcers, wounds, fever, and pain, of all who applied to him, by enchantment, potions, incisions, and by external applications. So renowned became the name of this illustrious physician that temples were erected to his fame and in his honor, in which schools of medicine were established, and the science taught. These temples existed for centuries, and the schools were presided over by the priest, who treated all sick persons who repaired to or were conveyed to them. If not able to go in person, their deputies were sent. The sick person or his representative, after ablution, prayer, and sacrifice, was made to sleep on the hide of a sacrificed animal, or at the feet of the statue of the god, while sacred rites were performed. In his sleep the appropriate remedy was indicated by a dream. Moral or dietetic remedies were more often prescribed than drugs. Thus it was that medicine as a science was practiced for centuries in Greece prior to the advent of Hippocrates, in the fourth or fifth century, B. C., to whom is credited the high conception of the duties and status of the physician, as shown in his celebrated "Oath," and elsewhere in his writings,—"equally free from the mysticism of a priesthood and the vulgar pretensions of a mercenary craft." By some writers this great physician and

osopher is called the "father of physic." We can be but little doubt that he may be regarded as the founder of the medical profession; that it was by and through his teaching that medicine came to be a distinct, disconnected and disassociated from sacrootalism. He wrote many books on medicine, and yet he possessed but little knowledge of anatomy, physiology, and pathology, and absolutely knew nothing of chemical drugs. Indeed, he and his disciples attached but little importance to drugs as a therapeutic agent, but relied in acute diseases mainly upon diet; the variations necessary in its administration in different diseases being minutely defined. In the treatment of cases of chronic diseases, diet, exercise, and natural methods were chiefly relied upon. Indeed, in those days drugs as therapeutic agencies were of necessity of minor importance in the treatment of the sick, since they were few, and since chemical drugs were not discovered until long afterwards, to wit, about the fifteenth century. For several centuries the Hippocratic school of medicine, known as the "Dogmatist," prevailed, though there were opposing sects or schools. Succeeding the dogmatist was the school of medicine founded by Asclepiades, who, repudiating the Hippocratic doctrine, adopted hygienic remedies,—for the most part, bodily exercise. Gymnastic exercises, as was also massage, was fully recognized by the physicians of those days, and prescribed by them as a therapeutic agent, in the healing of diseases. So was water recognized as a scientific remedial agent,—technically called "Hydrotherapy." After the appearance of Galen, a great physician and scholar who is supposed to have died about 200 A. D. at the age of 71 years, and who wrote many works on the science of medicine, Europe for 13 centuries seemed to have yielded to his authority. Indeed, to him the medical profession is indebted for much. Yet, in the revolutions of medical opinion, the works of this great man were publicly burned in the fourteenth century by Paracelsus and his disciples; and for centuries following the medical profession was divided between the Galenist and the chemist until a complete ascendancy over both was obtained by the vitalist. Thus we see that no system of therapeutics has been uniformly followed, and perhaps, as we have said, never will be. Indeed, we might go further, and show that at this day the regular practitioners of medicine, as they are known to the profession, recognize the efficaciousness of water, massage, electricity, and perhaps other external applications to the body, as scientific therapeutic agencies. It may not be amiss in this connection to instance the "rest cure,"—a thoroughly recognized scientific treatment for mental or nervous troubles. It consists in keeping the patient quiet and at rest, giving to him occasionally a massage, an application of electricity, a sponge bath, with proper diet. No drug is

used, except a laxative occasionally, if necessary. The use of drugs, however, is a secondary consideration, and may be dispensed with altogether. Thus it is made entirely clear, both by definitions and history, that the word "medicine" has a technical meaning, is a technical art or science, and as a science the practitioners of it are not simply those who prescribe drugs or other medicinal substances as remedial agents, but that it is broad enough to include, and does include, all persons who diagnose disease, and prescribe or apply any therapeutic agent for its cure.

Is there anything in the language of the statutes which prevents giving to the word "medicine" its legitimate technical use or meaning? This question can best be answered by tracing the history of the legislation on this subject culminating in the present statutes. Before doing so, however, we should bring to mind the purpose of these enactments, and constantly keep before us that the legislative purpose was to protect the public against charlatanism, ignorance, and quackery. *Brooks v. State*, 88 Ala. 122, 6 South. 902. The first enactment on this subject was approved December 22, 1823 (Acts 1823, p. 45), wherein it was provided that no person or persons shall be allowed to practice physic or surgery, or any branch thereof, or in any case to prescribe for the cure of diseases, for fee or reward, unless he shall be licensed to do so. That act also provided for the establishment of boards of physicians, whose duty it was to examine the applicant and to grant him the license. In 1832 persons practicing medicine on the botanical system of Dr. Samuel Thompson were exempt from taking out a license. In 1841 it was made the duty of the medical boards to examine and license applicants to practice dental surgery, under the same rules and regulations and subject to the same restrictions as those who apply for license to practice medicine, and a penalty was imposed upon any person styling himself a dentist, or other person who engaged in the practice of dental surgery as a professional business, without having been regularly licensed by one of the medical boards. *Clay*, Dig. p. 487 et seq. The substantial provisions of these enactments were embodied in the Code of 1852. However, in the adoption of that Code there was added the requirement that all druggists should obtain a license to deal in drugs from the medical board of the county in which such business was pursued. Code 1852, § 980. Thus stood the law, with some few amendments which are not necessary to be here noticed, until the act of February 9, 1877 (Acts 1876-77, p. 80), which committed the duty theretofore imposed alone upon the medical boards to the boards of censors of the several county medical societies, in connection with the board of censors of the Medical Association of the State of Alabama. No material change was made by this act with respect to the class of persons re-

quired to obtain a license to practice medicine, surgery, dentistry, or to sell drugs, except as to those persons who desired to practice some irregular system of medicine, and females who practice midwifery. As to irregular practitioners, they were prohibited from practicing their system of medicine, in any of its branches or departments, as a profession and means of livelihood, without having obtained a diploma or certificate of qualification in anatomy, physiology, chemistry, and the mechanism of labor, from some authorized board of medical examiners. Code 1876, pp. 460, 461, cc. 3, 4. On the 11th day of February, 1881, a board of dental examiners was constituted, whose duty it was to grant licenses to all dentists who may have received licenses from medical boards without examination or fee, and to grant licenses to all other applicants who underwent a satisfactory examination, upon the payment of a fee of \$5. Code 1886, § 1296 et seq. In 1887 a board of pharmacy was established to examine every person desiring to conduct the business of selling at retail, compounding, or dispensing drugs, medicines, or chemicals for medical use, or compounding or dispensing as pharmacists prescriptions prepared by physicians. In 1895 every physician who was licensed to practice medicine was also authorized to fill prescriptions of other physicians, compound and sell medicines and poisons, and carry on the business of pharmacists. As far back as 1875 the Medical Association of the State of Alabama was constituted a board of health for the state, and to it was committed cognizance of the interest of health and life among the people of the state, and the duty imposed of investigating the causes and means of prevention of endemic and epidemic diseases, of investigating the influences of localities and employments upon the public health, of making to the lawmaking branch of the state such suggestions as to legislative action as in their judgment may seem advisable. This board of physicians were in fact constituted the medical advisers of the state. Acts 1874-75, p. 130; Code 1876, § 1537 et seq.; Code 1886, § 1260 et seq. And at this writing to this board is intrusted largely the enforcement of all laws relating to public health, quarantine, and sanitation. Code 1896, § 2392 et seq. Thus has been the growth and development of the law in this state regulating "the practice of medicine in any of its branches or departments as a profession." From this growth and development, can it be seriously doubted that it was not the intention or purpose of the legislative mind to restrict the examination of those desiring to practice medicine to that class of the profession who may prescribe drugs as therapeutic agents in the healing of diseases? We think not. On the contrary, the very first enactment on the subject (1823) prohibiting any person from prescribing for the cure of diseases for fee or reward without obtaining a license is a clear, unequivocal, and unmistakable declaration of the legislative purpose to

deal with medicine and the practice of it in its broad and comprehensive sense,—as a science or art of healing and curing diseases. And this purpose has been rather emphasized than otherwise in subsequent legislation on the subject. Our conclusion, therefore, is that the defendant was engaged in the practice of medicine, within the meaning of the statutes. This conclusion is fully supported by the decisions of other courts. In *Bibber v. Simpson*, 59 Me. 181, Appleton, C. J., speaking for the court, said: "The services rendered were medical in their character. True, the plaintiff does not call herself a physician, but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her most appropriate. Whether the plaintiff calls herself a 'medical clairvoyant,' or a 'clairvoyant physician,' or a 'clear-seeing physician,' matters little. Assuredly, such services as the plaintiff claims to have rendered purport to be and are to be deemed medical." So it was held that she was not entitled to recover for her services, she having no license to practice medicine. In *Hewitt v. Charlier*, 16 Pick. 353, it was held (Shaw, C. J., delivering the opinion) that "a person who practices bonesetting, and reducing sprains, swellings, and contractions of the sinews by friction and fomentation, but no other branch of the healing art, is a person practicing surgery, within the meaning of St. 1818, c. 131, § 1, which provides that no person practicing physic or surgery shall be entitled to the benefit of law for the recovery of his fees unless he shall have been licensed by the Massachusetts Medical Society, or graduated a doctor in medicine in Harvard University." In *Davidson v. Bohlman*, 37 Mo. App. 576, it was held that: "The statutes restricting the right to practice medicine and surgery to registered physicians and surgeons, and requiring the filing of diplomas, apply to one who, as a physician, gives electric treatments. It is not necessary that one should administer internal remedies, in order to practice medicine within the meaning of the statutes" which prohibited the practice or the attempt to practice medicine or surgery without first filing a diploma, etc. The case of *Eastman v. People*, 71 Ill. App. 236, is directly in point. The appellant there, as here, was engaged in the practice of osteopathy. The statute of Illinois (Rev. St. 1893, c. 91, par. 14) defined "practitioners of medicine" in this language: "Any person shall be regarded as practicing medicine within the meaning of this act who shall treat, operate on or prescribe for any physical ailment of another." The court, after saying that the appellant "professes to be able to diagnose and advise in respect to a long list of diseases, and to furnish discriminating and efficient treatment to those who may come to him, and while he may rely wholly upon manipulation, flexing, rubbing, extension, etc., yet he professes to have skill and judgment in these methods, so as properly to adopt the treatment to each

case, giving it what is appropriate in amount, and with repetition at such times and to such extent as may be dictated by his knowledge and experience"; and, after stating Bigelow's and Dunglison's definitions of "medicine," held that the practice of osteopathy was the practice of medicine. We need only add that our statutes are not so materially different from the statute construed in that case as to impair the decision of it, in any degree, as an authority directly upon the question in hand. So, also, is the case of *Little v. State* (Neb.) 84 N. W. 248, 51 L. R. A. 717 (being an osteopathy case), directly in point. See, also, *Underwood v. Scott* (Kan. Sup.) 23 Pac. 942; *Jones v. People*, 84 Ill. App. 453; *People v. Gordon* (Ill.) 62 N. E. 858. We have examined the cases relied upon by appellant. Some of them are perhaps in point, but are opposed to our view of the law.

The next point we shall consider is the one assailing the constitutionality of these statutes. We need but refer to the following cases, and the reasoning employed in them, to uphold the constitutionality of this legislation: *Brooks v. State*, 88 Ala. 122, 6 South. 902; *Stough v. Same*, 88 Ala. 231, 7 South. 150; *Bell v. Same*, 104 Ala. 79, 15 South. 537; *Nicholson v. Same*, 100 Ala. 132, 14 South. 746; *Hewitt v. Oharlier*, 16 Pick. 358; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Board v. Fowler* (La.) 24 South. 809; *Harding v. People* (Colo. Sup.) 15 Pac. 727; *State v. Webster* (Ind. Sup.) 50 N. E. 750, 41 L. R. A. 212, and cases cited on page 217, 41 L. R. A., pages 753, 754, 50 N. E.

So, likewise, the contention that the associations and boards of censors are not regularly organized under the constitution of the Medical Association of the State of Alabama is untenable. It is enough that the board of examiners is de facto acting under the provisions of the statutes, and that its certificate of qualification would protect defendant from prosecution for a violation of the criminal statute.

The remaining insistence relied upon, rather as an excuse or palliation for a violation by defendant of the law, is no justification or excuse at all. It is that the boards of examiners, as presently constituted, discriminate in favor of those physicians who practice the regular system of medicine, against all who practice other systems or belong to other schools. If it be conceded that this fact is shown by the record, it furnishes to defendant no right to violate the criminal laws of the state. His remedy is by proper procedure in the civil courts in the event his application for license is rejected. It strikes us that this defense is an afterthought. The record does not even hint at any attempt on the part of the defendant to procure a license. He rather chose to construe the law to suit his own notions, and engaged in the practice of medicine without even making any effort whatever to comply with its mandates, or even to have the unjust discrimination of which he com-

plaints removed before engaging in the practice. *Dent v. West Virginia*, supra; *Harding v. People*, supra; *Board v. Fowler*, supra; *Association v. Schrader* (Iowa) 55 N. W. 24, 20 L. R. A. 355.

The defendant was properly convicted. Affirmed.

KANSAS CITY, M. & B. R. CO. v. FOSTER.

(Supreme Court of Alabama. June 28, 1902.)

CARRIERS—GIVING WRONG TICKET—EJECTION—DAMAGES—PROXIMATE CAUSE—ERROR CURED.

1. The wrong committed by a ticket agent in giving a ticket to Y. only to a passenger buying a ticket to I., the agent knowing that yellow fever was prevalent near Y., and the danger and inconvenience of going about there, is the proximate cause of the passenger's suffering on account thereof; he being put off at Y., and not having money to buy a ticket to his destination.

2. The ticket agent of one carrier is the agent of a connecting carrier, so as to make the latter liable for his act in giving a passenger a ticket to Y. only, when buying a ticket to I., both points being on latter company's road, but I. being more distant, so that the passenger was put off at Y.; the latter company having recognized tickets sold to points on its line by the former company, and received from it its proportional part of the price of such tickets, and having received said passenger's ticket for transportation to Y.

3. The measure of damages of a passenger, who, buying a ticket to one point, is given one to a less distant point, where he is ejected, is not confined to the mere cost of transportation between the two points.

4. The overruling of a demurrer to a count in contract, that it was joined with counts in tort, cannot be reviewed; all the others having during the trial been withdrawn, or the court having charged there could be no recovery on them.

Appeal from city court of Birmingham; Ohas. A. Senn, Judge.

Action by Edwin H. Foster against the Kansas City, Memphis & Birmingham Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint contained six counts. Under the opinion on the present appeal, it is only necessary to set out the third count of the complaint, which was as follows: "(3) The plaintiff further claims of the defendant the sum of eighteen hundred (\$1,800) dollars, as damages, because of the following state of facts: And plaintiff avers that on, to wit, the 13th day of September, 1897, plaintiff applied to and paid defendant's agent at Waco, in the state of Texas, whose name is to plaintiff unknown, for a ticket from Memphis, in the state of Tennessee, to Birmingham, in the state of Alabama, over defendant's railroad extending between those points. And the plaintiff avers that the defendant's said agent, instead of furnishing plaintiff with a ticket from Memphis to Birmingham, as it was his duty to do, negligently furnished plaintiff with a ticket from Memphis to Byhalla, a point on defendant's

said road in the state of Mississippi between Memphis and Birmingham.

"And plaintiff avers that the ticket which he received from defendant's said agent was quite long, consisting of several coupons and containing a great deal of printed matter, that when said ticket was delivered to him by defendant's said agent he asked said agent if he was sure said ticket was to Birmingham, that in reply said agent stated that it was all right for Birmingham, and pointed out to plaintiff the word "Birmingham" between punch marks on several of the coupons composing said ticket; and the baggage master at the Waco depot having (upon having said ticket exhibited to him) checked plaintiff's trunk from Waco to Birmingham on said ticket; and plaintiff, having had little experience with tickets of this kind, and being at that time hurried in order to be ready to leave on the train for which he had purchased said ticket, received said ticket without further examination, feeling assured that it was such as he had asked for, and got upon the said train without observing that the said ticket was not correctly made out from Memphis to Birmingham.

"And plaintiff avers that at about 9 o'clock p. m. on to wit, the 14th day of September, 1897, he boarded, at Memphis, Tennessee, defendant's passenger train, which was to run from Memphis to Birmingham, for the purpose of coming to Birmingham. And plaintiff avers that when the defendant's agent who was in charge of said train (whose name is to plaintiff unknown) came to take up the fare plaintiff delivered to him the ticket which the defendant's said agent at Waco had furnished him as aforesaid. And the plaintiff avers that upon examining said ticket, the defendant's said agent in charge of said train found that it was a ticket from Memphis to Byhalia, a point on defendant's road in the state of Mississippi, between Memphis and Birmingham; that it was not to Birmingham, as plaintiff had been informed, and as he believed up to that time. And plaintiff avers that the defendant's said agent in charge of said train would not allow plaintiff to travel to Birmingham on said ticket. And plaintiff, not having sufficient money with which to pay the fare from Byhalia to Birmingham, defendant's said agent put plaintiff off of the said train at Byhalia in the state of Mississippi.

"(And plaintiff avers that when he was put off it was about ten o'clock at night, was during the time when the yellow fever was prevailing in many parts of the country, including that in which Byhalia is situated, and the town of Byhalia was quarantined against all other places.) (When plaintiff was put off of said train as aforesaid he was met by an armed officer and other citizens of Byhalia, who told him that he should not enter or stop at Byhalia, and commanded him to proceed immediately on his journey on foot, and upon plaintiff's hesitating to do

so, greatly frightened, abused and mortified plaintiff by their harsh and severe language and treatment of him.) (And plaintiff avers that it was with the greatest difficulty and after much trouble, delay, opposition, alarm and mortification to himself that he obtained leave to pass the night at Byhalia and he was forced and required to leave the town the following morning.) And the plaintiff avers that the defendant's said agent, when he sold the plaintiff the said ticket knew that the yellow fever was prevailing, and knew of the danger and inconvenience of making one's way through the state of Mississippi through which said defendant's said road passes. And plaintiff avers that he had not with him at that time sufficient funds with which to purchase a ticket or pay the railroad fare from Byhalia to Birmingham, and the defendant's agent, who was in charge of said train, knew this likewise, when he put plaintiff off of the said train. (And plaintiff avers that being unacquainted with any one in Byhalia, he suffered great inconvenience, hardship and mortification from the lack of money as aforesaid, and it was with great difficulty, delay and trouble and only by pledging and depositing as collateral security certain valuables which he had with him, that he was able to obtain sufficient, and then barely sufficient money with which to pay his expenses and fare to Birmingham.) And plaintiff avers that by and from being wrongfully put off said train, as aforesaid, he suffered great fear and uneasiness because of the supposed prevalence of yellow fever in that locality and his exposure thereto.

"(And plaintiff avers that he had previously ordered his mail sent to Tuscaloosa, Alabama, where it was awaiting him and where he had intended to go immediately upon his arrival in Birmingham. And plaintiff avers that being put off at Byhalia as aforesaid, so delayed him in arriving at Birmingham, that when he did at last arrive at Birmingham, he had not time to go to Tuscaloosa as he had intended, but was detained in Birmingham by business as he would not have been detained had he not been put off of defendant's train at Byhalia and his arrival in Birmingham delayed as aforesaid. And plaintiff avers that there were waiting him at Tuscaloosa letters of great importance, informing him of the illness of his wife who was in the state of Colorado, and plaintiff avers that by being put off of the defendant's said train as aforesaid, the receipt of said letters was delayed, and he was prevented from providing promptly for having his wife, who was among strangers, properly nursed and treated, that the delay in such provision increased and aggravated his wife's illness and caused her to have to remain during a long illness in the state of Colorado, instead of coming home to her family, and increased greatly the expense which her illness entailed on plaintiff. And plaintiff avers that the said delay, as afore-

said, caused his wife to have a much more severe and serious spell of illness than she would have had had the plaintiff been able to provide promptly for her nursing and treatment, as he could and would have done had he not been wrongfully put off of defendant's train as aforesaid; and the increased severity of her illness has caused and forced plaintiff to expend large sums of money in and about having his wife treated, nursed and cared for, and has seriously and permanently injured, weakened, and undermined the health of plaintiff's wife.) By all of which plaintiff has been damaged in the sum of to wit: eighteen hundred (\$1,800) dollars and therefore he sues."

The defendants moved to strike the portions of the third count of the complaint which are in parentheses. The portions of said count to which motions to strike were overruled are set out in the opinion. The motion to strike was sustained as to the other portions which are in parentheses. The defendant pleaded the general issue and also filed a plea setting up the contributory negligence of the plaintiff in that he failed to read or notice with sufficient care and attention his ticket. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The court at the request of the plaintiff gave to the jury the following written charges: "(1) If the jury believe from the evidence that the plaintiff was forced to leave the train at Byhalia by reason of the negligent act of the ticket agent at Waco, provided you find from the evidence such agent to be defendant's agent, they will return their verdict in his favor and assess his damages at such sum as will reasonably compensate him for any additional expenditure of money, incurred by plaintiff on account of such expulsion, for any physical discomfort or inconvenience and for any mental anguish, indignity, humiliation or annoyance which the jury may find from the evidence proximately resulted to the plaintiff on account of such mistake on the part of the agent at Waco—provided the jury find from the evidence that the agent at Waco was the agent of defendant. (2) While the jury cannot assess any damages on account of the expulsion from the train, taken alone and of itself, they may assess such damages as the jury may find proximately resulted to the plaintiff from the negligent act of the Waco agent,—provided you find from the evidence such agent to be defendant's agent—including expenses, any physical discomfort or distress, and any mental anguish, distress, annoyance, or humiliation or indignity, which resulted as an immediate consequence of having to leave the train at Byhalia."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) The court charges the jury that what

happened to the plaintiff after he left the train is not the proximate result of the mistake in the ticket and for such happenings the plaintiff cannot recover in this action. (2) The court charges the jury that if they believe the evidence they must find for the defendant. (3) The court charges the jury that if they believe the evidence they cannot find for the plaintiff under the third count of the complaint. (4) The court charges the jury that if they believe the evidence they must find that there was nothing in the character of the expulsion of the plaintiff from the train which tended to humiliate or degrade the plaintiff. (5) The court charges the jury that if they believe the evidence they cannot find that the defendant was guilty of negligence in putting the plaintiff off the train where quarantine regulations were in force, if they believe from the evidence that such regulations were in force there. (6) It was the duty of the plaintiff to submit to all reasonable and proper quarantine regulations after he was put off the train and for such he is not entitled to an award of damages. (7) If you believe the evidence you must find that the ticket agent issuing the ticket to the plaintiff at Waco, Texas, was not the agent of the defendant. (8) The court charges the jury that it was the duty of the plaintiff before being ejected from the train, to have done all that a reasonable and prudent and careful man would have done under the circumstances of the situation to have properly avoided expulsion from the train. (9) You are not authorized under the evidence if you believe it, to award to the plaintiff any more than the money or value he expended in procuring a ticket from Byhalia to Birmingham. (10) The court charges the jury that if they believe the evidence the plaintiff is only entitled to recover the price paid for his ticket from Byhalia to Birmingham, and reasonable compensation for the trouble, delay and inconvenience he suffered in his effort to reach Birmingham from Byhalia. (11) The court charges the jury that if they believe the evidence they must find that in issuing the ticket to the plaintiff at Waco, Texas, the ticket agent, issuing such ticket, was in the performance of no duty he owed to the defendant and for his negligence in issuing such ticket the defendant is not liable. (12) The court charges the jury that if they believe the evidence they must find that the ticket agent at Waco, Texas, in issuing the ticket to the plaintiff was in the performance of a duty he owed to the St. Louis & Southwestern Railway Company and for any mistake of such agent in the issuance the plaintiff has a right of action against such railway company, and not against the defendant. (13) The court charges the jury that if they believe the evidence they must find that the defendant had fully performed all the duty he owed to the plaintiff when it carried him safely to Byhalia, Mississippi."

There were verdict and judgment for the plaintiff, assessing his damages at \$300.

Thereafter the defendant made a motion for a new trial, upon the ground that the verdict of the jury was contrary to the law and the evidence, that the damages assessed were excessive, and that the court erred in its rulings upon the charges requested. This motion was overruled and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant. Henry N. Jones and Robison Brown, for appellee.

HARALSON, J. The complaint contained six counts. The ones numbered 2 and 5 were withdrawn and abandoned by plaintiff, and the court instructed the jury, at the instance of defendant, that they could not find for the plaintiff under the first, fourth and sixth counts. We need not, therefore, consider any of the rulings of the court on motions to strike certain parts of these counts, and on the demurrers interposed to them. There was left alone in the complaint, the third count, on which, after rulings on motions to strike certain parts thereof had been overruled and others sustained, issue was taken and the cause tried.

1. The portions of said count, which the defendant moved to strike and which were overruled were, (1) "And plaintiff avers, that it was with the greatest difficulty and after much trouble, delay, opposition, alarm and mortification to himself, that he obtained leave to pass the night at Byhalla, and he was forced and required to leave the town the next morning. (2) And plaintiff avers, that when he was put off, it was during the time and when the yellow fever was prevailing in many parts of the country, including that in which Byhalla is situated, and the town of Byhalla was quarantined against all other places. (3) And plaintiff further avers, that by and from being wrongfully put off of defendant's said train, as aforesaid, he suffered great fear and uneasiness because of the supposed prevalence of yellow fever in that locality, and his exposure to it."

The count contained the averment, that the defendant's agent at Waco, Texas, sold him his ticket, and when he sold it to him, said agent knew that the yellow fever was prevailing, and knew of the danger and inconvenience of making his way through the state of Mississippi, through which defendant's said road passed; that plaintiff had not with him at that time sufficient funds with which to purchase a ticket, or pay the railroad fare from Byhalla to Birmingham, and defendant's agent who was in charge of said train knew this fact, when he put plaintiff off of said train.

It is sometimes difficult to determine what, in law, is and what is not proximate cause of injury. In *Armstrong v. Railway Co.*, 123 Ala. 233, 26 South. 349, the rule was stated

to be, "That a person guilty of negligence, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." *Railroad Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Railway Co. v. Mutch*, 97 Ala. 194, 11 South. 804, 21 L. R. A. 316, 38 Am. St. Rep. 179. Here, the wrong committed by the agent at Waco, and the alleged damage, are known by common experience to be naturally and usually in sequence, and we are impressed, that the court committed no error in overruling the motion to strike the parts of the complaint objected to.

2. There are a great many errors assigned, but appellant's counsel very correctly state in brief, they each substantially raise one or the other of two propositions, that the appellant is not liable to appellee for the mistake of the St. Louis Southwestern Railway Company's agent at Waco, Texas, or, if it should be held that appellant is liable for the mistake of such agent, appellee's recovery in this action must be limited to the cost of transportation between Byhalla and Birmingham.

The first inquiry is, was the ticket agent at Waco, Texas, the agent of the defendant in selling the plaintiff his ticket from Memphis to Birmingham, as is alleged he was. It appears that the two roads,—the one from Waco to Memphis, and the other from that point to Birmingham,—were connecting lines and that the plaintiff purchased a coupon through ticket from Waco to Birmingham. In answer to interrogatories propounded by plaintiff to defendant, the company answered, that the conductor on defendant's road, did receive from plaintiff on the 14th September, 1897, a ticket or coupon from Memphis to Byhalla, said ticket or coupon purporting to have been issued by the St. Louis Southwestern Railway Company; that it was impossible for it to state whether defendant had, prior to that time, placed on sale at Waco, tickets over its railroad from Memphis to Birmingham; that defendant itself, did not place such tickets on sale at Waco, and had no officer or agent at that point; that a railroad company frequently issues and places on sale, tickets reading from points on its line to points on the lines of other roads, and often, with coupons reading over several lines of roads between initial point and destination; that defendant could not say that it knew that tickets like the one received by said conductor, were on sale at Waco; that it, however, did know, that the St. Louis Southwestern road sometimes issued and placed on sale, tickets with coupons attached, reading to points on the line of defendant, and that that road collected the value of the entire ticket, remitting to defendant the amount due it, and such tickets had been

issued and placed on sale by said St. Louis Southwestern Company, prior to September 14, 1897.

The general rule prevailing in this country, as is well understood is, where there are connecting roads as here, that in the absence of a special contract, or some relation between them, each is liable, only for a loss or injury on his particular line or route. *Railroad Co. v. Moore*, 51 Ala. 394; *Railway Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Jones v. Railroad Co.*, 89 Ala. 376, 8 South. 61; *Railway Co. v. Hughart*, 90 Ala. 36, 8 South. 62.

In *Express Co. v. Hess*, 53 Ala. 19, it appeared that the Adams Express Company and the Southern, connected at a point from which the one secured goods destined for points on the line of the other, and it was held, that this fact, constituted the one company the agent of the other, as to such freight, and its consignor and consignee, and if the company finally delivering the goods does not deliver them in the condition in which they were received by its agent,—the company who issued the bill of lading,—it must account for the injury. The same rule is in reason applicable in the sale of tickets to travelers over connecting lines. Hutchinson states the rule in such cases to the same effect, that "When the passenger has received from the carrier a number of coupon tickets, one for his passage over the route of the first, and others as passports over the lines of succeeding carriers, * * * such tickets are held not to import a contract on the part of the first carrier, from whom they are received, to be responsible for the carriage of passengers beyond its own line. In such cases, the first carrier is considered rather in the light of an agent for the succeeding carriers, than as undertaking for the faithful discharge of their duty, and the coupons as in the nature of separate tickets on behalf of the successive carriers, and binding upon them in the same manner as if issued by themselves." He cites numerous authorities to sustain the text. *Hutch. Carr.* p. 662, § 578.

In this case, the defendant's own evidence, with nothing in conflict with it, is sufficient to sustain the agency of the Waco ticket agent, on behalf of defendant, to sell the ticket to plaintiff. The fact that the defendant had no general agent or office at that point, and itself, did not place tickets there for sale, is a matter of no consequence, if the other road with defendant's approval acted in this behalf for it. It was shown, the defendant recognized and ratified the agency in receiving the ticket from plaintiff in payment of his fare on its own line, from Memphis to By-halla.

3. "The law, settled by the great weight of authority is, that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. * * * The passenger must submit to the inconvenience of

either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent." 4 Elliott, R. R. § 1504. The author adds: "It does not necessarily follow, however, that the railroad company may not be liable where the passenger has, in fact, a right to his passage at the ticket rate, and he is afforded no opportunity to get a ticket, or is misled, or given a wrong or defective ticket by the company's agent, or the like." Hutchinson, taking the same view, holds, on the authority of cases he cites, that in the action for the recovery of damages sustained, the action must be for a breach of the contract. *Hutch. Carr.* p. 674, § 580h. Mr. Elliott, referring to the authorities which hold that the passenger's remedy is an action for breach of the contract,—without denying the right to sue in contract,—says: "It may be that some of the cases to which we have just referred are contrary to the weight of authority, in holding that the only remedy is an action for breach of the contract, and in stating the measure of damages, but whether the action be in contract or in tort,—for the breach of a contract or for the violation of a duty imposed by law,—the gist of the action cannot well be the expulsion of the traveler, where there is no unnecessary force, in accordance with the rules of the company, when he has no ticket or evidence of his right to transportation valid on its face, or such as those rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled, that a complaint proceeding upon one theory, will not authorize a recovery upon another and entirely distinct and independent theory." Elliott, R. R. § 1504.

Mr. Freeman in note to *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, 476, says: "If by mistake of one of the officers of the company, he is not furnished with a proper ticket or check, evidencing his right to be carried to his destination, his right nevertheless remains, and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. * * * He (the traveler) should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as part of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant" etc. *McGhee v. Reynolds*, 117 Ala. 419, 23 South. 68.

4. The count in this case is treated by defendant in the demurrer interposed, as one in contract and not in tort. Generally, the damages to which a passenger is entitled who has been injured by the negligence of the carrier, are measured by the rule of compensation; but, as Mr. Hutchinson observes, "the elements which enter into the question of compensation are so various, and in themselves so uncertain, that it furnishes in most cases only

a rule for approximation of the actual damage, and must, after all, be left to the sound discretion of those whose province it is to decide the amount. Certain principles, however, have been settled as to what may be properly included within the meaning of the term 'compensation' which will serve as guides in the calculation. One of these rules is that the compensation of the injured party will not be confined to his mere pecuniary loss, but may embrace recompense for the pain and suffering of both body and mind which have resulted from the injury." *Telegraph Co. v. Adair*, 115 Ala. 441, 22 South. 73; *Railroad Co. v. Binlon*, 107 Ala. 645, 18 South. 75.

We hold, therefore, that the measure of damages, is not limited, as contended by defendant, to the cost of transportation from Byhalla to Birmingham.

It may be proper to add, that we have found it unnecessary to decide in this case, whether the plaintiff is confined for such damages as he claims to a suit on the contract, such as is admitted this one is, and cannot sue in tort, since it is nowhere disputed that an action in contract may be maintained.

The only demurrer to the third count, was that it joined with an action in tort as set up in other counts, the third being in contract. But this objection cannot be considered, since all the other counts, in the progress of the trial, were either withdrawn by plaintiff, or the court charged there could be no recovery on them, as was stated in the first part of the opinion.

5. We have considered the only errors assigned, which have been insisted on in argument, except on the overruling of the motion for a new trial; and we have found nothing, which in our judgment would justify us in setting the judgment aside, on any of the grounds urged.

Affirmed.

CENTRAL OF GEORGIA RY. CO. v. FREEMAN.

(Supreme Court of Alabama. June 28, 1902.)

RAILROADS—INJURIES AT CROSSING—PLEADING—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. A count alleging that defendant's servant, with knowledge "or" notice that by running the train at a rapid rate of speed on the street crossing great personal injury would likely be caused, wantonly and intentionally did so, and, as a proximate consequence thereof, plaintiff was injured, did not state a cause of action.

2. A count alleging that defendant's servant, with knowledge "or" notice that many people were likely to be crossing the track at the street crossing, and that the failure to ring the bell or blow the whistle, as required by statute, wantonly and intentionally failed to do so, and, as a proximate consequence thereof, plaintiff was injured, did not state a cause of action.

3. In an action against a railroad for injuries received at a crossing, where the failure of the engineer to ring the bell or blow the whistle was alleged as negligence, a plea that plaintiff did not stop and look and listen before attempting to cross the track was good.

Appeal from circuit court, Jefferson county: A. A. Coleman, Judge.

Action by Robert A. S. Freeman against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint contained five counts, in each of which the plaintiff claimed \$20,000. In each of the counts it was averred that the plaintiff was run over by a train operated by the defendant, while he, the plaintiff, was on the public highway in Alexander City; that by reason of being so run over, he lost a part of both feet, and was otherwise injured and crippled for life. The negligence averred in each of the counts was as follows: "First count: Plaintiff alleges that defendant negligently caused or allowed said engine or train to run upon or against plaintiff, as aforesaid. Second count: The engineer or other person having control of the running of said locomotive negligently failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching the crossing of said railway with said street, which crossing was a public road crossing, or negligently failed to blow the whistle or ring the bell at short intervals until said locomotive had passed said crossing, as required by section 3440 of the Code of Alabama. Third count: The engineer or other person having control of the running of said locomotive negligently failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching a regular station or stopping place on said railway, or negligently failed to continue to blow the whistle or ring the bell at short intervals until said engine had reached said station or stopping place, as required by section 3440 of the Code of Alabama; said station or stopping place being the depot of said company at said Alexander City. Fourth count: Defendant's servant or agent upon said engine or train, with knowledge or notice that by running said train at a rapid rate of speed to and upon the crossing of said street, great personal injury would likely be caused to persons upon said crossing, wantonly or intentionally ran said train to or upon said crossing at a rapid rate of speed, and as a proximate consequence thereof said engine or train ran upon or against plaintiff, and he suffered the injuries and damage set out in the first count of this complaint. Fifth count: Defendant's servant or agent upon said engine or train, with knowledge or notice that many people were likely at all times to be crossing the track of said railway upon said street at said crossing, and that the failure to ring the bell or blow the whistle, as required by section 3440 of the Code of the state of Alabama, in approaching said crossing, wantonly or intentionally failed to ring the bell or blow the whistle, as required by said law, while approaching said crossing, and as a proximate consequence thereof said engine or train ran upon or against plaintiff, and inflicted the injuries and damage set out in the first count

-of this complaint." To the first count of the complaint, and to each count thereof, the defendant demurred upon the ground that they did not set out a cause of action, or did not state facts showing the negligence complained of. To the second and third counts the defendant demurred upon the ground that each of said counts fails to allege how the failure to blow the whistle or ring the bell before reaching the crossing caused the injuries complained of. To the fourth and fifth counts the defendant demurred upon the ground that the facts set up therein state no cause of action against the defendant. The demurrers to each of the counts were overruled. Thereupon the defendant pleaded the general issue, and several special pleas, setting up the contributory negligence of the plaintiff. One of these pleas was as follows: "(8) For further answer to each count of the complaint, separately and severally, defendant says it was the duty of plaintiff to stop, look, and listen before going upon or attempting to cross defendant's said track, and defendant avers that plaintiff did not stop and look and listen before going upon or attempting to cross said track; and defendant avers that the negligence of the plaintiff in this regard contributed proximately to produce the injuries complained of." To each of the special pleas setting up the contributory negligence of the plaintiff the plaintiff demurred, so far as they purported to be in answer to the fourth and fifth counts of the complaint, upon the ground that contributory negligence was no answer to the negligence averred in said counts. The demurrers were sustained. On the trial of the case there were verdict and jury assessing the plaintiff's damages at \$6,750. The defendant appeals, and assigns the rendition thereof as error.

John London, for appellant. Bowman & Harsh, for appellee.

MCLELLAN, C. J. The first, second, and third counts of the complaint allege negligence on the part of the defendant, and that such negligence caused the injuries complained of. The fourth and fifth counts charge nothing; they allege no cause of action against the defendant. *Railway Co. v. Bunt* (Ala.) 82 South. 507. The case should have been tried as if they were not in it. Defendant's pleas of contributory negligence were good against the only causes of action alleged in the complaint. The demurrers to them should have been overruled. The evidence was free from conflict to the proof of those pleas. With them in the case, the defendant will be entitled to the affirmative charge.

Reversed and remanded.

SOLARY et al. v. WEED et al.
(Supreme Court of Florida. Nov. 26, 1901.)

WRIT OF ERROR—DISMISSAL.

1. Where a writ of error was issued in August, 1896, and made returnable to the Janu-

ary term, 1897, of the appellate court, and no scire facias ad audiendum errores has been issued and served on the defendants in error, who have in nowise appeared in the appellate court, such cause will be dismissed.

(Syllabus by the Court.)

Error to circuit court, Duval county; H. H. Buckman, Referee.

Action between A. Solary and G. H. Brown and J. D. Weed and William D. Krenson. From the judgment, Solary and Brown bring error. Dismissed.

A. W. Cockrell & Son, for plaintiffs in error.

PER CURIAM. The above-styled cause came on for final disposition in its regular order, and was referred by the court to two of its commissioners, Maxwell and Glen, for examination, who have reported that the same should be dismissed because of a want of service of any scire facias ad audiendum errores on defendants in error; and it appearing to the court that the writ of error in the cause was sued out on the 27th day of August, A. D. 1896, returnable to the January term, A. D. 1897, of this court, and that no scire facias has been issued and served upon defendants in error, and that they have not appeared in this court, it is therefore ordered and adjudged that said writ of error be, and the same is hereby, dismissed, at cost of plaintiff in error A. Solary.

TAYLOR, C. J., on account of sickness in his family, did not participate in this decision.

GABRIEL v. STATE.

(Supreme Court of Florida. March 16, 1902.)

RECEIVING STOLEN GOODS—INDICTMENT—INSTRUCTIONS.

1. An indictment or information for receiving stolen property must describe the property alleged to have been received, and when the property received embraces only part of what was stolen, or is in form different from it, that received must be described, and not simply that which was stolen. A difference in description only in quantity or number will be immaterial, but matter descriptive of the property received is material, and must be proven as alleged.

2. A charge of receiving stolen goods, to wit, "two cases of cigars, both of the value of \$500," will not be sustained by proof of the receipt by defendant of a lot of loose cigars not in cases, and not received directly from cases known to have been stolen, even though such cigars came from the cases of cigars which had been previously stolen.

Carter, J., dissenting.

(Syllabus by the Court.)

Error to criminal court of record, Hillsborough county; Walter S. Graham, Judge.

Alfonso Gabriel was convicted of receiving stolen goods, and brings error. Reversed.

Wall & Hampton, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. This case was referred by the court to its commissioners for in-

vestigation, who have reported that it should be reversed. After consideration, the court concurs in this view.

The information filed against plaintiff in error contains two counts,—the first for larceny; the second for receiving stolen property. The state elected to rely upon the second count. Plaintiff in error was convicted, the count describing the property as "two cases of cigars, both of the value of five hundred dollars," of the goods and property of the Savannah, Florida & Western Railway Company, a corporation.

Assignments of error urged here are that the court erred in giving a certain charge at the request of the state, and in refusing one requested by the accused. The one given is as follows: "That while it is charged in the information that defendant received two cases of cigars, which had been stolen, knowing them to have been stolen at the time he received them, it is not necessary for the state to prove that he received two cases or any other matter; but if the state proves that the defendant received any part of the cigars out of the two cases, whether in or out of a case, of the property of the Savannah, Florida & Western Railway Company, of any value, which had been theretofore stolen, and knew at the time they had been stolen, then you should find him guilty." The one refused reads: "The information charges the defendant with receiving two cases of cigars, and that they were stolen, and that at the time he received them he knew them to have been stolen, but the court charges you that it is not sufficient for a conviction of the defendant that the proof shows he received a lot of loose cigars, neither in cases nor in boxes, even though all the other elements of the charge are proven to your satisfaction, beyond a reasonable doubt, and that the cigars received by him came out of, and were part of, the cigars so stolen in the cases."

The proofs show that two cases of cigars of the ownership alleged were stolen, and according to one phase of the evidence the cases were unpacked, and some of the cigars taken therefrom, and in a loose state were carried to defendant's house the morning of the day following that on which the cases were stolen, and there received by him. There was testimony tending to connect defendant with receiving the stolen cases of cigars before they were broken and unpacked, but the accused had the right to have the law correctly given under the count upon which he was tried in any phase of the testimony which the jury was authorized to accept favorable to him. Shimmy, alias Simmons, was an accomplice, an admitted convict of another grave offense, and contradicted in several particulars, besides being inconsistent in his own statements before the jury. The credibility of his testimony was for the jury, and the accused had

the right to have the jury instructed on the theory that his testimony be entirely rejected. On the showing of the other witnesses the jury might have found that defendant received loose cigars carried to his house on the morning after the cases of cigars were stolen, though taken out of them by other parties than defendant, and on this phase of the testimony the court erred, in our judgment, in giving the latter part of the charge excepted to and in refusing to give the request refused.

In an indictment for receiving stolen goods, the property which was received must be described, and not that which was stolen, if the one embraced only such part of the other, or the other in such changed form, that a description of one could not apply to the other. If the difference is only in quantity or number, it would be immaterial, as these allegations need not be proven precisely as made; but matter which is descriptive must be proven as alleged, to apply to the goods as received. The word "cases," as used here, is not shown to have a recognized meaning as denoting packages containing a certain number or quantity of cigars; and, even if it had such meaning, it should still be construed as descriptive of a case containing cigars, and not of a certain number of cigars, without reference to their packing. The charge in the indictment would not be sustained, therefore, by proof of the receipt by defendant of a lot of loose cigars not in cases, or not received directly from cases known to be stolen. *Com. v. Gavin*, 121 Mass. 54, 23 Am. Rep. 255; *State v. Moore*, 33 N. C. 70; 2 Bish. Cr. Proc. § 710; *Rip. Larceny*, § 238. The charge refused states the law correctly, and it was error to refuse it.

For the errors pointed out the judgment must be reversed.

CARTER, J. (dissenting). In November, 1901, an information was filed in the criminal court of record of Hillsborough county, charging plaintiff in error by the first count with larceny, and by the second count with receiving stolen property. The property was described in the second count as "two cases of cigars, both of the value of five hundred dollars, of the goods and chattels of the said Savannah, Florida & Western Railway Company, a corporation, then lately before feloniously stolen, taken, and carried away." At the conclusion of the evidence for the state, the defendant offering no testimony, the state elected to rely for conviction upon the second count, and upon that count defendant was found guilty, and from the sentence imposed sued out this writ of error. At the conclusion of the testimony the defendant moved the court to instruct the jury to bring in a verdict of not guilty, on the ground that "the proof does not correspond with the allegations contained in the information." The motion was

denied, an exception noted, and the ruling is assigned as error, and argued in this court. In its general charge the court instructed the jury that they must find that defendant received the "two cases of cigars described in the information, or some portion thereof," as one of the elements necessary to support a conviction. At the request of the state the court further instructed the jury "that while it is charged in the information that the defendant received two cases of cigars which had been stolen, knowing them to have been stolen at the time he received them, it is not necessary for the state to prove that he received two cases, or any other number; but if the state proves that the defendant received any part of the cigars out of the two cases, whether in or out of a case, of the property of the Savannah, Florida & Western Railway Company, of any value, which had been theretofore stolen, and knew at the time they had been stolen, then you should find him guilty." This instruction was duly excepted to, and the defendant also excepted to the refusal to give the following instruction requested by him: "The information charges the defendant with receiving two cases of cigars, and that they were stolen, and that at the time he received them he knew them to have been stolen; but the court charges you that it is not sufficient for a conviction of the defendant that the proof shows he received a lot of loose cigars, neither in cases nor in boxes, even though all the other elements of the charge are proven to your satisfaction beyond a reasonable doubt, and that the cigars received by him came out of and were part of the cigars so stolen in the cases." The testimony is clear that boxes of cigars containing 50 or less, packed in cases, were by the agents of the Savannah, Florida & Western Railway Company placed in a freight car, and the doors of the car closed and sealed at about 8 o'clock p. m., September 4, 1901; that about two hours afterward it was discovered that the car had been broken into, and two cases of the cigars stolen. Some of these cigars in the boxes were on the 5th or 6th of September sold by John Simmons, otherwise known as "Shimmy," to Gordon Keller. John Lee, a hack driver, testified that on the night of September 4th he saw defendant and Shimmy at Bob Donaldson's; that Shimmy told him he wanted witness to haul some boxes; that defendant would pay for the hauling; that witness then and there asked defendant "how about the pay to haul these boxes"; that defendant told him to go ahead, that he would pay for the hauling; that subsequently defendant did pay for it; that thereupon he and Shimmy went for the boxes, and took them to Shimmy's house, Shimmy telling him they were cigars, and that he and a Cuban bought them from a factory, and they would not be missed for six months. When Shimmy was arrested, a few

days later, defendant told Lee that he heard Shimmy was trying to get defendant and Lee into the "cigar business," and that, if any one asked Lee "about these cigars, you tell them that you don't know anything about them."

Joe Guzman testified that he was a cigar maker, and employed by defendant as such in his factory in September, 1901; that about 9 or 9:30 a. m., September 5th, defendant sent him with Shimmy, telling witness he wanted him to pack some cigars at defendant's house; that witness went with Shimmy to the latter's house, where he saw a lot of 3,000 or 4,000 cigars in a counterpane, some with wrappers on them, others with no wrappers on them, but none of them in cases or boxes; that Shimmy told him the cigars belonged to defendant; that he went on to defendant's house, where he found defendant; that 15 or 20 minutes afterwards Shimmy came bringing the cigars,—3,000 or 4,000 loose cigars,—and he, at defendant's request and in his presence, packed them loosely in a trunk. He also stated that the cigars were like those introduced in evidence that had been purchased from Shimmy by Gordon Keller; that he saw no cigar cases or boxes while at Shimmy's house, and thought he would have seen them had any been in the room.

John Simmons, otherwise known as "Shimmy," testified that on the night of the 4th of September, after the freight train left, defendant went to a certain place, and showed witness the two cases of cigars, and told witness he would give the latter \$10 to let them remain at his house that night; that he employed Lee, the hackman, at Donaldson's bar, to haul the cigars to witness' house; that witness went with Lee to the place where the cigars had been left by defendant, and put them in the hack, and carried them to witness' house; that he knew defendant would not be able to pay witness the \$10, so witness opened one of the cases at his house, and took out 24 boxes of cigars, and Lee took out 1 box, and witness nailed the case up again; that witness carried 23 boxes of the cigars taken out by him to Gordon Keller; that the next morning about 8 o'clock defendant came to witness' house, and he and defendant unpacked the cigars by taking them out of the cases and boxes; that he loaned defendant a comfort to put the cigars in, and assisted defendant to carry them to defendant's house, where the little wrappers were taken off, and the cigars packed in a trunk by Guzman at defendant's request; that afterwards, on the same day, defendant returned to witness' house for the cases and boxes from which the cigars were taken.

The evidence does not show how many cigars were in each case, but the assistant state attorney admitted in open court that they each contained 5,000 cigars.

I have not stated all the testimony of the

witnesses, but only such part thereof as appears to be necessary to determine the propriety of the instructions given and refused. The testimony of Shimmy was not only contradictory in many respects and contradicted by other state witnesses in other respects, but he admitted that he had been convicted of embezzlement and other crimes. Lee and Guzman also contradicted themselves in some respects, and there was testimony tending to show that Shimmy, Lee, and I think Guzman, were accomplices in the defendant's alleged crime. The credibility of these witnesses was, however, for the jury, and the court could properly charge the jury upon any tenable theory deducible from their testimony, leaving the jury to judge of the credibility of the testimony, and of the sufficiency of the evidence to sustain a particular theory. From the testimony of Shimmy, in part corroborated by Lee, two theories are deducible: One that defendant received the two cases of cigars on the night of the 4th; another that he received the cigars or a part of them the next morning, while they were being taken from the cases and boxes; or, to state it in another way, that the cigars were in his presence and partly by him taken from the cases, and that he received them or a part of them as they were taken from the cases. Upon either theory, in my opinion, he would be guilty under the second count of the information, and there would be no substantial variance in the proof relating to the description of the goods received by him. The statute punishes as a felon, without regard to the quantity or value of the property received, one who "receives stolen money, goods or property, knowing the same to have been stolen." Section 2451, Rev. St.

Under the allegation that defendant received two cases of cigars, I think it cannot be denied that he could lawfully be convicted upon proof of receiving one case of cigars; likewise, if he received one case only half full or partly filled with the cigars. The property is described as "two cases of cigars." It was unnecessary to allege that the cigars were in cases, but having so alleged the matter becomes descriptive, and must, like all other descriptive matter, be substantially proved as laid. I do not understand that it would be necessary in such a case to prove that the cases were stolen property. They might have been the property of the defendant, which he had previously turned over to the thief for the purpose of being packed with stolen cigars, in which event, so far as the cases alone were concerned, there could be no receiving of stolen property by receiving defendant's own cases from the thief; but, if they were filled with recently stolen cigars when received, the defendant would be guilty of receiving "two cases of cigars then lately before stolen," in strict conformity to the allegation of this information. I think this allegation means that defendant received stolen cigars in cases, and that the words

"two cases" are merely descriptive matter, showing the state or condition in which the cigars were when received. Now, it is clearly shown by the evidence in this case that the cigars and the cases containing them were both stolen, and of course if the defendant received them on the night of September 4th, according to Shimmy's testimony, he received precisely the same number and in precisely the same cases and in the precise condition as when stolen, and the allegation of the information is not only substantially, but literally, met by such proof. If, however, he did not receive them until next morning, and at the time and during the process of receiving them they were removed from the cases in the presence of defendant, and he then and there assisted in removing them from the cases, and then and there took possession of the entire lot, or only a part of the entire lot, even though less than an entire case, I believe that he is guilty of a complete offense under the statute, and that there is no material variance between the allegation of the description of the property received and the proof. If a party was charged with stealing a ham covered with a napkin, and the evidence showed that he carefully removed the napkin without moving the ham, and then took the ham, leaving the napkin, would the variance be material? If one be indicted for receiving a bottle of stolen whisky, and the proof showed that the bottle was only half full, or that the receiver did not take manual possession of the bottle, but held a jug or quart cup while defendant poured the bottle of whisky into it, would the variance between the allegation and proof be material? I believe not. The defendant in such a case could not be misled by so insubstantial a variance, nor would the offense proven be different from that charged; and it seems to me that it would be going beyond the verge of technicality to say that a change in the outward form or characteristics of a stolen article effected during the process of receiving such stolen property, or during the process of stealing it, should protect the receiver or the thief against conviction on an indictment properly describing the property as it existed when the process of receiving or stealing was begun, though not as it existed at the completion of the offense. I do not understand that any of the authorities cited by the court contravene the position I have assumed. In *Com. v. Gavin*, 121 Mass. 54, 25 Am. Rep. 255, defendant was indicted for stealing "six bottles of whisky and six bottles of brandy," and the evidence showed that the liquor was in casks and drawn therefrom into bottles by defendant. The court held the variance fatal. If the liquor had been in bottles, but the defendant had drawn it from these bottles into his own vessels, it seems to me the conviction could and would have been sustained upon the principles I have stated. In *State v. Moore*, 33 N. C. 70, defendant was indicted for stealing two barrels of turpentine, while

the proof showed that the turpentine was stolen by dipping it from boxes in the trees, and it was afterwards put into two barrels by defendant. The court held the variance fatal. If, however, the turpentine had been in barrels when stolen, and the defendant effected the larceny by drawing it from the barrels and placing it in his own vessels, I think the variance would be immaterial. The text-books cited refer to these and similar cases, and do not, in my judgment, announce a rule different from that contended for by me. Indeed, I have found no direct authority upon the subject, either for or against the view I entertain. If one be charged with stealing a case of salmon, and it be shown that the case was open and he simply took the boxes of salmon therefrom constituting a full case (four dozen), would the variance be fatal because the thief failed to steal the box? Must he steal the case, too, to make him guilty of the larceny of a case of salmon? And can a different rule be applied to the larceny of a case of cigars? I think not. Tested by the rules I believe to be applicable, I think there is no error in the instruction given on behalf of the state, and that the one requested by defendant was properly refused, under the facts of the case. The instruction given required the jury to find that defendant received some part of the cigars out of the two cases which had been theretofore stolen, but whether in a case or not was immaterial. This, I think, was a correct exposition of the law, as applied to one theory of the evidence growing out of the testimony of Shimmy, to the effect that defendant was present when the cigars were unpacked, and received the cigars as they were taken out of the cases and boxes. The instruction refused was broad enough to deny this theory of the case, and as applied to the evidence supporting that theory would have nullified the instruction just considered. It asserted that defendant could not be convicted upon proof that he received a lot of loose cigars, neither in cases nor boxes, even though the cigars received by him came out of and were part of the cigars so stolen in the cases. If, as I have stated, defendant was present when the cigars were taken from the cases and boxes, and received them as they were taken from these cases and boxes in a loose state, he would be guilty, but under this instruction, if given, the jury would have been bound to acquit. This instruction as applied to that theory of the case does not state the law correctly, and it was therefore properly refused. If the instruction had been so framed as to convey the idea that if the jury believed from the evidence that the defendant did not receive the stolen cigars or any of them until they were carried to his house by Shimmy on the morning of September 5th, and that when so carried to his house and received by him they were in a loose state, and not in cases, they should acquit, I think the instruction would have been

correct as applied to the testimony of Gusman, if his testimony furnishes an inference or supports the theory that the cigars were first received at defendant's house on September 5th, which the majority of the court seems to think is the case, but which I doubt; but, whether it does or not, the instruction asked is not confined to that theory of the receiving, but would include the theory which I have shown is supported by one phase of Shimmy's testimony.

From what has been said it will appear that in my opinion the court properly denied the motion to instruct the jury to find defendant not guilty upon the ground stated in the motion, and that there was no error in the instruction given, or in the ruling refusing defendant's requested instruction. I think the judgment ought to be affirmed.

CLEM v. MESEROLE et al.

(Supreme Court of Florida. May 6, 1902.)

BILL TO REMOVE CLOUD—POSSESSION—PLEADING.

1. Where the complainant's title to real estate is a legal one, he must be in possession in order to maintain a suit in equity to remove a cloud from such title, unless the land is wild, unimproved, and so unoccupied as not to destroy the constructive possession that follows the legal title; and the bill must allege such possession, or such unoccupied condition of the land, else it is subject to demurrer for want of equity.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Browne, Judge.

Bill by David R. Clem against Frank R. Meserole and others. Decree for defendants, and plaintiff appeals. Affirmed.

L. D. Browne (R. H. Terry, on the brief), for appellant. Arthur F. Odlin, for appellees.

PER CURIAM. This cause, being reached in its regular order on the docket, was referred by the court to its commissioners for investigation, who report the same, recommending affirmance.

Upon due consideration, the court finds that the original and amended bills in the case alleged the complainant (appellant) to be the owner of the legal title to certain real estate in Orange county, and that a certain judgment, sheriff's sale, and deed thereunder, of said premises, and certain subsequent conveyances thereof by the purchaser at such sheriff's sale, and certain subsequent mortgages thereof, were illegal, null, and void, and prayed that the same might be so declared and canceled of record. The bill is essentially one by the alleged owner of the legal title to real estate, seeking the removal of alleged clouds upon such title, but the bill omits to allege whether the complainant therein was

in possession of the lands at the time of the filing of his bill, though it does allege that he had been in possession thereof about three years previously thereto, and it shows that some of it, at least, was improved with dwelling houses and orange groves. The bill, as amended, was demurred to, on the ground of a want of equity. This demurrer was sustained, and the bill dismissed, from which decree the appeal is taken.

It has been settled here by a long line of decisions that where the complainant's title to real estate is a legal one, he must be in possession of the premises in order to maintain a suit in equity to remove a cloud from such title, unless the land is wild, unimproved, and so unoccupied as not to destroy the constructive possession that follows the legal title; and the bill must allege such possession or such unoccupied condition of the land, else it will be subject to demurrer for want of equity. *Cavedo v. Billings*, 16 Fla. 261; *Conant v. Buesing*, 23 Fla. 559, 2 South. 882; *Sloan v. Sloan*, 25 Fla. 53, 5 South. 603; *Haworth v. Norris*, 28 Fla. 763, 10 South. 18; *Patton v. Crumpler*, 29 Fla. 573, 11 South. 225; *Gamble v. Hamilton*, 31 Fla. 401, 12 South. 229; *Graham v. Mortgage Co.*, 33 Fla. 356, 14 South. 796; *Winn v. Strickland*, 34 Fla. 610, 16 South. 606; *Woodford v. Alexander*, 35 Fla. 333, 17 South. 658; *Levy v. Ladd*, 35 Fla. 391, 17 South. 635; *Brown v. Solary*, 37 Fla. 102, 19 South. 161; *Watson v. Holliday*, 37 Fla. 488, 19 South. 640; *Richards v. Morris*, 39 Fla. 205, 22 South. 650. There was, therefore, no error in sustaining the demurrer to the bill. It is therefore hereby considered, ordered, and adjudged that the decree of the court below appealed from in said cause be, and the same is hereby, affirmed, at the cost of the appellant, but without prejudice to his right to file another bill as he may be advised, if in position to allege possession in himself of the premises involved.

ROUSE v. STATE.

(Supreme Court of Florida. March 11, 1902.)

CRIMINAL LAW—LIMITATION OF PROSECUTIONS.

1. The statute of limitations as to criminal prosecutions (section 2357, Rev. St.), providing that all offenses not punishable with death shall be prosecuted within two years after the same shall have been committed, contains no exceptions on account of an accused concealing himself or absenting himself from the state after the commission of an offense; and it is the established practice in this state, as to offenses to which the two-year limitation applies, that, if it appears from the indictment or information that the offense charged was committed more than two years before indictment found or information presented, a motion to quash is proper, and should be sustained, in the absence of any allegations showing that the prosecution was based upon one instituted before the expiration of the statutory limitation.

2. Where an information in a criminal court of record shows that the offense charged was committed more than two years before the fil-

ing of the information, and alleges further that the accused was prosecuted for the offense within the two-year limitation, by the making of an affidavit before a justice of the peace, the issuance of a warrant to the proper officer, and its failure of service on account of the concealment and absence of the accused from the state, but fails to allege that the information was based upon or had any connection with the prosecution before the justice of the peace, it should be quashed on motion based on the ground that the prosecution by information was barred by statute of limitation. Whether a proceeding before a committing magistrate under our system, which is not made an indispensable prerequisite to the finding of an indictment or the filing of an information, will constitute a beginning of a prosecution, within the meaning of our statute of limitations, is not decided, as the information in this case shows no continuation or connection with any prior prosecution.

(Syllabus by the Court.)

Error to criminal court of record, Escambia county; A. C. Blount, Jr., Judge.

Richard Rouse was convicted of assault, and brings error. Reversed.

C. H. Alston (A. W. Spears, on the brief), for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MABRY, J. On the 8th day of July, 1901, an information was filed in the criminal court of record for Escambia county by the county solicitor against plaintiff in error, charging him with an assault upon one John Bell with a premeditated design to effect the latter's death. The information alleges that the assault was committed in Escambia county, Fla., on the 5th day of July, 1898, and it is further alleged that "the said Richard Rouse was then prosecuted for the above set forth offense by the making of an affidavit by Geo. E. Smith, charging the said Rouse with the said offense, on the sixth day of July, 1898, before Boykin Jones, who was then and there a justice of the peace in and for the Second justice district of said county and state; and a warrant was then and there issued by the said justice of the peace for the arrest of the said Richard Rouse, and said warrant was placed in the hands of one Geo. E. Smith, sheriff of said county and state, who endeavored to and used all diligence to arrest and apprehend the said Richard Rouse, but was prevented from so doing because the said Richard Rouse concealed himself from the aforesaid time of the commission of the offense for the space of two years and ten months, and was for that space of time absent from the said state, wherefore," etc.

A motion was made to quash the information on three grounds, and denied by the court. The only ground of this motion insisted on here is the third, to the effect that, the alleged assault having been committed more than two years before the information was filed, the prosecution was barred by the statute of limitations. The accused was arraigned, tried, and convicted of the charge preferred against him, and moved in arrest of judgment and for new trial, which mo-

tions were denied by the court. The grounds in arrest of judgment relied on are the same in substance as the stated ground of the motion to quash. From the final judgment of the court, imposing a sentence of five years in the penitentiary, a writ of error was sued out.

Section 2357, Rev. St., provides that "all offenses not punishable with death shall be prosecuted within two years after the same shall have been committed." There are no exceptions to this statute on account of an accused concealing himself or absenting himself from the state after the commission of an offense, and, if the information in this case can be sustained, it must be on the ground alleged,—that the accused was prosecuted for the offense by the making of the affidavit before the justice of the peace and the issuance of the warrant within the period of two years from the alleged commission of the crime. It is the rule in this state, in reference to offenses to which the two-year statute of limitations applies, that, if it appears from an indictment that the offense charged was committed more than two years before the indictment was found, it will be quashed on motion made for that purpose. *Savage v. State*, 18 Fla. 970; *Nelson v. State*, 17 Fla. 195; *Anderson v. State*, 20 Fla. 381. The cases in which this has been held do not show that there had been any preliminary proceedings for the offense before a committing magistrate within the period of two years from the date of the crime. In addition to the jurisdiction to try and determine certain misdemeanors, justices of the peace are made committing magistrates, with authority to issue warrants against persons charged on oath with violating the criminal laws of the state, and to commit offenders to jail or recognize them to appear before the proper court at the next ensuing term thereof to answer the charge, or may discharge them from custody, according to the circumstances of the case. Specific provisions are made as to what the affidavits filed before the justice shall contain, the issuance of warrants thereon and their service, the examinations before the justice, and commitments and bail. They are also required to hand over to the proper prosecuting officers all affidavits, depositions, and bonds taken in criminal cases, and to recognize the material witnesses on behalf of the state, in cases where parties are bound over, to be and appear on the second day of the term of court to give evidence before the grand jury, or the prosecuting officer in case of information, against the accused. Sections 2869-2874, 2876-2878, Rev. St. The constitution provides (Declaration of Rights, § 10), "No person shall be tried for a capital crime or other felony, unless on presentment or indictment by a grand jury, except as is otherwise provided in this constitution, and except in cases of impeachment, and in cases in militia when in active service in time of war, or which the state, with the consent of

congress, may keep in time of peace." In the judiciary article it is provided, in reference to criminal courts of record, that they shall have jurisdiction of all criminal cases not capital which shall arise in their respective counties; that there shall be six terms of said court in each year, and that all offenses triable in said courts shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand juries of the circuit courts for the counties in which such criminal courts of record may exist may indict for offenses triable in the said criminal courts; and that upon finding indictments in the circuit courts the judges thereof shall commit or bail the accused for trial in such criminal courts, which trial shall be upon information. Sections 25, 26, 28, art. 5, Const. Under our system a preliminary investigation of a criminal charge by a committing officer is not an indispensable prerequisite to the finding of an indictment by a grand jury, or the filing an information by a prosecuting attorney of a criminal court of record. The grand jury may indict where there has been no such investigation, and so the prosecuting attorney in a criminal court of record may act without reference to any investigation by a committing magistrate. The prosecuting attorney for this court may have process for witnesses to appear before him in or out of term time, at such convenient places and times as may be designated in the summons, to testify before him as to any violations of the criminal law upon which they may be interrogated. Section 2327, Rev. St. According to many authorities, some of which we cite, a prosecution of an offense, within the meaning of statutes like ours, is commenced when the warrant upon a proper affidavit filed is issued and placed in the hands of an officer for service, and when this is done within the time allowed for prosecutions of offenses an indictment or information followed up and based thereon may be presented and filed after the expiration of such time. Under this view the limitation is not upon the filing of the indictment or information, but upon the prosecution, which is regarded as commenced when the warrant has been placed in the hands of the proper officer for service. *State v. Miller*, 11 Humph. 505; *Newell v. State*, 2 Conn. 38; *State v. Groome*, 10 Iowa, 308; *People v. Clark*, 33 Mich. 112; *People v. Clement*, 72 Mich. 116, 40 N. W. 190; *State v. Erving*, 19 Wash. 435, 53 Pac. 717; *In re Griffith*, 35 Kan. 377, 11 Pac. 174; *In re Clyne*, 52 Kan. 441, 35 Pac. 23; *In re Crandall*, 59 Kan. 671, 54 Pac. 686; *State v. Howard*, 15 Rich. Law, 274; *State v. Keifer*, 90 Md. 165, 44 Atl. 1043; *Flick v. State*, 22 Ind. App. 550, 51 N. E. 951; *Bish. St. Crimes* (3d Ed.) § 261; *Whart. Cr. Pl. & Prac.* (8th Ed.) § 323. Apparently contra, but based upon special provisions in statutes, *Commonwealth v. Haas*, 57 Pa. 443; *Broughn v. State*, 44 Neb. 889, 62 N. W. 1094; *People v. Ayhens*, 85 Cal. 86, 24 Pac.

635; *Ex parte Lacey*, 6 Okl. 4, 37 Pac. 1095. The extent of the rule established by the cases cited is not now approved, and in fact it is not necessary for us at present to definitely determine that a proceeding before a committing magistrate by affidavit and warrant, followed up and based thereon by indictment or information, would be the commencement of the prosecution, within the meaning of our statute.

It appears from the information before us that the offense was committed more than three years before it was filed, and that after the warrant was issued by the justice no proceeding was had by information for at least three years. The information does not show that it was based upon the proceedings before the justice of the peace, or had any connection whatever with it, even if that would save it, which we do not now determine; and, in our judgment, the motion to quash should have been sustained, instead of denied.

The judgment of the court is reversed, with directions to sustain the motion to quash the information and discharge the accused thereunder. Ordered accordingly.

MCKINNIE et al. v. STATE.

(Supreme Court of Florida. March 4, 1902.)
CRIMINAL LAW—ALLEGATION AND PROOF OF VENUE.

1. It is necessary for an indictment to state the county within which the offense was committed, and the proof must affirmatively sustain such allegation. Such venue need not be established beyond a reasonable doubt. But if the evidence raises a violent presumption that the offense was committed within the county charged, or if the evidence refers to locations and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably have inferred that the offense was committed in the county charged, it will be sufficient. But where the evidence wholly fails to show in what county or state the crime was committed, a judgment of conviction will be reversed.

(Syllabus by the Court.)

Error to circuit court, Washington county; Evelyn C. Maxwell, Judge.

John W. McKinnie and Susan Strickland were convicted of crime, and bring error. Reversed.

Benj. S. Liddon, for plaintiffs in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, C. J. The plaintiffs in error were indicted, tried, and convicted at the spring term, 1901, of the circuit court for Washington county of the crime of living together in an open state of adultery, and from the sentences imposed seek relief on writ of error returnable to the present term of this court.

The only error assigned is the denial of the defendants' motion for new trial. This motion was based upon the following grounds:

(1) That the verdict is unsupported by the evidence; (2) that the verdict is contrary to the evidence; (3) that the verdict is contrary to the charge of the court; (4) that the verdict is contrary to the law. The first contention under this assignment is that the state failed to prove the venue of the crime. In the case of *Cook v. State*, 20 Fla. 802, it is held that it is necessary for an indictment to state the county within which the offense was committed, and the proof must affirmatively sustain such allegation, and that in such a case a new trial will be granted when all the evidence taken in the court below fails to establish the venue as laid in the indictment. In *Warrace v. State*, 27 Fla. 362, 8 South. 748, it is held that venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient. *Smith v. State*, 29 Fla. 408, 10 South. 894; *Duncan v. Same*, 29 Fla. 459, 10 South. 815; *Lealie v. Same*, 35 Fla. 184, 17 South. 559. After a careful examination of the evidence, we do not think that, even under the liberal rule as to the sufficiency of proof of venue announced in the cases last cited, the evidence in this case sufficiently establishes the venue of this crime as being in the county charged in the indictment. It wholly fails to show either in what county or state the crime was committed; neither does it refer to locations or landmarks at or near the scene of the alleged crime, known or probably familiar to the jury, from which they might reasonably have inferred that the offense was committed in the county charged.

It is further contended that the evidence in the case otherwise fails to make out the crime charged, but as the judgment must be reversed because of the failure of the proof as to venue, and another trial ordered, it will be improper for us to express any opinion as to the merits or demerits of the proofs upon the main facts in the case.

For the error found, the judgment of the court below is reversed, and a new trial ordered.

SOUTHERLAND v. SANDLIN.

(Supreme Court of Florida. Feb. 28, 1902.)
ELECTION CONTEST—PLEADING—AMENDMENT—DISMISSAL—BILL OF EXCEPTIONS—OBJECTIONS WAIVED.

1. A petition to contest the election of the office of tax collector was filed within the time prescribed by statute (section 190, Rev. St.), and a demurrer thereto was sustained on the ground that the petition failed to set out with sufficient distinctness the grounds of contest, with leave to amend. An amendment was filed in accordance with the order of the court, but after the expiration of the time provided by

¹ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 726, 1578, 1231; Indictment and Information, vol. 37, Cent. Dig. § 230.

statute for filing an original petition of contest, and therein more definitely set out the grounds of contest originally alleged with a new ground of contest. Motion was made to strike the entire petition on the only ground insisted on,—that a new ground of contest was incorporated into the amended petition after the expiration of the statutory period within which an original petition could be filed,—and the motion was denied by the court. *Held*, without deciding whether the new ground of contest was proper under the statute by way of amendment, that the motion was correctly denied on the objection urged, because it sought the dismissal of the entire petition, when there were good grounds of contest in it.

2. Where it appears that no assignment of errors was presented to the judge at the time of making an ordinary bill of exceptions as a guide for the making of the same, and the bill exhibits no sufficient statement of evidence or facts showing any impropriety of the rulings of the court on the matters sought to be presented, nothing is thereby presented for the appellate court to review.

3. Assignments of error not argued in the appellate court are regarded as abandoned.

(Syllabus by the Court.)

Error to circuit court, De Soto county; Joseph B. Wall, Judge.

Petition by Jesse R. Sandlin against James D. Southerland to contest an election for tax collector. Judgment for petitioner, and defendant brings error. Affirmed.

Defendant in error, as contestant, filed in the office of the clerk of the circuit court for De Soto county, on the 3d day of December, 1900, a petition against plaintiff in error, as contestee, to contest the election for tax collector held on the 6th day of November of that year. The contestee demurred to the petition, and the circuit judge sustained the demurrer December 7, 1900, on the ground, as shown by the order, that the petition failed to set out with sufficient definiteness the grounds of contest. Leave was given to amend by rule day in January, 1901, and on the 3d day of that month contestant filed the following amended petition, viz.: "To the Honorable Joseph B. Wall, Judge of the Sixth Judicial Circuit of Florida in and for the County of De Soto: The petition and complaint of Jesse R. Sandlin respectfully shows that he is a citizen and qualified elector of the county aforesaid; that a general election was held therein on the first Tuesday in November, being the 6th day of November, A. D. 1900, and that amongst other offices to be filled at said election by the qualified electors of said county and state was the office of tax collector in and for said county. Your petitioner further shows that he was a candidate regularly nominated by a convention held in said county by the Democratic party, and his name was placed upon the ticket to be voted for at the said election, in manner and form as the law prescribes, for the said office of tax collector of said county and state. Your petitioner further shows: That it has been returned that at said election James D. Southerland received four

hundred and thirty-four votes for the said office of tax collector for the said county and state, and that Jesse R. Sandlin, your petitioner, received four hundred and nineteen votes for said office, and that the said James D. Southerland has been elected thereto by a majority of fifteen votes, which your petitioner charges to be an undue election, and a false return of the said James D. Southerland, and he contests his right to said office of tax collector of the said county. That the said election and the said return of the said James D. Southerland is false, fraudulent, and untrue, in this: that at the said election two candidates for the said office of tax collector were voted for, to wit, the said James D. Southerland, who was unduly returned as having received for the said office four hundred and thirty-four votes, and the said Jesse R. Sandlin, who was returned as having received four hundred and nineteen votes for the said office, whereas your petitioner alleges, charges, and verily believes that at the said election the said James D. Southerland received not more than four hundred legal votes, and that your petitioner, the said Jesse R. Sandlin, received at least four hundred and twenty-two legal votes for said office, whereby your petitioner alleges, charges, and believes that he, the said Jesse R. Sandlin, has received the highest number of legal votes cast at said election for the said office, to wit, at least twenty-two more votes than the said James D. Southerland, whereby the said Jesse R. Sandlin is elected to the said office of tax collector of the said county of De Soto, and should have been so returned. And your petitioner specifies more particularly the following grounds of contest, to wit: (1) That in the general returns of the votes of the said county for the said office of tax collector of said county the returns of votes by the inspectors from the election districts Nos. 2, 3, 8, 10, 11, 17, 18, 20, and 22 of said county, for the said James D. Southerland for the said office of tax collector are erroneously computed at 200 votes, being an excess of 5 votes for district No. 2, 4 votes for district No. 3, 5 votes for district No. 8, 5 votes for district No. 10, 4 votes for district No. 11, 3 votes for district No. 17, 2 votes for district No. 18, 2 votes for district No. 20, and 4 votes for district No. 22, making in all an excess of 34 votes beyond the true number of legal votes which should have been returned for the said James D. Southerland for said office. The said excess of 34 votes were erroneously counted and illegally and fraudulently returned by the said several inspectors of the said several election districts of said county by counting all such ballots for the said James D. Southerland as were marked by a cross-mark to the right of the name of the said James D. Southerland, and by counting all such ballots for the said James D. Southerland as

were marked by a cross-mark opposite each of the respective names of the said James D. Southerland and this petitioner for the said office, and by counting all such ballots as were marked by the cross-mark opposite and directly between the name of the said James D. Southerland and this petitioner for the said James D. Southerland for the said office for said county, and by counting all such ballots for the said James D. Southerland as were erroneously marked and mutilated, contrary to the legally prescribed methods of counting the ballots and of returning the votes for the said election districts. (2) That in the said general returns of votes for the said office of tax collector it was unduly returned that at said election in the said several election districts there were voted for the said James D. Southerland 84 votes in excess of the true number of legal votes which should have been returned for the said James D. Southerland in the illegal and fraudulent manner aforesaid by counting all such ballots for the said James D. Southerland as were marked by a cross-mark opposite each of the respective names of the said James D. Southerland and this petitioner, Jesse R. Sandlin, for the said office of tax collector, and by counting all such ballots for the said James D. Southerland as were marked by a cross-mark opposite and directly between the respective names of the said James D. Southerland and this petitioner, Jesse R. Sandlin, for the said office of tax collector, and by counting all such ballots as were marked to the right of the names of the said James D. Southerland, and by counting all other such ballots for the said James D. Southerland for the said office of tax collector as were mutilated, and not in conformity with law. Your petitioner therefore alleges, charges, and verily believes that the errors aforesaid were committed in the counting and returning of the votes aforesaid by the said several inspectors in the said several election districts, and by returning the said several excessive 84 votes in the manner aforesaid, and that there should have been only 166 votes returned for the said James D. Southerland for the said office of tax collector, instead of 200 votes, which were returned for the said James D. Southerland for the said office of tax collector from the said several election districts, as will appear by a recount of the ballots voted at said election. (3) Your petitioner further alleges that the county canvassing board did not, and refused to, count the return of the vote of district No. 13, which returns show that your petitioner received three votes cast at said election district for the said office of tax collector, which three votes were the only votes cast at said district for the said office of tax collector, and would have given your petitioner three more votes for the said office, and would have made your petitioner's vote for said office four hun-

dred and twenty-two, as alleged. (4) Your petitioner shows, as a further proof of the fraudulent return and undue election of said James D. Southerland as tax collector of said county, that he is informed and believes, and therefore avers, that the said election inspectors of said election district No. 2, in addition to the five illegal votes aforesaid returned, did not conduct and hold said election in the manner and form provided by law, in that the said inspectors of said election district negligently, fraudulently, and illegally permitted and allowed more than one voter—a great number of persons (a more particular description to your petitioner unknown)—to enter into and be in the polling place of said election district at one and the same time, and did negligently, fraudulently, and illegally permit and allow a large number of voters and other persons (a more particular description to your petitioner unknown) to come into, near, and around, within less than fifteen feet of, said polling place, between the time of the opening of the polls and the completion of the counting of the ballots and making the certificate of return, contrary to law; that at said election district No. 2 the said election was not held in the manner and form provided by law, in that the said inspectors thereat fraudulently and illegally permitted and allowed the ballots thereat, and for said district provided by law, to be taken from the polling place of said district, and to be inspected by the great number of electors who were wrongfully and illegally in, near, and around said polling place, and said inspectors did fraudulently and illegally tear off and distribute to divers persons, to your petitioner unknown, from the pad of ballots for said district provided, and did distribute the same to the said persons wrongfully, fraudulently, and illegally in, near, and around said polling place; and therefore your petitioner avers that the said election in said district No. 2 was illegal and void, and that the votes in said election district ought not to be counted, whereas the same were returned by the said inspectors and clerk of said election district to the county canvassing board as 52 votes for James D. Southerland and 10 votes for Jesse R. Sandlin for the said office of tax collector, and by the said canvassing board included and counted in the general result; whereby the said James D. Southerland was illegally and wrongfully returned and certified as elected to the office aforesaid, when in fact the said Jesse R. Sandlin, your petitioner, was duly elected to said office. Your petitioner therefore, for the reasons heretofore specified, avers that the vote in said election district No. 2 ought to be rejected, and not counted, which would give the said James D. Southerland 353 votes, and your petitioner, Jesse R. Sandlin, 412 votes, for the said office of tax collector; that all said acts were done and committed with intent and purpose of holding an undue election, and willful desire to prevent an honest expression of the popular will of the peo-

ple at said election, and a true ascertainment of the real vote of the qualified voters residing in said election districts aforesaid who voted at said election; and that, in pursuance of such conduct aforesaid on the part of the said inspectors of the said several election districts of the said county, the popular will of the voters of the said several election districts was not ascertained, but was, by the said several inspectors of the said several election districts in the said county, defeated; and your petitioner therefore and thereby charges that the said election in the said several election districts, by the said several inspectors, was false, fraudulent, and untrue, and the votes thereat polled should be recounted, and a true, correct, and due return thereof made. Wherefore your petitioner shows that at the said election, and by the means aforesaid, your petitioner has been duly elected to the said office of tax collector for the county aforesaid, having received more legal votes than were given for the said James D. Southerland, the returned candidate, or for any other person for said office; and that, therefore, the election was undue, and the return false, in declaring and returning the said James D. Southerland as duly elected to the said office of tax collector. Your petitioner therefore prays that your honor will appoint a suitable time for hearing this complaint, and make such order or orders as may be necessary to exhibit the aforesaid undue election and false return, and that, after hearing the proofs of the aforesaid allegations and charges, you will order, adjudge, and decree the said election and returns of the said James D. Southerland to the office of tax collector of the said county of De Soto, as aforesaid, to be an undue election and a false return, and that the said Jesse R. Sandlin was at said election duly and legally elected to said office."

Counsel for contestee filed a motion to strike the amended petition on the following grounds, viz.: "(1) Because, with the exception of the allegations contained in paragraph three thereof, relative to the conduct of the election in election district number two of said county, the said amended petition is practically the same petition, and sets up the same facts as were set out in the original petition, to which a demurrer has been sustained by the court. (2) Because the petitioner, in paragraph three of said amended petition, attempts to introduce a new and distinct ground of contest not embraced in his original petition and notice, and subsequent to the expiration of the time allowed by law for the giving of such notice and the filing of his ground of contest; said amendment not being permissible, and without which the said petition remains practically the same as the original petition hereinbefore filed. (3) The amended petition, while setting up the same alleged frauds and irregularities as those contained in the original petition, fails to do so with sufficient particularity to apprise the respondent of the grounds of contest, or to

sustain said amended petition. (4) The facts set forth in said petition, even if true, show only irregularities in the conduct of said election, and are not sufficient to affect the bona fides of legality thereof. (5) And for other good and sufficient reasons apparent upon the face of said amended petition."

The circuit judge overruled the motion, and contestee filed the following answer: "The answer of James D. Southerland to the amended petition of Jesse R. Sandlin. The respondent admits that it is true, as set forth in said petition, that at a general election held in the county of De Soto, in said state, on the 6th day of November, A. D. 1900, that among other offices to be filled at said election by the qualified electors in said county and state was the office of tax collector in and for said county, and that the said Jesse R. Sandlin was nominated by the convention held in and for said county by the Democratic party, and that his name was placed upon the ticket to be voted for in said election in the manner and form as the law prescribed for said office of tax collector of said county and state. Further answering, respondent admits that it is true that it has been returned that at said election your respondent received 484 votes for said office of tax collector of De Soto county, and that the said Jesse R. Sandlin received 419 votes for said office, and that this respondent has been duly elected thereto by a majority of 15 votes or more. Further answering, the respondent respectfully shows that on the 10th day of November, A. D. 1900, the county judge of said county, the supervisor of registration, and the chairman of the board of county commissioners of said county of De Soto, sitting as a county canvassing board of election, in pursuance of law, after having made a canvass of the votes cast at the election held on said 6th day of November, A. D. 1900, declared the result of the said canvass, and that the respondent was shown by said canvass to have received the highest number of votes cast for any person for said office of tax collector at said election, and was declared to be elected to said office. And that on the said 10th day of November, A. D. 1900, the supervisor of registration did make, sign, and deliver to the said respondent a certificate of election, certifying that on the 10th day of November, A. D. 1900, A. E. Pooser, county judge of said county, H. A. Ellis, supervisor of registration, and William King, chairman of the board of county commissioners of said county, did publicly canvass the returns of the election districts in said county filed with the county judge and supervisor of registration, as required by law, showing the votes cast for tax collector of said county at the election held therefor on the said 6th day of November, A. D. 1900, and according to said returns and canvass that the said respondent received the highest number of votes cast for any person for said office of tax collector of said county. And that a commission under the great seal of the state of Florida, in due form of law,

has been issued by the governor of said state of Florida to the said respondent for a term of two years beginning from the first Tuesday after the first Monday in January, A. D. 1901, and until his successor is duly elected and qualified. And that the respondent is now the incumbent of said office of tax collector for said county under and by virtue of the election aforesaid, and under and by virtue of the commission issued by the governor of the state of Florida aforesaid. Your respondent, further answering the allegations of said amended petition, says that he is informed and believes, and so charges the fact to be, that, instead of having received 434 votes for tax collector of said county of De Soto on the said 6th day of November, A. D. 1900, that he received a much larger number of votes than those actually counted by the inspectors at the said election districts in said county by reason of the fact that in said several election districts mentioned in said amended petition the said respondent is informed and believes, and so charges the fact to be, that the inspectors at said election districts declined to count all such votes cast at said election for the respondent which contained a cross-mark to the right of the respondent's name, and that the said respondent believes that a recount of said votes for respondent in the election districts mentioned in the amended petition herein will exhibit that this respondent has been elected to the office of tax collector of said county by a much larger majority than 15 votes. Further answering, the respondent denies that the said Jesse R. Sandlin received the highest number of votes cast at said election for the office of tax collector for De Soto county, but upon information and belief the respondent charges the fact to be that the said Jesse R. Sandlin received less than 419 legal votes for the office of said tax collector. Further answering, the respondent denies that in the general return of votes of said county of De Soto for said office of tax collector of said county the returns of the votes by the inspectors from the election districts numbered 2, 3, 8, 10, 11, 17, 18, 20, and 22 for the respondent for said office of tax collector is erroneously computed at 200 votes, the same being in excess of 5 votes from district No. 2, 4 votes from district No. 3, 5 votes from district No. 8, 5 votes from district No. 10, 4 votes from district No. 11, 3 votes from district No. 17, 2 votes from district No. 18, 2 votes from district No. 20, and 4 votes from district No. 22; making in all an excess of 34 votes beyond the true number of legal votes which should have been returned for the respondent for the said office of tax collector. Respondent also denies that said 34 votes, or any part thereof, or in fact any of the votes from any of the districts mentioned, were erroneously counted and illegally and fraudulently returned by the said inspectors of the said several election districts of said county aforesaid. Respondent also denies that all such ballots were counted for respondent by

the inspectors of the election districts aforesaid as were marked by a cross-mark to the right of the name of respondent, or that all such ballots were counted by a cross-mark opposite the respondent's name and the name of the said Jesse R. Sandlin, or that all such ballots were counted for the respondent as were marked with a cross-mark opposite and directly between the names of the respondent and the said Jesse R. Sandlin, or by counting all such ballots for respondent as were erroneously marked and mutilated, contrary to the legally prescribed methods of counting the ballots and returns of the votes from the said election districts; but respondent charges the truth to be that the election so held in the several election districts mentioned were legally, honestly, and fairly held and conducted, and that the counting and returns of the said votes were fairly, honestly, and legally had and made as the law prescribed. Further answering, this respondent says that the allegations contained in paragraphs numbered 1, 2, 4, and 5 are utterly false and untrue; and that in all things pertaining to the election held in the election districts mentioned in said petition the same was legally, honestly, and fairly conducted, and a true return made of the actual and true votes thereat cast for the said Jesse R. Sandlin and this respondent. Further answering, the respondent admits that the county canvassing board did not, and they refused to, count the return of the votes of district number 13 in said county; that the said return exhibited that the said Jesse R. Sandlin received three votes cast at said election in said election district for office of tax collector. Respondent charges the fact to be that the returns of said district number 13 in said county were not signed by the inspectors holding the said election in said election district, and the same were not returned in the manner as prescribed by law. Wherefore the respondent says that there was no undue election, or false return made of him as tax collector of said county of De Soto, but that he was duly and legally elected to said office by a majority of the legal votes cast at said election on the 6th day of November, A. D. 1900, and therefore prays that said amended petition may be dismissed."

A general replication was filed to the answer, and testimony was taken before a commission appointed by the judge. On final hearing a decision was rendered in favor of contestant, the final order reciting: "That from the testimony herein consisting of the recount of the ballots cast at districts numbered as follows, to wit, two, three, eight, ten, eleven, seventeen, eighteen, twenty, and twenty-two, and the election returns duly made by the election officers and by them returned from districts numbered as follows, to wit, one, four, five, six, seven, nine, twelve, fourteen, fifteen, sixteen, seventeen, and twenty-one, showing 428 votes for the contestant and 424 for contestee, and the court being advised that Jesse R. Sandlin, the contestant

herein, is entitled to the office of tax collector of De Soto county, Florida, he, the said Jesse R. Sandlin, having received the greatest number of votes cast at the general election held in said De Soto county on the 8th day of November, A. D. 1900, for any candidate for said office of tax collector for said county, it is thereupon adjudged, ordered, and decreed that the contestee herein, James D. Southerland, be ousted from the office of tax collector in and for the said county of De Soto, state of Florida, mentioned in the complaint in this action. And it is further adjudged that Jesse R. Sandlin, named in the petition, and the contestant in this action, is, and he is hereby declared to be, entitled to the said office of tax collector in and for the county of De Soto and state of Florida by virtue of the election in the said petition mentioned." A writ of error was sued out to this judgment.

Other facts will be stated in the opinion.

John H. Treadwell and Wilson & Wilson, for plaintiff in error. H. J. Spence and M. L. Williams (J. W. Burton, on the brief), for defendant in error.

MABRY, J. (after stating the facts). This case was referred by the court to its commissioners for investigation, and they have reported that the judgment should be affirmed. After due consideration, the court is of opinion that the judgment must be affirmed on the record presented, for the reasons now stated.

The first error assigned is that the court erred in overruling the motion of the contestee to strike the amended petition. The only contention made under this assignment of error is that a new ground of contest was incorporated into the amended petition after the expiration of the statutory period within which an original petition specifying the particular grounds on which contestant intended to rely to establish his right to the office was allowed to be filed under the statute. The statute provides that the "contestant shall, within twenty-five days after the canvass by the county canvassing board of the election returns for such office, file a petition in the office of the clerk of said court, and serve a copy thereof on the contestee by," etc. "He shall set forth in his petition the particular grounds on which he intends to rely to establish his right to such office." Rev. St. § 190. It is argued that after the demurrer was sustained to the original petition a new ground of contest was introduced into the amended petition filed after the expiration of the 25 days from the date of the canvass of the returns of election, and the motion indicates that this new ground of contest is contained in paragraph 3 of the amended petition. Comparing the original and amended petitions, we do not find any new ground of contest in paragraph 3, but the fourth paragraph of the amended petition contains new matter as an additional ground of contest in election district No. 2,

specified in paragraph 1. As the motion indicates the nature of the new matter of contest sought to be presented as an objection, it may be regarded as applicable to paragraph 4. The motion, it will be observed, is to dismiss the petition on the sole ground urged that an additional ground of contest was incorporated into the amended petition. If the other grounds of contest stated in the petition are sufficient to call for an answer, it would be improper to dismiss the petition because of one insufficient ground. The objection argued here should have been confined in a proper way to the ground deemed to have been improperly incorporated into the petition, and, if the court had refused to eliminate it, then the question would have been presented whether an entire new ground of contest can, under our statute, be interjected into the proceedings by amendment after the expiration of 25 days from the canvass of the returns of election. This motion was properly overruled on the objection urged, because it sought the dismissal of the entire petition, and was therefore too broad. The other grounds of the motion are not argued, and need not be considered.

The second assignment of errors is expressly abandoned, and the tenth and eleventh are passed without argument, and must, therefore, be considered as abandoned.

Six of the remaining assignments of error presented at the time of making up the transcript for this court, numbered 3, 4, 5, 6, 7, and 8, relate to orders and rulings of the judge in reference to the admission of evidence in the cause, and the other one, numbered 9, imputes to the judge error in holding that the ballots counted and reported by the commissioner to whom the cause was referred were sufficient to overcome the presumption of the correctness of the several returns of the inspectors of the various contested election districts mentioned in the amended petition. All of these matters are in pais, and are required to be exhibited to this court by bills of exceptions made up in compliance with the rules prescribed for presenting such matters. We find in the transcript bills of exceptions, but they are not made up so as to properly present the questions designed to be raised.

In reference to the ordinary bill, the rule requires that, while it need not contain the entire evidence adduced at the trial, it should contain such brief statement of the proofs as is necessary to show clearly the propriety or impropriety of the ruling of the court during the trial that is assigned as error, or such portion of the evidence that may have been presented on any issue of fact that may have been decided at any time prior or subsequent to the trial of the cause upon which error is assigned. Special rule 1 for the government of circuit courts in the preparation of bills of exceptions and transcripts of records in civil cases (21 South. vii). The ordinary bill in this case contains no sufficient

statement of facts showing any impropriety of the rulings of the court on the matters sought to be presented by the bill as errors. Not only is this the case, but no assignment of error whatever was presented to the judge upon the making up of either the ordinary or evidentiary bill of exceptions. The rule referred to requires the plaintiff in error, at the time of presenting a bill of exceptions to the judge to be made up and settled for the appellate court, whether such bill is to be made up from memoranda in writing of exceptions to rulings during the progress of the trial and signed in open court or otherwise, to present with such bill an assignment of errors covering all the points that he intends to present in and by such bill of exceptions as grounds for reversal; and such assignment of errors shall be the guide for making up the bill of exceptions, and shall be made a part thereof. And in reference to the evidentiary bill the rule provides that, if any assignment of error presented to the judge is based upon the refusal of the court to grant a new trial, on the ground that the verdict is contrary to the evidence or not supported thereby, or if the defendant in error shall demand in writing that all the testimony shall be reviewed for the purpose of showing that an error of law, either as to the admission or rejection of testimony, or as to a charge given or refused, is, in view of the whole testimony, a harmless error, then an entirely separate and distinct bill of exceptions of the evidence adduced at the trial of the cause shall be made up and signed by the judge, to be known as the "evidentiary bill of exceptions." The requirements of the rule in reference to the assignments of error in making up both bills of exceptions in this case were entirely disregarded, and for the defects stated we are unable to review the rulings of the court on the assignments of error made for the appellate court and argued by counsel. In reference to the ninth assignment set out there is no statement of facts showing that the court held, as assigned, the ballots counted and reported by the commissioner were sufficient to overcome the presumption of the correctness of the returns of the inspectors of the contested districts. What the report of the commissioner was is not therein stated, but it does appear from the evidentiary bill that the judge had before him at the hearing ballots, returns, and a mass of testimony relating to the election in the contested districts, as well as returns from the uncontested ones. It does not appear, however, from the final decision rendered, that there was any change of results in the uncontested districts.

While the state of the record in reference to the assignments of error in making up the bills of exceptions is as stated above, we find a recital in the caption of the evidentiary bill signed by the judge that it was made up at the instance of the plaintiff in error in support of an assignment of error predicated upon the refusal of the court to grant a new trial

on the ground that the findings and judgment of the court were contrary to the evidence.

The eleventh assignment of error is that the court erred in overruling the motion of contestee to set aside and vacate the alleged finding of the court and the final judgment of ouster consequent thereon; but this assignment of error is not noticed in brief of counsel for plaintiff in error, and must, therefore, under the settled rule of this court, be considered as abandoned.

In view of this fact we do not now determine whether the recital of the judge in the evidentiary bill stated, in the absence of any record evidence of a sufficient assignment of error presented at the time of settling the bill, will authorize this court to review the ruling of the judge denying a motion for a new trial on the ground that the evidence is not sufficient to sustain a finding.

For the reasons stated, we are of opinion that the judgment must be affirmed, and it is so ordered.

On Petition for Rehearing.

(March 13, 1902.)

In a petition for a rehearing filed in this cause it is particularly insisted that there was error in our conclusion on the first assignment of error predicated upon the ruling of the circuit court denying the motion of plaintiff in error to strike the amended petition of defendant in error. It is alleged, in substance, that in our opinion we overlooked and did not consider the fact that the circuit court sustained a demurrer to the original petition, thereby holding the grounds of contest therein alleged to be insufficient, and that the amended petition alleged the same matters charged in the original held to be insufficient, except in the fourth paragraph, which set up an entirely new and distinct ground of contest after the expiration of the time provided by the statute for filing a petition of contest setting forth the particular grounds on which a contestant intends to rely to establish his right to an office. The petition for rehearing states "that all of said grounds in said amended petition contained, with the exception of paragraph 4 thereof, were identically as those set up and alleged in the original petition hereinbefore referred to, and to which the court below had formerly sustained a demurrer; and that under the rules of pleading and practice a motion to strike said amended petition was proper, in that the same contained the same matters set forth in the original petition; and the demurrer having been sustained thereto, and setting forth and alleging in paragraph 4 thereof the new matter referred to constituting the only ground of contest shown, and said new matter and ground of contest having been filed after the statutory time had elapsed."

The court did not overlook the fact that a demurrer had been sustained to the original petition, and the opinion states that, "comparing the original and amended petitions, we

do not find any new ground of contest in paragraph 3, but the fourth paragraph of the amended petition contains new matter as an additional ground of contest in election district No. 2, specified in paragraph 1." Counsel have fallen into error in assuming that all the grounds in the amended petition, with the exception of paragraph 4, are identically the same in allegation as those contained in the original petition. The court sustained a demurrer to the original petition because the grounds of contest relied on were too indefinitely stated, but the amended petition is much more definite in this respect. The court denied a motion to strike the amended petition because the grounds of contest therein alleged, except in paragraph 4, were identically the same as those set up in the original petition, and that the ground of contest alleged in paragraph 4 was sought to be incorporated by amendment after the time provided in the statute for filing a petition of contest. No argument was made here that the grounds of contest in the amended petition were alleged identically or in substance as in the original petition, but the only contention was that the entire amended petition should be stricken because a new ground of contest was brought forward by way of amendment after the period when a petition of contest can be filed under the statute. The court did not assume that the grounds of contest stated in both petitions, except in paragraph 4 of the amended one, were in substance the same in allegation, because to have done so would have been contrary to the facts, and it was unnecessary and improper under the rule to discuss this phase of the motion, because it had been abandoned in the argument. The court fully considered the only contention made under the motion, to the effect that the petition should be stricken because a new ground of contest had been incorporated therein 25 days after the canvass by the county canvassing board of the election returns, and reached the conclusion that the objection urged should have been confined in a proper way to the ground deemed to have been improperly incorporated into the petition, and that, if the court had refused to eliminate it, the question would have been presented whether an entire new ground of contest can, under our statute, be interjected into the proceedings by amendment after the expiration of the time mentioned. It is quite evident that a petition containing several sufficient grounds of a contest should not be stricken from the files because it contains one insufficient ground, or one not authorized by the statute. Counsel having abandoned, by not arguing, the grounds of the motion that the grounds of contest, except in paragraph 4, were identically alleged in both petitions, and it appearing to the court that the grounds alleged in the amended petition are sufficiently definite to authorize an investigation as to the result of the election, it was not necessary to say anything about any ground of the motion not argued.

In this case the court has examined carefully every point that has been presented in such a way as we could, consistently with our rules, consider.

The petition for rehearing is denied.

JONES v. STATE.

(Supreme Court of Florida. March 18, 1902.)
CRIMINAL LAW—CONTINUANCE—OPINION EVIDENCE—REVIEW.

1. An application for a continuance upon the ground of the absence of a witness must show that the applicant has exercised due diligence to procure the attendance of the witness.

2. Denial of a motion for continuance will not be reversed by an appellate court, unless there has been a palpable abuse of discretion, clearly and affirmatively shown by the record.

3. A statement made in the order of a trial court as to a matter in pais will be presumed to be correct, unless the contrary is made clearly apparent.

4. A statement or declaration of a person charged with crime is not rendered inadmissible in evidence against him by the mere fact that it is made after the commission of the crime. If it tends to show a guilty intent, it is admissible, for the guilty intent of a party may be shown by his acts, conduct, and declarations before, at the time of, or after the commission of a criminal act.

5. The opinion of a witness, except as to a matter regarding which expert testimony is competent, is not legitimate evidence as to any matter that may be reproduced before the jury. It is the province of the jury to deduce its own conclusion from facts of common experience, uninfluenced by the opinion of any witness on those facts, especially where such opinion is sought on facts given in the testimony of another witness.

6. A question asked a nonexpert witness, seeking to elicit his opinion as to what must have been the necessary position of the hand and pistol of the person who shot another in a particular manner, where the witness did not see the person who shot, or the hand that held the pistol when it was shot, is properly excluded.

7. Where alleged error in giving two or more charges asserting distinct propositions of law is made the basis of a single ground of a motion for a new trial, alleging generally that the court erred in giving such charges, and excepted to under and by virtue of an exception to the denial of the motion for new trial, this will be regarded as a general exception to the giving of the charges, and will not be further considered than to determine that any one charge was correct.

(Syllabus by the Court.)

Error to circuit court, Columbia county; Bascom H. Palmer, Judge.

Alex Jones was convicted of crime, and brings error. Affirmed.

A. J. Henry and T. B. Oliver, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Alex Jones, was convicted at the fall term of the circuit court of Columbia county, A. D. 1901, of an assault with intent to commit murder, and brings his case here by writ of error.

The first assignment of error is that the

court erred in refusing to grant a continuance on defendant's application. The application was made on the ground of absence of a material witness, one W. G. Shealy, and an affidavit of the defendant was filed that the said Shealy had been subpoenaed at the instance of defendant, and was in attendance at a previous term of court in response to the subpoena, when said cause was continued on account of the absence of a witness for the state; that the witness was absent without the procurement or consent of defendant, either directly or indirectly given; that the testimony of the witness was necessary and material to his defense; that the application was not made for delay only, and defendant expected to procure the testimony of the witness at the next term of the court; that the witness was a resident of the county of Lee or Monroe, in the state of Florida; that defendant could not safely go to trial without the testimony of said witness, and expected to prove by him the following facts, which he could not prove by any other witness known to the defendant, viz.: "That on the night and at the alleged time of the shooting alleged to have been done some eight miles from Lake City, Fla., this defendant was then and there in the constant employ of the witness W. G. Shealy from early in the evening until a late hour in the night, at the place of the said Shealy's business in the town of Lake City, Fla., and then accompanied the said Shealy to his home in said town, and could not possibly have been at the place of the alleged shooting on the night or at the time such shooting is alleged to have been done; that said witness, immediately after this defendant's accusation, and frequently since, has told both affiant and affiant's counsel that he would testify to said facts upon a trial of said cause; that said witness was recently in Lake City and Columbia county, and was then informed by defendant and defendant's attorney that he would be needed as a witness in this behalf, and then promised to return and attend at this term of the court, but has failed to do so; that said witness was never given leave, directly or indirectly, by or for this defendant, to absent himself from attendance in said court in this behalf." The court denied the application for continuance on the following ground, as set forth in the bill of exceptions, viz.: "This being Tuesday morning, and the second week of court, and the absent defendant's witness not appearing any day of this court, and said cause having been several times called, and no attachment being asked for up [to] this time for said witness, and this cause having been on the docket for trial since December 6, 1899." An application for a continuance upon the ground of the absence of a witness must show that the applicant has exercised due diligence to procure the attendance of the witness. *Shiver v. State*, 41 Fla. 630, 27 South. 36. Such motions are addressed to the discretion of the court, and the action of the trial court will

not be reversed unless there has been a palpable abuse of discretion, clearly and affirmatively shown by the record. *Ballard v. State*, 31 Fla. 266, 12 South. 865; *Bryant v. State*, 34 Fla. 291, 16 South. 177. It must be assumed that the statement of the trial court in the present case, made in denying the motion, was fully warranted by the facts, as the contrary is not made apparent. That being so, it cannot be said that there was an abuse of discretion in denying the motion, as the defendant did not exercise that degree of diligence that he might have exercised to obtain the presence of the witness, by applying for an attachment when the witness did not appear at the beginning of the term. The application made was for a continuance, without asking for an attachment for an absent witness, and our conclusion is not in conflict with what was held in *Green v. State*, 17 Fla. 609.

The second assignment of error is not argued, and is therefore abandoned.

The third assignment of error is that "the court erred in permitting the witness W. H. Colson to testify, over the objection of the defendant, as to threats of the defendant Alex Jones after the alleged offense." W. H. Colson, a witness on behalf of the state, after having testified that he heard the defendant make a statement in Lake City, on or about the day of his committal trial, concerning Jerry (the person against whom the assault was alleged to have been committed), was asked what he (defendant) said, and thereupon testified: "He said that if Jerry was out there, he would kill him on first sight." He further testified that this was about 8 or 10 days after the alleged shooting. This testimony was objected to, on the ground that it related to something that occurred after the shooting, and was irrelevant and immaterial, and exceptions were duly reserved to the rulings of the court permitting the questions, and denying a subsequent motion to strike out the testimony. The testimony objected to was properly permitted to go to the jury. Other testimony had previously been introduced tending to establish the presence of the accused when the crime charged was committed, and his connection therewith. The statement was a voluntary one on the part of the accused, tending to show extreme hostility on his part towards Jerry (the person assaulted), and was made within 8 or 10 days after the assault. It was but a repetition of a threat made before the assault was committed, with no intervening cause shown to give rise to it. A statement or declaration of a person charged with crime is not rendered inadmissible in evidence against him by the mere fact that it is made after the commission of the crime. The guilty intent of a party may be shown by his acts, conduct, and declarations before, at the time of, or after the commission of a criminal act. *State v. Lewis*, 45 Iowa, 20; *Waldron v. State*, 41 Fla. 265, 26 South. 701.

The fourth assignment of error is that "the court erred in sustaining the objection of the state to the question asked by the defendant to the witness Phillip Belvin, as to the necessary position of the party who did the shooting." The witness had testified to the position of Jerry at the time of the shooting, that he was lying on a bench near a window, with his head inclined from the window; and the question was then propounded, "Where would the hand and pistol of the party had to have been to shoot Jerry in the top of the head, inside or outside of the window?" The question was objected to by the state's attorney on the ground that it sought the opinion of the witness, and the objection was sustained. The witness did not see the person who shot Jerry, nor the hand that held the pistol with which he was shot. Another witness testified to seeing a hand at the window, holding a pistol, at the time of the firing. There was no error in excluding the question. It was permissible to show the precise position of Jerry with respect to the window, and the jury could then draw its own conclusion as to whether or not he could have been shot on the top of the head from within or without. The opinion of a witness, except as to a matter regarding which expert testimony is competent, is not legitimate evidence as to any matter that may be reproduced before the jury. It is the province of the jury to deduce its own conclusion from facts of common experience, uninfluenced by the opinion of any witness on those facts, especially where, as in this case, such opinion is sought on facts given in the testimony of another witness. *Mann v. State*, 28 Fla. 610, 8 South. 207; *State v. Parce*, 37 La. Ann. 268; *People v. Westlake*, 62 Cal. 303; *Brown v. State*, 55 Ark. 593, 18 S. W. 1051; *Dillard v. State*, 58 Miss. 368; *Foster v. State*, 70 Miss. 755, 12 South. 822; *Kennedy v. People*, 39 N. Y. 245; *Cooper v. State*, 23 Tex. 331.

The only ground of the fifth assignment of error relied on is that the court erred in denying the fifth ground of the motion for a new trial. That ground was the giving of three several and distinct charges, asserting distinct propositions of law, and no exception is taken to the charges other than incorporating them into the motion for new trial. If either one of the charges be correct, we are precluded, under the rule established in this court, from examining the others. *Eggart v. State*, 40 Fla. 527, 25 South. 144; *McCoggle v. State*, 41 Fla. 525, 26 South. 734. The first one, in reference to the presumption of innocence, taken in connection with what immediately precedes it on the same subject, is correct, and therefore this assignment of error must fall. As we examine the charges no further than to ascertain that one is correct, we do not determine the correctness of the others.

The judgment will be affirmed, and it is so ordered.

MOORE v. STATE.

(Supreme Court of Florida. March 13, 1902.)

CRIMINAL LAW—ARRAIGNMENT.

1. Defendants jointly indicted for a felony may be arraigned either separately or together, even though no severance has been granted.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; John L. Doggett, Judge.

Thomas Moore was convicted of larceny, and brings error. Affirmed.

On the 18th of June, 1901, an information was filed in the criminal court of record of Duval county against Thomas Moore, Henry Sloan, and M. Q. Anthony, containing two counts,—the first charging them with the larceny of certain property of the value of \$26.16, of the goods, chattels, and property of Armour & Co., a corporation, etc.; and the second charging that the same parties "feloniously did have, receive, buy, and aid in the concealment of, the same property," before that feloniously stolen, taken, and carried away.

The record shows that on the 18th day of June, 1901, "came the defendants Thomas Moore and Henry Sloan, each in their own proper person, and upon being duly arraigned in open court, to this information pleaded not guilty, and it was ordered that the defendants Thomas Moore and Henry Sloan be remanded to the custody of the sheriff, to await the further action of the court, and that this cause be continued for the term," and that "on the twenty-sixth day of June, 1901, the defendants Thomas Moore, Henry Sloan, and M. Q. Anthony, each being personally present in open court, on motion of the state it is considered by the court that a severance be, and the same is hereby, granted in this cause, as to the defendants Tom Moore and M. Q. Anthony." The defendants Thomas Moore and M. Q. Anthony were thereupon placed on trial, and a trial had, and the jury returned the following verdict: "We, the jury, find the defendant Thomas Moore guilty as charged in the first count, and M. Q. Anthony guilty as charged in the second count."

On the 29th day of June, 1901, the defendant Thomas Moore moved in arrest of judgment as follows: That the court do not pronounce sentence or judgment, because an inspection of the record shows that these defendants were jointly indicted and tried, and that defendant Anthony was not arraigned, nor did he plead to said information, and that there was no issue joined. This motion was denied, and the defendant Moore excepted to the ruling. Moore was then sentenced to the state's prison for 12 months, and from this sentence and judgment he sued out a writ of error from this court.

Geo. U. Walker, for plaintiff in error.
William B. Lamar, Atty. Gen., for the State.

PER CURIAM. The sole assignment of error is "that the court erred in denying the motion of plaintiff in error in arrest of judgment." The contention of the attorney for the plaintiff in error is that where several defendants are jointly indicted, they must be arraigned together, unless there is, prior to placing them at the bar, a severance ordered and entered of record. The authorities cited by counsel in support of the proposition have been examined, and found not to support it. The apparent authority to the contrary, contained in a statement found in 1 Ohit. Cr. Law, 418, when traced to its source, has no application. The correct rule is given by Mr. Bishop (volume 1, New Or. Proc. § 729) as follows: "Persons jointly indicted may be arraigned separately, or, what is more common, together. Yet each is asked whether he is guilty or not, and his answer constitutes his plea." The purpose of an arraignment is to establish the identity of the accused, to acquaint him with the charge, and to obtain his answer or plea, and, if he advises himself, and answers the accusation by plea, he waives such formalities, which are mere preliminaries to that result. *Dixon v. State*, 18 Fla. 631. The record in this case shows that no objection was made by plaintiff in error to the method of his arraignment, or that his codefendant was not arraigned before trial, and in our judgment the assignment of error is not well taken, and the judgment should be affirmed.

BURNHAM v. DRIGGERS.

(Supreme Court of Florida. March 12, 1902.)

APPELLATE PRACTICE—CERTIFYING TRANSCRIPT OF RECORD—APPEAL FROM INTERLOCUTORY DECREE AFTER FINAL DECREE OF DISMISSAL.

1. A certificate of the circuit clerk to a transcript of record on appeal, stating simply that certain numbered pages contained a correct transcript of the record of the judgment, "and a true and correct recital of such papers and proceedings in said cause, as appears upon the record and files of his office, that had been directed to be included in the transcript by the written demands of the parties," is fatally defective because of its omission of the words "and copy of all" immediately after the word "recital."

2. Where there is a final decree that dissolves an injunction previously granted and dismisses the bill, there can be no appeal solely from that feature of said decree that dissolves the injunction; and such an appeal, that does not also include the feature of the decree that dismisses the bill, will be dismissed.

(Syllabus by the Court.)

Appeal from circuit court, De Soto county; Joseph B. Wall, Judge.

Bill by A. S. Burnham against J. B. Driggers. Decree for defendant, and complainant appeals. Dismissed.

Isaac H. Trabue and R. W. Williams, for appellant. H. J. Spence, for appellee.

PER CURIAM. A motion has been made to dismiss the appeal in this, a chancery case.

The certificate of the clerk to the transcript certifies that certain numbered pages of the transcript contained a correct transcript of the record of the judgment in the above-stated case, and a true and correct recital of such papers and proceedings in said cause, as appeared upon the record and files of his office that had been directed to be included in the transcript by the written demands of the parties.

The decree in the case dissolved an injunction that had previously been granted, and dismissed the bill, and the appeal, as appears from the recital before the court, was from the part of the decree dissolving the injunction, as it was construed in the case of *Stockton v. Harmon*, 32 Fla. 312, 13 South. 833.

The attempted appeal must be dismissed, both for the reasons that the certificate is defective, and that there can be no separate appeal from an order dissolving an injunction while there is a standing order dismissing the bill.

An order dismissing the appeal will be entered.

RUSH v. CONNOR.

(Supreme Court of Florida. Feb. 13, 1902.)

APPELLATE PRACTICE—LACHES IN FILING TRANSCRIPT—DISMISSAL.

1. When the plaintiff in error fails to file the transcript of record within the term of the appellate court to which his writ of error is made returnable, and it appears that such failure is attributable to the laches of the plaintiff in error, the writ of error will be dismissed at the cost of plaintiff in error.

(Syllabus by the Court.)

Error to circuit court, Volusia county; John D. Broome, Judge.

Action between Charles W. Rush, executor of John L. Rush, and W. E. Connor. From the judgment, Rush brings error. Dismissed.

A. W. Cockrell & Son, for the motion. Isaac A. Stewart (Egford Bly, on the brief) and J. B. Whitfield, opposed.

PER CURIAM. The writ of error in this cause was issued on May 12, 1897, returnable to the 19th day of June following, a day within the June term, 1897, of this court. The transcript of record therein was not filed until the 11th day of January, 1898, after the close of said June term, 1897. The defendant in error moved on January 24, 1898, to dismiss the writ of error, on the ground, among others, that the transcript of the record was not filed on the return day of the writ of error, nor within the term of this court to which such writ was made returnable. The court is satisfied that no laches is attributable to the plaintiff in error or his counsel for failure to make up and file such

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 296.

transcript prior to and up to the 30th day of October, 1897, on which day the bills of exceptions in the case were, without laches of the plaintiff in error, settled and signed by the circuit judge; but it appears that the written directions to the clerk for making up the transcript required him to commence making up such transcript on the 22d day of November, 1897, and no sufficient showing has been made as to why the said transcript, containing but 58 pages of typewritten matter, was not, and could not have been, perfected and filed during the 49 days that remained of the said June term, 1897, of this court subsequent to the said 22d day of November, 1897; from which we conclude that laches is chargeable to the plaintiff in error for failure to file such transcript within the term of this court to which his writ of error was made returnable, and it is therefore ordered that the writ of error in said cause be, and the same is hereby, dismissed, at the cost of the plaintiff in error. *Grigaby v. Purcell*, 99 U. S. 506, 25 L. Ed. 354; *Fayolle v. Railroad Co.*, 124 U. S. 519, 8 Sup. Ct. 588, 31 L. Ed. 538.

CONSUMERS' ELECTRIC LIGHT & ST. R. CO. v. PRYOR.

(Supreme Court of Florida. Feb. 18, 1902.)

NEGLECTANCE—PLEADING—STREET RAILROADS—ORDINARY CARE—RIGHT OF WAY—PEDESTRIANS—QUESTION FOR JURY.

1. In actions where negligence is the basis of recovery, it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing injury, coupled with an averment that they were negligently done, will be sufficient.

2. Where the declaration is not drawn upon the theory of the rule stated in the preceding headnote, but undertakes to set forth the acts relied on as a cause of action, without stating they were negligently done, it must appear from the direct averments of the declaration that the acts causing the injury were per se the result of negligence, or negligence must appear from a statement of such facts as certainly raise the presumption that the injury was the result of the defendant's negligence.

3. The act of 1891 (chapter 4071) applies to street railroads, but it does not change the rule of pleading negligence to the extent of permitting only an allegation of injury or damage by the running locomotives, cars, or other machinery of a defendant company. The statute does not fix arbitrarily liability for an injury done, but under it there is a presumption of negligence arising from injury.

4. The measure of duty under the act of 1891 is all ordinary and reasonable care and diligence, and what will constitute the amount or kind of diligence required will vary under different circumstances, as the terms "ordinary" and "reasonable" are relative, and what under some conditions would be ordinary and reasonable diligence might under other conditions amount to even gross negligence.

5. Street cars, regardless of the power by which they are impelled, have no superior rights to other vehicles or pedestrians at regular street crossings, in the absence of a specific legislative grant, but their rights are equal and in common, and impose correlative duties on the respective parties.

6. The employees of a street car company in operating cars have the right to presume that a pedestrian will exercise ordinary and reasonable care and avoid injury from moving cars, and they are not required to stop a car until it becomes evident to a person of ordinary and reasonable care and prudence that the pedestrian has failed in his duty, and has placed or is about to place himself in a perilous situation. The duty, however, devolves upon the employees to keep a vigilant lookout for persons on or approaching the track, especially at street crossings, and, when they are discovered to be in danger or going into danger on the track, to use every effort consistent with the safety of passengers to avoid injuring such persons.

7. Additional pleas amounting only to the general issue may properly be stricken out on motion.

8. In an action against a street car company for damages for alleged injury caused in the running of a car, an instruction to the jury is properly refused that seeks to limit the duty of the company's employees to avoid the injury to the time when they became aware of plaintiff's danger, without reference to whether they had observed all ordinary and reasonable care before that time to discover the dangerous situation of plaintiff.

9. When the question of negligence arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be certain and uncontrovertible, or they cannot be decided by the court.

Taylor, O. J., dissents from the conclusion reached, on the ground of insufficiency of the testimony to support the verdict.

(Syllabus by the Court.)

Error to circuit court, Hillsborough county; Barron Phillips, Judge.

Action by Mary E. Pryor against the Consumers' Electric Light & Street Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Defendant in error sued plaintiff in error, and obtained a judgment for \$775 and costs, to which a writ of error was sued out.

The amended declaration upon which the case was tried alleged as follows: "That the defendant on the 5th of March, 1896, in the city of Tampa, county and state aforesaid (said city being then and there a densely populated city), was the owner of and using and operating a certain electric street railroad, then running upon a certain public highway there, to wit, Florida avenue, at a certain place in the said public highway, to wit, at the crossing of said Florida avenue by Zack street, and, so being the owner of and using and operating the said railroad as aforesaid, the defendant then and there drove a certain street car along and upon the said street railroad on said Florida avenue up to, upon, and at the crossing of the same by Zack street; and it was the duty of the said defendant to so run and operate its said street railroad as not to endanger persons or vehicles traveling upon or crossing any of the streets of said city upon which said street railroad was operated, and, when necessary for the protection of persons and vehicles traveling upon or crossing any of said streets, to stop its

cars. That the plaintiff, to wit, on the date aforesaid, with divers numerous persons (the same constituting a large crowd, who had just come out of the Presbyterian Church, situated near the intersection of Florida avenue and Zack street aforesaid), was crossing Florida avenue and the track of the said defendant's street railroad, laid thereon at a regular crossing thereof (the said plaintiff being accompanied by numerous other persons as aforesaid), while one of the defendant's cars was approaching said crossing on said Florida avenue; and it was then and there the duty of the conductor and motorman running said car to so run and operate the same as to enable the plaintiff and the other persons who were with her to safely cross said track; the said conductor and motorman of said car being at such a point on said Florida avenue that they could see the crowd which was crossing the track at least two hundred feet from said crossing; but therein the defendant wholly failed and made default, by not stopping said car before reaching said crossing (to enable the plaintiff, together with the crowd of people accompanying her, to cross said track in safety), by means and in consequence of which default and neglect of the defendant aforesaid (by reason of the action of its said employees) the said street car then and there ran and struck with great force and violence upon and against the plaintiff, who was then and there, with all due care and diligence, crossing the track of the said defendant's street railroad at the said regular crossing at the intersection of Florida avenue and Zack street as aforesaid, and thereby the plaintiff was then and there greatly bruised, hurt, and wounded," etc.; further alleging injury and damage for which suit was brought.

A demurrer to the declaration was overruled, and defendant filed four pleas, as follows: (1) The general issue. (2) That the injury complained of was nothing but an unavoidable accident, for which defendant was in no wise responsible. (3) That the injury complained of was caused entirely by the fault, negligence, and carelessness of plaintiff, and by no carelessness, negligence, or fault on the part of defendant. (4) That on the 5th day of March, 1896, defendant had car No. 10, with proper appliances, and operated by a motorman well skilled in operating electric cars, running from Ybor City into the city of Tampa; that immediately before crossing Zack street, at the crossing of that street and Florida avenue in the city of Tampa, the motorman on said car noticed several persons crossing the street; that immediately he began ringing the gong and to slacken the speed of the car until every one had apparently crossed the track, or stopped for the car to pass; that, when the car had run to within about 10 or 20 feet of the south crossing of Zack street on Florida avenue, the plaintiff started to go across the track immediately in front of the car; that, the moment the motor-

man saw this (he keeping a lookout in the meantime), he applied the brakes and reversed the car, but it was too late, and, though the motorman did everything that could be done to stop the car, it struck plaintiff, and thereby injured her; that the injury was caused entirely by the carelessness, negligence, and fault of plaintiff, and was not done by the fault, negligence, or carelessness of defendant. Issue was joined upon the first plea, and the others were stricken out on motion of plaintiff.

The testimony bearing upon the negligence or liability of defendant is in substance as follows: Plaintiff testified that she was 55 years old, and not in very good health, at the time of the injury. On the day she was injured she came out of church, holstered her umbrella, walked to the sidewalk, heard the car, looked up, and saw the car coming just as she was going to cross the track. The car was then opposite Mr. Krause's residence, and it paralyzed her so she could not move. She said, "You are not going to run over me," as the car struck her. She threw up her hands, and her dress caught on the steps, and she tried to move her foot, but the wheel ran over her toes. The car reversed, but did not strike her coming back. That when she first looked up and saw the car, it was 40 or 50 feet away. The accident occurred at the corner of Zack street and Florida avenue about 12 o'clock on the 5th of March, 1896, in the city of Tampa. There were about 50 persons coming out of the church. Some had crossed, and some had not, and she thought there were some others crossing when she was. She thought she could have gotten over the track if she had not been paralyzed with fear. She had crossed the track at other times when the car was nearer. That she was not in the habit of taking doubtful chances then, her health not being very good, but she had often taken doubtful chances before that time in crossing before cars; that she could have gotten across the track that time if she had not become paralyzed, and she was a little nervous that morning and gave out. She did not hear them tell her not to cross. Her umbrella was up the way the car was, so she could not see it coming, but looked up when she heard the electric current. Her umbrella was raised and pointing the way the car was coming, and when she raised it up she was right on the track. When she saw she could not stop, she wanted the car to stop, and at that time she was on the track, in the act of crossing it, but she could not say whether she really stepped on the track. She thought the steps struck her. That she blamed the motorman, although she might have said it was her fault; that she remembered seeing the car, but did not realize the danger and did not hear the gong; that she never saw the car until she got to where she was struck, and that she might have moved back when she saw it. She heard the car before she saw it, and when she was crossing

the street to cross the track she never looked up or down to see whether the car was coming, and when she discovered the car she was in the act of stepping on the track. The car was to her right, and she had her book under one arm, and her umbrella down. She had faulty hearing and had to use her eyes, but she heard the electric current, and looked in the direction the car was coming, and said, "Oh, there is the car!" She was not feeling well, was walking slowly, and had her umbrella down to protect her eyes. That when she heard the sound and saw the car coming she changed the umbrella into her left hand and threw up her hand; that she was subject to nervous spells.

W. M. Poage testified for plaintiff that he was in the church at the corner where the accident happened, but did not see it. The services had closed, and most of the people had gone out, and there were not less than one hundred persons, nor more than one hundred and fifty, there. It was a place where people congregate on Sunday, but this was on Thursday, and there was an evangelistic service. He had heard that the city had a population of from twenty to twenty-five thousand, and he supposed it might be called the central portion of the city.

A Mr. Wells testified for plaintiff that he was standing at the foot of the door steps of the church, and saw the accident to plaintiff. A large part of the congregation had come out, and there may have been 50 people outside. That he saw Mrs. Pryor when she started to cross the street, and the car then must have been half the distance of the street—30 or 40 feet—away; that Mrs. Pryor passed him as he was standing at the door; that he saw her pass and go towards the car and the track crossing, and that as she passed him he then looked and saw the car coming; that when he first saw the car it was just entering the street on the other side; that he watched her walk and go on; when on the track, the car struck her; that the car ran past, came to a stop, and started back, but was stopped; that it did not run over her going back; that some men took hold of the car to stop it going back; that he did not notice Mrs. Pryor do anything after she got on the track; that he could not tell about the slackening of the speed; that it happened on Zack street,—a regular street crossing; that Mrs. Pryor had just preceded him as the car came into Zack street, but he was on the church steps, the car coming this way, she going towards it; that she had an umbrella in her hand, and went along paying no attention to anything; that there was not any one else crossing the track then; that he did not hear any one yell, but just as she reached the track the car struck her, but she was walking along paying no attention to anything, and could not see, for her umbrella; that he could not say whether she stopped before the car struck her. If it was so, it was

only momentarily; that the car was not coming as slow as in some parts of the city; did not remember whether the car was open or closed car; that she fell lengthwise, and the car did not pass her far, if it passed her at all; that he did not see her motion to the motorman to stop the car; that, as far as he knew, she never noticed the car at all; that some people had crossed the track, and some had not; that he did not know who was on the track at the time she started to cross, and that the car was about midway of the street when she was approaching the track; that, when he said "approached the track," he meant from the street; that she never looked towards the car or motioned for the motorman to stop; that the moment she got on the track the car threw her; that he was looking right at her, and did not see her make a motion to the motorman.

Mary E. Taylor testified for plaintiff that she knew the plaintiff about 8 or 10 years; that she had not been in good health for several years; that she did not see the accident, but was at the church; that she supposed there were about 150 people present that day; that church services were over, and most had left, but a few were in the church, when the accident happened; that she was in the church when the plaintiff was brought in.

J. Q. Brantley testified for the plaintiff that he knew the plaintiff and was present at the accident; that the congregation was dispersing, and the car was on this side of the street, coming in the usual way; that he had time to cross and did cross; that the people were crossing at that time and fixing to cross; that the car attracted his attention, and he did not get across much too soon; that he turned around and saw Mrs. Pryor; that the car seemed to pass her some little space before she fell, and the car ran over her; that he went over to assist in taking care of her; that the car seemed far enough back for the motorman to stop the car, and it seemed to him he had time to check the car, but that if Mrs. Pryor had been noticing closely, or if she had been so she could hear well, she could have escaped being run over; that he states that upon the assumption that she was able to get away quickly; that he did not notice or recognize Mrs. Pryor till after the car had run over her, but had passed her between the churchyard and car track; that the car was close enough then to attract his attention, as it caused him to look around; "that there was time, from Mrs. Pryor's position from where I saw her before she crossed,—that there was time for a person in her physical health and mind to have crossed"; that he thinks Mr. Durham passed the same time he did; that he could not say whether any considerable number of people had crossed before he did; that some had crossed and some had not; that there was a regu-

lar street crossing at the corner of the church where the street car track passes; that the congregation was usually very good, but the church services were over and the congregation dispersing; that when he passed Mrs. Pryor she was between the Presbyterian Church and the street car track; that the crossing is on Florida avenue, the Presbyterian Church on this side, and Mr. Krause's house on the opposite side; that he did not know whether it was midway, or not, between the Presbyterian Church and street car track that he passed Mrs. Pryor; that he was with Mr. Durham, walking a little rapidly, when he saw the car coming; that others crossed in front of him; that Mrs. Pryor was walking when he passed her,—walking with her head down; that when he looked back the car struck her, but he did not look back specially for her; that he did not mean to say that there was sufficient time after Mrs. Pryor got on the track for the motorman to have stopped the car,—not after she got on the track,—“but that there was sufficient time for her to pass when I passed her, if she had walked as I did, but, if I had been as weak and feeble as Mrs. Pryor, I would not have attempted to cross the track, because Mrs. Pryor is not as active as I am”; that a reasonable and prudent man would not have attempted to cross unless he thought he could get across safely; that he started to stop himself; that the fact of it was, he did not know whether the motorman attempted to stop the car, because, when he got across and looked around, the car was striking Mrs. Pryor; that he did not think he had got quite over to the other side of the street when he turned around, but that he did look around somewhere between the track and the sidewalk; that it seemed to him Mrs. Pryor was just entering the track on that side of the car as it struck her; that he did not hear her say anything after it occurred, unless some expression of grief; that he was attending church that day, and was well acquainted with her, belonging to the same church, but she did not do business with him; “that you could see two or three blocks up the street car track”; that when he first saw her (that is, when he was coming out of the church door) he thought the car was just about entering the street,—the northern edge.

C. E. Parcell testified for the plaintiff that he was a contractor, architect, and civil engineer; that he had worked for the Consumers' Company as superintendent of construction; that he knew the plaintiff, and was present at the accident; that he was on the car coming from Ybor City, talking with James Roberts, the plumber; that after he crossed the South Florida Railroad track he noticed a number of people coming out of the Presbyterian Church; that Mr. Roberts got up to get out on the north sidewalk; that after that he kept his eye on the people, and, in crossing the south sidewalk, felt a

slight jolt of the car in passing; that as they passed he saw some person lying on the ground, on the left-hand side of the street coming this way; that some one remarked they had run over some one, and the reverse current was then on the car; that he hallooed to the motorman to stop the car, the car being reversed; the rear step was opposite the person lying on the ground; that he stepped out over the person, and asked them to move the car ahead so they could pick her up; that they carried her in the church; that it was a Consumers' car, and the motormen were employed by the company; that he saw people on the right-hand side of the car and on the side towards the church; that he did not notice the decrease in the speed of the car; that he did not feel it till the reverse current was put on, and thought he would have felt the brakes; that he did not notice this particular person till after she was struck, and could not tell the particular place on the track till afterwards; that the first thing he noticed was the jolt of the car, like striking a piece of wood; that the car went about a half length after striking her,—probably 18 feet before it started to go back, or 15 feet,—but that he did not mean the current was put on after they passed the woman; that Wuerpel was superintendent of the company at the time he was superintendent of construction; that he did not intend to enter into an explanation of electricity, in explaining the difference between a car reversing and the reverse current, because he knew nothing about it; that when he spoke of the “reverse current” he meant the car started back; “that when the motorman turns the reverse lever it throws the reverse lever to the dynamo, or whatever you call it, and the car will turn back immediately, but that, if a car is going this way, for a car to immediately turn back, instead of going almost the length of the car before it turns back, depends largely on the speed it is going before it turns back,” and that he was not paying attention to the speed of the car; that after the reverse current was put on he did not think the car would go over five or six feet, but that it would take five or six seconds to put the reverse current on; that he did not think the car was going much faster than a person could walk; that he was talking with Mr. Roberts previous to getting to Zack street; that it was a closed car, and he knew nothing at all about the accident till after the jolt; that he knew nothing about the accident; that he did not see the motorman at the time of the accident; that he did not see whether he put on his brakes or not, nor reverse current, because he did not see the motorman, and did not even remember whether the gong was ringing; that he was talking to Mr. Roberts; that he did not see the person on the track, and did not know it was a person it run over; that the distance from the South Florida Railroad to the Presbyterian Church was 210 feet, “and you could see the

people from there"; that the accident occurred on the south side of Zack street.

Charles Bizzontz testified for the defendant that he worked in the Western Union office as a messenger; that he knew Mrs. Pryor when he saw her; that he was on car No. 10 and saw the accident on the 5th of March, 1896; that the church was on the left-hand side, and he was standing on the front platform; that she was coming across the track, and she was not more than 8 or 10 feet from the car; that all the rest of the people stayed still and hallooed to her not to go across, but she kept right on, with her umbrella over her head, and he could not see her face; that the bell kept on ringing from the South Florida Railroad till it got there, and she did not pay any attention to it; that the motorman reversed his car,—hurt his little finger in doing so,—and the step caught her dress; that the motorman commenced ringing that gong at the South Florida Railroad crossing, and kept on till he got to the church, just as hard as he could ring it,—ringing the bell the whole of the square; that he saw the people coming out of the church, and heard them tell her not to cross, but she did not pay any attention to the people; she did not look at the car, and had her umbrella up; that the umbrella was pointing towards the car; that she was coming this way towards the track; that she did not stop till she kind of stepped back and the car struck her; just as she started to go across she stepped back, and the car struck her; that he was standing on the front platform; that the car was going three or four miles an hour, or just about a walk; just as soon as the motorman saw she was going to get on the track he put on his brakes as hard as he could and reversed his car; that when he started to put on his brakes he was about 15 feet away; that Mrs. Pryor was just stepping on the track when the car was about 15 feet off, and just as the motorman put on the brakes and reversed his car she stepped back, but all the rest of the people stayed right back on the sidewalk, except her; "some men went across, but I don't know who it was," but he was over by Roberts' building when the car struck Mrs. Pryor; that the car was further down when he crossed; that he saw Mrs. Pryor coming away from the church, and saw the whole transaction from beginning to end; that after the accident she would first say it was her own fault, and then the motorman's; that the car was stopped as quick as it could be stopped; that no motorman could have stopped it any quicker; that he commenced ringing his bell when he was up by the South Florida crossing, and kept ringing it all up Florida avenue, and that Mrs. Pryor never looked at the car once; that he is 13 years old, and has worked for the Western Union about 3 years; that he never worked for this or any other street car company; that he did not know about street cars, and, when the motorman put on his brakes and current, it sent him over against the dash-

board; that Mr. Krause's residence is the other side of the street, "and there I first saw Mrs. Pryor; she was looking at some kind of a book,—looked to me like a Bible"; that the people were coming out of the church, and all of them says, "Look out! there comes the car," but she just kept on looking at the book, with the umbrella over her face; that she was coming from the church when he first noticed her; "when I first saw her the car was on the other side of the street from where the church is now"; the book in her hand was open, and he thought it was a Bible, but could only see a little of it; that she had the book in this hand, and the umbrella was sort of pointing with the west, and all the people on the church steps was hallooing to her to look out, the car was coming; that there was a good many people in the crowd hallooing to her; that he only noticed one man across the street; that he was coming from Ybor, and had just delivered a telegram to Manrara's Factory; that the motorman turned his brake and reversed his car just as fast as he could when he was about 15 feet away; that he was "about as far as from here to her when the motorman commenced to turn on his brake"; that he pulled the levers back, reversed his car, and had the brakes on as tight as he could; that the car did not run over her till it knocked her down; that the wheels passed over her, and the car commenced to run back as soon as it stopped; that there must have been some sand on the track, and the wheels kind of slid first, without turning; that she said it was her fault, and then the fault of the motorman, three or four times, and wanted somebody to tell her son, and he went to get him; that she did not complain any, but just talked about whose fault it was; that Mrs. Pryor walked slowly, taking her time, and he could see the white pages of the book, and that she seemed to be reading it; that he did not hear the motorman say anything, but he put on all the brake he could; that he did not use to pay anything for riding on the cars, but does now; that the Western Union buy the tickets and sell them to the boys; that the post referred to is the post that holds the trolley wire.

Julia Norris testified for the defendant that her name was Julia Norris, living in Tampa, at the corner of Elghth and Central avenues; had lived there about two months, but was born here and lived all her life here; that she was on the upstairs porch at the Krause residence at Zack street and Florida avenue; knew Mrs. Pryor, and saw the accident on the 5th of March, 1896, and saw the people coming out of the church; that the ringing of the bell of the street car attracted her attention; that when she first saw Mrs. Pryor she was within a few feet of the street car track,—about five or six feet,—and the car was about the middle of the street; that the next thing she saw was when the car had passed over her, because she did not happen to be looking at the car

at the time it struck her; that, the car being between them, she could see the motorman, but the car was reversed so quickly that she thought the car had run over Mrs. Pryor again; that they carried her into the church; that a gentleman at the corner of Mr. Roberts' store motioned to her not to go on the track, but she did not pay any attention to it, and kept right on coming into the track; that witness heard the bell of the car ringing even before she saw the car, and saw the car stop so quickly that she thought it was going to run over Mrs. Pryor again; that the car was going slowly, and one gentleman had got over by the corner store; that she did not see her as she stepped on the track; "the car was in the middle of the street, and a man motioning for her to stop before she got to the track, but I was at Mr. Krause's, the opposite side of the street, and couldn't say who the gentleman was, but he motioned to her, and she was coming towards the track;" witness was first looking at Mrs. Pryor when this man motioned when she was about five or six feet from the track, walking towards it; that Mrs. Pryor was on the south side of Zack street, and that the car had slowed up for some gentleman to get off just before it got to where she was; that he got off while the car was in motion on the west side; that Mrs. Pryor was looking straight ahead, with an umbrella in her hand.

Rosa L. Krause testified for the defendant that her name was Rosa L. Krause, living at the corner of Zack street and Florida avenue since she was born; that she was also in the piazza and saw the accident to Mrs. Pryor on the 5th day of March, 1896; that when witness first saw Mrs. Pryor she was walking towards the street car, but does not know which way she was looking, and the car was only 10 feet away from her (from Mrs. Pryor) when witness first saw it; that the bell distinctly rung; a man motioned to Mrs. Pryor, but she stepped on the track, tried to step back too late, and the next thing she was laying on the ground, and they picked her up and carried her into the church; that witness was on this side, so when the car and she came together she could not see her; that Mrs. Pryor stepped one step across the rail; the gong was ringing, and she was the only one coming across there; that Mrs. Pryor made no effort to stop and wait for the car to pass until she got on the track itself; that she does not remember how fast the car was coming, but there was a gentleman to get off at the corner, and the car was slackening up, and saw the gentleman get off,—Mr. Roberts; "that he got off on the sidewalk next to his store, but don't remember whether he got off the back or front end"; that Mrs. Norris was with her on the upper piazza on the northwest corner of Zack street and Florida avenue; when she first saw her, the car was very near Mrs. Pryor, and she had just put

one foot across the first rail; "the gentleman on the other side of the track motioned to her, but don't know who he was"; that she knew J. Q. Brantley and L. E. Durham, but did not see them; that Mrs. Pryor kind of hesitated when she crossed the first rail, but stepped back too late; that she stepped right back; that she did not see the motorman, because he was in front of the car; that the car started back, but did not run over Mrs. Pryor again, and did not hear anything said before the car struck her.

James W. Roberts testified for the defendant that he knew Mrs. Pryor when he saw her, and was present at the accident to her on the 5th of March, 1896; that he was coming from Ybor City to his store, on the corner of Zack street and Florida avenue; that he was on the car, and walked to the back steps to get off; that he usually motioned to the conductor to slow down, but the car was going unusually slow, and he did not motion this time; that he saw a lady by the crossing as he was going to jump off, and he jumped off on this side, and Mrs. Pryor was under the edge of the car, and the car went about two feet from the crossing, and started back; that he thinks the car was reversed; that he got off without any trouble at all, and was probably talking to Parcell coming down; that Parcell did not get off when he did; that when he first saw Mrs. Pryor she was on the ground, after she was struck; that he, with some others, put their shoulders there to keep the car from running back after it was reversed, but the car did not run over her coming back; that he remembers jumping off on the sidewalk; that the car was running very slowly; that he often got off the car without them stopping it; that the car was running about an ordinary man's walk; that he thought he saw two people who had crossed; one was Mr. Brantley; that the car had run the whole length of the block slow, and did not take the usual speed; that witness noticed that, and that is the reason he did not notify the conductor.

Harry Hawse testified for the defendant that he was present at the accident on the closed car about a year ago; that he was standing in front with the motorman, with his feet on the dashboard; that when they got to the railroad crossing all the people were coming out of the church, and the motorman was going slow and ringing his bell; that when the motorman got along there all the people stopped, and the track was clear, and when very near this Mrs. Pryor started to cross, and immediately he saw she was going to cross he reversed his car and put the brakes on, but he could not stop it in time, and it caught her dress and knocked her down, "and, the last I saw, I think it run over her foot"; that as soon as this occurred he went on to the Consumers office; that he was standing on the front steps, with side next to the church, on the car,—on the side Mrs. Pryor was

struck; that no one was on the track, and the track was clear, and as soon as Mrs. Pryor started to go on the track the motorman reversed the current; that he reversed his car when she had first stepped over the rail; that he knocked all the skin off his hand in reversing it, and had it reversed so that it started back; that the motorman started to stop that car as soon as she got on the track; that when she had just stepped on the track somebody hallooed to her; that she was looking up towards Franklin street as she was coming towards the track, and not looking towards the car, because she had an umbrella over her, and was looking straight ahead; that she had just stepped over the rail when the car got to her; just as the car got there; just instantaneous; that he did not hear her say anything to the motorman, and was looking right at her; that she just came towards the car, and paid no attention to it; that he was 14 years old, and working for T. M. Bush & Co., at that time; that Mr. Paramore asked him to go to the Consumers office and report; that when he first saw Mrs. Pryor she was coming down the steps, but the balance of the people were just standing there, "and the car was about as far as from here over yonder" (witness pointing to object); that "you could see down the street," and when he first noticed the people the car was at the South Florida crossing, Polk street, one block away; that when Mrs. Pryor first got to the railroad track the car was about 10 or 12 feet away; that the car was running about as fast as an ordinary person walks, or a little faster; that he supposed the church steps from the railroad track were about as far as from him to a post in the courtroom (pointing out object); that there was nothing special to attract his attention to this lady, but when he first saw her she was coming down the church steps; that the motorman had the usual brake on his car, and put it on, and the reverse lever; that he pulls the lever with one hand, and turns the brake with the other; that the car ran about as far as from him to a table in the courtroom (which witness pointed out) after he put on his reverse lever; that the two front wheels ran over her, but the car did not go beyond her; that he got right off; did not go into the church; heard them halloo to her, but did not hear her say anything; that he was holding on tight, so he was not thrown off by the jerk when the motorman stopped his car; that when the motorman put on his brake and tried to stop his car he was only a few feet from her, when she had just stepped on the track in front of the car; that by the time he reversed his car he was on her; that she had an umbrella in her hand, and nothing else that he noticed.

J. A. Williams testified for the defendant that he was transfer agent for the Consumers' Company, but a motorman by occupation; that he had been in the employ of the Consumers' Company about three years; that he judged that was Mrs. Pryor sitting there, and

that he was present at the accident which occurred on the 5th of March, 1896; that he was on the car coming to dinner as a passenger, and noticed the people coming out of the church from the South Florida Railroad crossing till they got there; that they had crossed the track, except her and a few others, but that when the car got to within 15 feet of her she started to cross, and some lady on the other side motioned her to stop, but she had an umbrella in her hand and did not see them; and when the car was within 15 feet of her she stepped right in the middle of the track, and the car struck her; that he and Parcell were the first to get to her; that the motorman put on his brake and reversed his car, but one wheel went over her; that she was not looking at the car as it was coming down the track, or paying any attention to it, and had an umbrella over her, and that she stated in his presence that "if it hadn't been for the umbrella it would not have happened"; that he heard her say that if it had not been for the umbrella she would have seen it; that the car was going very slow, and the bell ringing, so that it attracted his attention; that Paramore was the motorman; that she deliberately stepped right in the middle of the track about 15 feet in front of the car; that the motorman immediately put on his brake and reversed the car; that he could not have acted any quicker than he did, and that the accident could not have been avoided, and that the car was stopped as quick as it could be, and that everything was done that could be done to stop the car; that it is quicker to stop a car to put on the reverse current, as the motorman did, than the brake; that it does not take long to reverse the car; "you having the controller and the handle, you put the current on;" that the reverse current is controlled by a lever; that "you simply reverse that lever, and that quick (snapping his fingers) it is done"; that the car was stopped suddenly; that he had been a motorman, was not now, and had been a motorman about two years and a half; that the car was midway of the street (and he did not know exactly how wide the streets were) when she was coming across the street, but when she stepped on the track the car was only 15 feet from her, or 14, and he reversed his car; after a motorman gets his car reversed, it can stop in 20 feet; if he could get it reversed sooner, it would stop sooner; that you stop the car by turning the lever from one side to the other once; move the lever with one hand, and brakes with the other, in five seconds; that both levers on one side have to be used with same hand, brake with the other; that you turn the reverse lever and the controller, and that constitutes a reverse; that it would take him about a quarter of a minute to do that, and then, after he gets it reversed, going that slow, it ought to stop within (after he gets it reversed) about six feet; that quite a lot of people were still inside of the church when they carried the lady

in; that when he first noticed this lady she stopped and turned back and spoke to some one, but had an umbrella over her, and wheeled right around and started across that track, and that the car was so that she could have got across then; that she seemed like she was frightened, but the persons on the other side of the street were motioning to her and hallooing to her; that she kind of turned back, and the car struck her; that he was inside the car, with 8 or 10 people; that there was a motorman and conductor, and the conductor's name was Jones; that when that woman started to cross that track the car was about 14 feet from her; that when the car was about halfway the persons hallooed to her to look out, but that she deliberately started to cross, and the motorman immediately reversed his car, and that he had never seen a car stopped so quickly as that car was stopped; that he thinks there is a sidewalk on the other side of Zack street; that when Mrs. Pryor started to cross that track the car was not more than 14 feet from her; that he did not mean to say that the car was midway between the sidewalks, but that it had crossed over the road crossing; that if she had been attentive she could have got over, because she had only to take a step; that the rear of the car was about the middle of the street, and the rear of the car might have been 40 feet from Mrs. Pryor; that he did not know what the length of the car was, but if Mrs. Pryor had not stopped she could have got over; that it was reasonable to suppose she was going to cross the track when she started; that she said if it had not been for the umbrella she would have seen the car; that he did not see her foot at all, but came right down to the office and reported, and looked for a doctor.

E. W. Paramore testified for the defendant that he lived in Tampa, and worked in the fire department; that he had been a motorman two years and a half,—eight months in Texas, and about a year and a half with the Consumers' Company, prior to the accident to Mrs. Pryor on the 5th of March, 1896; that as he got to the Polk street crossing, one block away, he noticed several people coming out of the Presbyterian Church, and began ringing his bell and slowed up the car; that when he was within 10 or 12 feet of the crossing a lady stepped out and stepped right on the track, and he immediately applied his brakes and reversed the car; that she stopped on the track about 10 or 12 feet from the car; that he saw her coming up, and thought she would cross over; that when she stopped he immediately applied the brakes and reversed the car, and the car could not have been stopped any quicker than it was; that it would not have stopped any quicker unless it had been run against a log; that the brakes and current were in good condition, and the current was all right; that he applied the brakes and put on the reverse current, and the car

stopped instantly; that the side of the car towards the Presbyterian Church struck her; that by the time he got the car stopped they were picking her up; that he thought they were at about the back steps of the car, and that he had never before had an accident; that there were some people coming out of the church when he first saw this lady standing among them, but did not take particular notice of her; there may have been 40 or 50; that some were standing and talking, waiting for the car to pass, and some had crossed over; that some of them crossed the track a half block ahead of him; that when Mrs. Pryor first stepped on the track she was 10 or 12 feet away from him; that the car was not over in the center of Zack street, but only 10 or 12 feet away; that she seemed to see the car, and stopped right still; that the car was stopped as quick as possible; that he stated at the city hall afterwards that those brakes were in fair condition, and he reversed the car, also; that the car ought not to have stopped within 10 feet, but could be stopped in 20; of course, having reversed the car, it started back till the reverse current was shut off; that he did not run over her again; that the current was as good as it ever was; that the appliances and current were all right; that he left the street car company about the 1st of February, because he was laid off indefinitely, and went to the office and got his money; that he could not tell how many ladies were on the church side, and how many had crossed over; that the quickest way to stop a car is to reverse it, instead of putting on the brakes; that as a usual thing they do put on the brakes, but that "that car on that day, on that track, could not have been stopped any quicker by any application that you ever heard of"; that he hurt his hand by the reverse lever of the controller; the controller handle being on top, when he reached for the lever he struck his hand; that he put on the brakes and reverse current, and the wheels were in a backward motion, slipping on the track; that there was time for the lady to have crossed if she had not stopped; that the current turned the wheels backward when he stopped and reversed the car; that, if he had had the brakes on tight enough to have blocked the wheels, it would have prevented it stopping as quick as the wheels going the other way.

Other facts necessary to be referred to will appear in the opinion.

P. O. Knight, for plaintiff in error. Wall & Stevens, for defendant in error.

MABRY, J. (after stating the facts). This case was referred by the court to its commissioners, a majority of whom report in favor of affirming the judgment. A majority of the court is of that opinion. In view of the existence of a difference of opinion as to

the result both among members of the court and the commission, it is deemed advisable, contrary to the usual custom of the court in cases of affirmance, to file a written opinion.

One of the errors assigned and insisted on is that the court erred in overruling the demurrer to the amended declaration, exhibited by the abstract and shown by the statement. Several general propositions of law are stated as grounds of the demurrer that have no special application to the allegations of the declaration, and are out of place.

Counsel for plaintiff in error argues that the declaration is defective in its failure to sufficiently allege negligence on the part of the defendant company in causing the injury, and there are specific grounds of the demurrer that present the objection urged. The rule established by this court in actions where negligence is the basis of recovery is that it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing the injury, coupled with an averment that they were negligently and carelessly done, will be sufficient. *Walsh v. Railway Co.*, 34 Fla. 1, 15 South. 686; *Railway Co. v. Jones*, 34 Fla. 286, 15 South. 924; *Railway Co. v. Garrison*, 30 Fla. 557, 11 South. 929. The declaration in this case is not based upon the theory of this simple rule of pleading, but it proceeds to set forth certain acts which are relied on as constituting a cause of action, without alleging in terms that they were negligently done. After stating that the defendant company owned and operated a street railroad upon a certain highway or street in the city of Tampa, and drove a certain street car upon said highway up to and across another named street crossing, it is alleged that it was the duty of defendant to so run and operate its said street railroad as not to endanger persons or vehicles traveling upon or across any of the streets of the said city upon which said street railroad was operated, and, when necessary for the protection of persons and vehicles traveling upon or across any of said streets, to stop the same. Other facts are stated showing acts on the part of defendant resulting in injury to the plaintiff, caused by the running of a certain street car, which must be considered, though they are not in terms alleged, to have been negligently done. The mere allegation of a duty, without sufficient facts to support it, will not be sufficient. It must appear from the direct averments of the declaration that the acts of the defendant causing the injury were negligently done, or, as is attempted by the declaration before us, it must appear from a statement of such facts as certainly raise the presumption that the injury was the result of defendant's negligence. *Seymour v. Maddox*, 16 Q. B. 326; *Angus v. Lee*, 40 Ill. App. 304; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874. Do the facts alleged meet this requirement? The act of 1891 defining the liability of railroad

companies in certain cases (Rev. St. Append., p. 1008, c. 4071) has been regarded by this court, in unwritten opinions, as applicable to street railroads; but it has not been considered as changing the rule of alleging negligence in such cases to the extent of requiring only an allegation of injury or damage by the running of locomotives, cars, or other machinery of the defendant company. The statute does not undertake to fix arbitrarily liability for an injury done, but there is a presumption of negligence under it, arising from the injury or damage.

An act in 1887 made the killing of stock by a railroad company *prima facie* evidence of negligence, and it was said in *Railway Co. v. Garrison*, *supra*, that it operated upon the remedy, and did not change the basis of liability in such cases; that negligence was the basis of the action, and must still be alleged in the declaration. And in the case of *Wilkinson v. Railroad Co.*, 35 Fla. 82, 17 South. 71, which was an action for personal injury under chapter 3744, Acts 1887, it was held that negligence was the basis of the action, and that the statute did not relieve the plaintiff from alleging it. If the pleader, however, departs from the rule of stating sufficient acts, and alleging that they were negligently done, and undertakes to state facts that certainly show a duty unperformed, from which injury results, the rule of liability recognized by the statute in cases coming under it should be kept in mind in determining the sufficiency of the facts. The first section of the act provides that "a railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The second section contains the provision that, if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him. The words in this statute, "all ordinary and reasonable care and diligence," are relative terms. It was held in the case of *Morris v. Railroad Co.*, 43 Fla. —, 29 South. 541, that, under the provisions of the section quoted, what will constitute the amount or kind of diligence that will be required as "ordinary and reasonable" must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words are themselves relative terms, and what under some conditions would be ordinary and reasonable diligence might under other conditions amount to even gross negligence.

The doctrine, based upon principle and the great weight of authority, is that street cars,

regardless of the power by which they are impelled, have no superior rights to other vehicles or pedestrians at regular street crossings, but their respective rights are simply equal. In the absence of a specific grant to that effect, it must not be presumed that the state has given a street railroad company any exclusive right to a highway. The use of rails and cars in a street is considered only as a more convenient way of using the street, without imposing any new burdens upon it. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 South. 590. Pedestrians must cross at street crossings, or cease to walk the streets, and they have the right to the ordinary use of the same; and likewise an authorized street car company must use the street in order to carry passengers, and it has the right to propel cars over its tracks in the street. The rights of both are equal and in common, and impose certain correlative duties which must be observed by each party. All ordinary and reasonable care is the measure of duty imposed, and it means care proportionate to the danger to be avoided. It will vary, of course, according to the circumstances and the exigencies of the situation, in view of the relationship of the parties, as held in *Morris v. Railroad Co.*, supra, and must be such as may reasonably be expected of persons of ordinary prudence under like circumstances. A railroad company having the right to operate its tracks cannot, from the nature of its construction, deviate therefrom as persons can; and hence it is the duty of a pedestrian in approaching the track to use ordinary and reasonable care to ascertain the approach of cars and to avoid injury therefrom. The employees of the company in control of a car have the right to presume that a pedestrian will exercise such care, and are not required to stop the car until it becomes evident to a person of ordinary and reasonable care and prudence that the pedestrian has failed in his duty, and has placed or is about to place himself in a perilous situation. The duty, however, devolves upon the company's employees to keep a vigilant lookout for persons on or approaching the track, especially at street crossings, and, when they are discovered to be in danger or going into danger on the track, to use every effort consistent with the safety of passengers to avoid injuring such persons. 2 *Shear. & R. Neg.* (5th Ed.) § 485a; *Booth, St. Rys.* § 304; *Bunyan v. Railway Co.*, 127 Mo. 12, 29 S. W. 842.

In addition to the allegations of the declaration stated above, it is further averred that the plaintiff, with numerous persons, constituting a large crowd that had just come out of the church situated near the intersection of Florida avenue and Zack street, was crossing said avenue and the track of defendant's railroad at a regular crossing thereof while one of defendant's cars was

approaching said crossing, and that the conductor and motorman of the car were at such a point on said avenue that they could see the crowd crossing the track at least 200 feet from said crossing. This is sufficient to show that the employees of the defendant could have seen, and therefore it was their duty to see, plaintiff and the crowd of people in a situation of danger, by approaching and going across the track in front of the car at a regular street crossing, and it then became the duty of the employees to use every effort consistent with the safety of passengers to avoid injuring plaintiff or the crowd of people. Conceding that the car could have approached the crossing under the assumption that plaintiff and the crowd would leave the track, still the presence of human beings thereon, and the apparent situation of danger to them, imposed upon the agents of the company the duty to so approach the crowd as to avoid injury, if possible,—even to the stopping of the car if necessary. The company has no right, of course, to run into a crowd of people, though they disregard their duty and do not leave the track.

It is alleged that at the time plaintiff was struck by the car she was crossing the track at a regular street crossing with all due care and diligence, and this is inconsistent with the view that the agents of defendant were at the time exercising a like care and diligence in running the car against her. The distance at which plaintiff and the crowd could have been seen on the track excludes the idea that the employees could not have avoided a collision by the exercise of ordinary and reasonable care and diligence, and they were under such duty in view of the alleged conditions and attending circumstances. The declaration clearly shows that defendant injured plaintiff by the act of running a car against her on a regular street crossing where she was passing with all due care and diligence, and it also shows, we think, fault on part of defendant, under the circumstances stated, in running the car against her.

It is alleged that, in consequence of the default and neglect of the employees of defendant in not stopping the car, it ran against and struck plaintiff. Under our system of pleading, special demurrers are abolished, and mere indefiniteness can only be reached by motion. We are inclined to hold that in substance the declaration alleges enough to show liability on part of defendant, and that the demurrer was rightfully overruled on the objection urged.

The grounds of the motion to strike out the second, third, and fourth pleas are not stated in the abstract, nor is there anything shown in the order of the court striking out the pleas to indicate the basis of the ruling. It is admitted in the brief of counsel that the ruling of the court may be regarded as

harmless so far as defendant is concerned, as its entire defense was permitted under the plea upon which issue was joined and the trial was had. We are of opinion that the pleas, so far as they attempt to set up a defense to the action, amounted to the general issue, and were properly stricken out on motion. *Little v. Bradley* (decided at this term) 31 South. 842. The fourth plea is an argumentative denial of liability on the part of defendant, and seeks to set up the same defense as the others.

The court gave several charges at the request of counsel for plaintiff, and some of them were excepted to in a motion for a new trial and have been assigned as error, but counsel has expressly abandoned these assignments in the argument here.

The court refused to give eight of the numerous requests to charge made by counsel for the defendant, and the refusals are properly assigned for error. The assignment on the refusal to give the first refused request is abandoned in the argument, and the second of the rejected requests was properly refused because it is erroneous. It is as follows: "The plaintiff cannot recover unless the motorman of the car, after becoming aware of the danger of plaintiff, by the exercise of reasonable care and prudence could have prevented the accident." This instruction seeks to limit the duty of defendant's employé to avoid the injury to the time when he became aware of plaintiff's danger, without reference to whether he had observed all ordinary and reasonable care before that time to discover the dangerous situation of plaintiff. It is not error to refuse a request that ignores the duty of the company's servant in that respect.

We have examined the other six requests refused, and find no error in their refusal on the abstracts submitted. Some of them contain statements of law that are not correct, and portions of some are fully covered by the charges given to the jury. The facts hypothesized as a basis for these charges are very meager, and amount to no more as a statement of facts than that when the street car was approaching the crossing the plaintiff was also going towards the track. Upon this showing it does not appear that the court erred in declining to give the requests, independent of other objections that might be urged against them.

The only other assignment of error to be considered is that the court erred in overruling the motion for a new trial on the ground that the verdict was not supported by the evidence. The statement gives that part of the testimony bearing on the liability of the company for the injury, and, after a careful examination of it, we are inclined to hold that the court did not err in overruling the motion. That the plaintiff was guilty of contributory negligence is shown by the evidence, but this alone does not debar her of a recovery, under

the statute, if the employé of the company were also at fault in proximately causing the injury. There was a presumption, under the statute, against the exercise of ordinary and reasonable care on the part of the company, in consequence of the damage, that had to be overcome. The testimony of some of the witnesses introduced by the defendant (notably, that of the motorman, Paramore, and the transfer agent, Williams) exonerated the company from any blame, but there was other testimony tending to show a failure to exercise ordinary and reasonable care on the part of the employé under the circumstances. That the employé saw, or could have seen by the exercise of ordinary care, for a distance of 200 feet in front of the car, a crowd of people coming out of the church, and crossing the car track at a regular street crossing, is sufficiently shown by the evidence. There is also evidence tending to show that, when the car was 40 or 50 feet away from the crossing, the plaintiff, who came out of the church and was in the crowd, could have been seen approaching the track without observing the car, with an umbrella between her and the car. One of the witnesses for the defendant, who was standing by the motorman, says that, while the bell kept ringing and people hallooed to plaintiff to stop, she paid no attention to it, but kept right on, with her umbrella over her head, between her and the car, and that she was looking at a book, with the umbrella over her face. This witness does say that plaintiff walked onto the track a short distance (10 or 15 feet) in front of the car, but there is other evidence tending to show that when plaintiff reached the track, with her umbrella over her, the car was 40 or 50 feet away. She says herself that when she got to the track, and then first saw the car, it was 40 or 50 feet away. Julia Norris says that when she first saw plaintiff she was about 5 or 6 feet of the car track, and the car was about the middle of the street. The exact width of the street is not given, though it is clearly inferable from other testimony that the middle of the street was 40 or 50 feet from the crossing. The motorman admits that the car might have been stopped in 20 feet, but he says the car was only 10 or 12 feet from plaintiff, and not in the middle of the street, when she stepped out on the track. There is a conflict in the evidence on this point. There is evidence to show that plaintiff had an umbrella over her head, and was warned of the approach of the car, of which she seemed to be oblivious at the time. This condition was observed by persons on the car, and it may be assumed that the motorman was aware of it. It was his duty to see it if he did not. It is clearly shown that he saw the crowd come out of the church, and it appears that there was crossing of the track up to the approach of the car. One witness says he did not get over any too quick. In view of the crowd in proximity to and on the

track, the motorman should have had the car under such control as to avoid the injury if it could have been done by the exercise of ordinary care. If the plaintiff was discovered, or could have been discovered by reasonable care, in a perilous situation, the employes should have avoided injuring her, if they could have done so. On this point we think there is room for difference of opinion among fair-minded men, and it was proper for the consideration of the jury. As said by Judge Cooley in *Railroad Co. v. Van Steinburg*, 17 Mich. 99: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." The same view is announced in *Boss v. Railroad Co.*, 15 R. I. 149, 1 Atl. 9, as well as in other cases. See, also, *Cooke v. Traction Co.*, 80 Md. 551, 31 Atl. 327, where it was held that, where the nature of the act relied on to show negligence contributing to the injury can only be determined by considering all the circumstances surrounding the transaction, it should be passed upon by the jury, and it is not for the court to determine its quality as matter of law.

Without further special comment on the evidence, we think it is of such a character as to render it beyond our province, after being approved by the trial judge, to declare it insufficient to sustain the verdict. The judgment must therefore be affirmed, and it is so ordered.

TAYLOR, C. J. (dissenting). I cannot agree to the conclusion reached by the majority of the court upon the sufficiency of the evidence to support the verdict found in this case. My view is that, in order to hold the street car company liable for the injuries sustained by the plaintiff below, it was necessary that the railway company should have been guilty of some negligence that was the proximate cause of the injury. The proofs, in my judgment, without any conflict therein, show that the agents of the railway company on the occasion of the injury used every reasonable care and diligence with which they were charged in law, and were not guilty of any negligence that would affix liability upon it for the accident, and that it was brought about wholly by the unaccountable negligence of the plaintiff below, who, from the proofs, seemed to have acted in total obliviousness of the plainest dictates of self-preservation. To hold the railway company liable, under the facts proved in this case, is, in my judgment, in effect constituting such companies unconditional insurers of the public against injury by the instrumentality of their appliances.

LITTLE BROS. FERTILIZER & PHOSPHATE CO. v. WILMOTT.

(Supreme Court of Florida. Feb. 4, 1902.)

ASSUMPSIT—MONEY PAID—PLEADING—PLEA IN ABATEMENT.

1. No recovery can be had against one party for money expended at the request of another, in no way authorized or empowered to bind the party sued.

2. There is no error in refusing to permit the withdrawal of a plea to the merits, for the purpose of interposing a plea insisting upon the statutory privilege of being sued in some county other than that in which suit is pending.

(Syllabus by the Court.)

Error to circuit court, Polk county; Eppes Tucker, Referee.

Action by James W. Wilmott against Little Bros. Fertilizer & Phosphate Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. H. Buckman, for plaintiff in error.

PER CURIAM. This cause, having been reached in its regular order for final adjudication, was referred by the court to its commissioners for examination, who have reported that the judgment should be reversed.

After due consideration of the case upon the abstracts of the record, submitted without exception, the court finds that the suit was instituted against the plaintiff in error by defendant in error, and the issue tried before a referee was upon an account for money paid and expended by the plaintiff for the defendant company at its request.

The question in the case is whether the plaintiff in error, defendant in the court below, was liable to the plaintiff for money paid by him for an option on the proposed purchase of phosphate land. It appears from a writing purporting to be the option that it was made by and between J. H. Tatum and Little Bros., and it also appears, without contradiction, that Little Bros. was a partnership firm, composed of Lockhart Little and J. A. Little, engaged in buying and selling phosphate land, distinct from the defendant corporation.

We will not set out the testimony, but have carefully examined it, and, in our judgment, it does not warrant a finding that the plaintiff below paid money on the option by the authority, or at the request, of the defendant corporation. Its tendency is to show that plaintiff paid the money at the request of Little Bros., or the individual members composing that firm, but fails to show liability on part of the defendant corporation.

There was no error in the refusal of the referee to allow the defendant below to withdraw the plea of the general issue, and to interpose a plea of privilege to be sued in another county than that in which the suit was instituted. We call attention, however, to one of the additional pleas filed by defendant. It appears that defendant, by leave of the referee, filed a plea of the statute of limitations, and no

issue was joined upon it. As the judgment must be reversed on another ground, we do not determine whether the failure to join issue on the plea would be reversible error, under the circumstances of the case. In the event of another trial, the parties can take some action in reference to framing an issue upon the plea.

The judgment is reversed, and a new trial awarded.

SIMONTON v. STATE ex rel. TURMAN.
(Supreme Court of Florida. Sept. 18, 1901.)
WRIT OF ERROR—SUPERSEDEAS—QUO WARRANTO—BOND.

1. Under the provisions of section 1272, Rev. St., a final judgment in quo warranto proceedings, adjudicating the title to an office as between relator and the respondent in favor of the relator, can be superseded, and in such a case a supersedeas bond is properly conditioned that binds the obligors therein "to pay all damages and costs that the relator may sustain in the event such judgment be affirmed."

2. A supersedeas in quo warranto proceedings operates to suspend further action under or relative to the judgment therein. It will relate to the status of the parties as existing at the time it becomes operative, even to the extent of preventing contempt proceedings to punish a party for not surrendering an office, on a judgment of ouster, held at the time the supersedeas becomes operative.

(Syllabus by the Court.)

Error to circuit court, Hillsborough county; John W. Malone, Judge.

Quo warranto by the state, on the relation of Solon B. Turman, against Frank M. Simonton. Judgment for relator, and defendant brings error. Motion to vacate supersedeas denied.

See 31 South. 821.

Barron Phillips, Geo. G. Clough, and A. W. Cockrell & Son, for plaintiff in error. Hugh C. Macfarlane and John P. Wall, for defendant in error.

PER CURIAM. On the application of Solon B. Turman he was authorized by the attorney general to institute proceedings by information in the nature of quo warranto in the name of the attorney general of the state of Florida against Frank M. Simonton to test his right and title to the office of solicitor of the criminal court of record for Hillsborough county, upon condition that the state should not incur any cost in the proceedings. Thereupon leave to file the information in the nature of quo warranto was applied for, and the judge of the Sixth judicial circuit, in which the application was made, duly entered of record his disqualification to act in the matter.

The judge of the Fifth judicial circuit, to whom the application was presented, entered a rule against the plaintiff in error to show cause why the information should not be filed, and proceedings thereafter had in the cause resulted in a judgment of ouster, ren-

dered on the 22d day of August, 1901, against him, by the judge of the Second circuit on demurrer to pleas filed to the information.

The information alleges the use, exercise, and usurpation of the office of solicitor of the criminal court of record for Hillsborough county by respondent, Frank M. Simonton, and that the relator, Solon B. Turman, had been duly appointed to said office, and, after qualifying and being commissioned by the governor, had exercised the duties of the office from the 8th day of June, 1899, to the 27th day of April, 1901, and that he is entitled to said office, and to perform the functions thereof, for four years from the date of his commission, which was on the 8th day of June, 1899.

The judgment rendered on the demurrer adjudges that relator, Solon B. Turman, was entitled to use, hold, and exercise the office of solicitor of the criminal court of record for Hillsborough county for four years from the 8th day of June, 1899, and that respondent, Frank M. Simonton, was guilty of usurping, holding, exercising, and receiving the emoluments of the same. It is further adjudged that respondent was thereby excluded from said office, and that he forthwith yield and deliver it up to relator, Solon B. Turman. Immediately after this judgment, and bearing the same date with it, the following entry of record appears over the signature of the judge, viz.: "The foregoing order is now made to be entered and become effectual at the same time with the filing of the writ of error by the respondent to the supreme court, and upon the giving and filing by the respondent of a supersedeas bond, with two good and sufficient sureties, or a surety company, under the laws of this state, to be approved by the clerk of the circuit court of the Sixth judicial circuit in and for Hillsborough county; said bond to be payable to the relator in the sum of eight thousand dollars, and conditioned to pay all damages and costs that the relator may sustain in the event said judgment be affirmed; whereupon said writ of error shall operate as a supersedeas, and the clerk shall so indorse said writ of error. Said foregoing order, however, is thus suspended for ten days only from this date."

The judgment was filed in the office of the circuit clerk for Hillsborough county on the 24th day of August, 1901, and a writ of error bearing same date was sued out to the judgment, returnable to the January term, A. D. 1902, of this court. On the same day a bond in compliance with the order of the court was filed, and approved by the clerk.

A transcript of the record in the cause has been filed in this court, and a motion made to vacate the supersedeas on substantially the following grounds: (1) There was no final judgment rendered and entered in the cause from which the writ of error issued will lie.

(2) In the judgment rendered, it being simply one of ouster, there is nothing upon which a supersedeas can operate.

(3) The bond given under the special order of the court is not made payable to the adverse party, as contemplated by the statute in such cases, and the conditions of said bond are not sufficient to protect the state of Florida or the relator.

It is not contended that the circuit judge had no power to conditionally suspend the operation of the judgment rendered by him for 10 days, and we have no doubt as to the final character of it. It was rendered upon sustaining a demurrer of relator to pleas of respondent, and finally disposed of the issues and contentions of the parties. Nothing further was to be done by the judge to judicially declare respondent not entitled to the office and to adjudge relator rightfully entitled to it.

The principal contention in the case is that there is nothing that can be superseded in a judgment rendered in a quo warranto proceeding simply ousting one person from an office and adjudging another entitled thereto. By statute it is provided that "all proceedings to procure review by an appellate court of the proceedings of a lower court in cases at law shall be by writ of error, except in cases where certiorari or prohibition shall lie, or where it shall be otherwise expressly provided." Section 1262, Rev. St. Writs of error lie only from final judgments, except as specified in section 1267. Section 1263, Id. "All writs of error shall be tested in the name of the chief-justice of the supreme court, and shall issue on demand as matter of right," etc. Section 1270, Id. By section 1265 it is provided that all orders and judgments of courts of this state made and passed in any cause therein, wherein said courts shall sustain or shall refuse to sustain any demurrer, shall and may be assigned for matter and cause of error upon any writ of error from the final judgment in said cause taken to the appellate court, and the said court shall hear and determine the matter so assigned for error in the same manner and under the like rules and regulations as in other cases.

Quo warranto proceedings are at law, and there can be no doubt that a writ of error can, under our statutes, be sued out to a final judgment rendered therein. This is not questioned by movant. In reference to supersedeas the following section is found in our statutory revision, viz.: "1272. When to Operate as a Supersedeas.—(1) As of course. Every writ of error shall operate as a supersedeas if sued out during the session of court at which the judgment was rendered, or within thirty days thereafter, if, within said time, the plaintiff in error, if he be the plaintiff in the court below, shall have paid all costs which may have accrued in and about said suit up to the time when the writ shall be issued, and shall have filed a bond payable to the defendant, with two good and sufficient obligors to be approved by the judge or clerk of the court below, in a sum sufficient to cover all costs which may

accrue in the prosecution of the writ, conditioned to pay the said costs if the judgment of the court below shall be affirmed; or if he be a party in the court below against whom a judgment has been given, shall have filed a bond payable to the adverse party with like obligors and approved in like manner as the bond hereinbefore required of the plaintiff, and if the judgment be a money judgment in a sum sufficient to cover the amount for which the judgment was given together with costs, conditioned to pay the amount of the judgment with interest and costs, if the same shall be affirmed by the appellate court, but if the judgment is in whole or in part other than a money judgment, the amount and condition of the bond shall be determined by the court below. (2) Upon special order. No writ of error except as above shall operate as a supersedeas unless by the special order of the appellate court or some judge thereof, made upon inspecting a copy of the record, and upon the plaintiff in error paying the costs and filing the bond required in the preceding paragraph. When such order is made and security given as aforesaid, the clerk, or the judge if there be no clerk, shall endorse on such writ of error that it shall be a supersedeas; and the said writ and endorsement shall be obeyed as such, suspending all such further proceedings in relation to said judgment, in and by the officers of the said court below." This section is sufficiently broad and comprehensive to embrace writs of error to final judgments in quo warranto proceedings, and we find nothing in any provision of our statutes to exempt such cases from its operation. Section 1783, under the head of "Quo Warranto," in reference to the conclusive character of judgments rendered between parties before the court, does not, in our judgment, have such effect, and no other section has any tendency to accomplish such result. It is the rule in this court that a supersedeas to a judgment at law does not annul or undo it, but only suspends further proceedings in relation thereto; and such is declared to be its effect in the second division of section 1272 under orders of supersedeas granted by a justice of the supreme court. In cases where the judgment is in whole or in part other than a money judgment, the amount and condition of the supersedeas bond shall be determined by the lower court. This provision allows sufficient latitude to adjust the conditions of supersedeas bonds to quo warranto judgments, and it cannot be said that the damages resulting to a successful claimant to an office are such as not to come within the terms of such conditions. The supersedeas in quo warranto proceedings can operate to suspend further action under or relative to the judgment, and there is nothing in our statutes to indicate that it should not have such effect. It will relate to the status of the parties as existing at the time the writ be-

comes operative, and such has been declared to be its effect by the supreme court of the United States, even to the extent of preventing contempt proceedings to punish a party for not surrendering an office, on a judgment of ouster, held at the time the supersedeas becomes operative. *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. Rep. 435, 42 L. Ed. 865, and cases therein cited. Some courts hold to a different view, but under our statutes it appears to us that the correct view is announced by the federal supreme court, and we follow it.

The writ of error in this case was sued out within 30 days after the rendition of the judgment, and required no order of the judge to make it a supersedeas to the judgment. It was other than a money judgment, and the amount and condition of the supersedeas bond could and should have been fixed by the trial judge. The order made in the case is a sufficient compliance with the statute in this respect; and, conceding that an order fixing the conditions of the bond is subject to our review, we think the conditions prescribed in the present case sufficiently protect the only party who has been adjudged to have any pecuniary interest in maintaining the judgment rendered. The state alleged in her information that Solon B. Turman was entitled to the office and the emoluments thereof, and the court so decided. The judge thought the conditions prescribed were sufficient to suspend further proceeding under the judgment, and we see no ground for disturbing his order in this respect.

The motion to vacate the supersedeas must therefore be denied, and it is so ordered.

TURMAN v. WHALEY.

(Supreme Court of Florida. Dec. 21, 1901.)

APPELLATE PRACTICE—CORRECTED ABSTRACT—WHEN REQUIRED.

1. Appellate courts will sometimes, *sua motu*, order certiorari or other proper proceeding for the correction of records, for the purpose of informing its conscience, in order to affirm a judgment; though never to reverse one or make error.

2. Where an abstract of the record, not excepted to, is so prepared as to make it appear that there was no evidence to support the verdict found, but counsel for the plaintiff in error admit in their briefs that there was some testimony at the trial tending to sustain such verdict, thereby admitting, in effect, that such abstracts of record prepared and filed by him fail to state the case fairly, fully, and correctly, and that by such failure error is wrongfully made to appear where otherwise none might exist, the appellate court, where it is evident that such omissions in the abstracts were not intentional, will exercise its discretion where the demands of justice require it, and will call, *sua motu*, for either true and correct abstracts of the record, or, in their stead, for additional copies, under the rules, of the transcript of the record. But in such a case, if there is any evidence tending to show that such omissions in

the abstracts were intentionally made, the cause would be dismissed.

3. Corrected abstracts, or in their stead, copies of the transcript of record, required to be filed within 20 days, cause to be dismissed on failure to comply.

Mabry, J., dissenting.
(Syllabus by the Court.)

Error to circuit court, Hillsborough county; Barron Phillips, Judge.

Action by Arthur D. Whaley against Solon B. Turman. Judgment for plaintiff, and defendant brings error. Corrected transcript ordered.

W. A. Carter, for plaintiff in error. Gunby & Gibbons, for defendant in error.

TAYLOR, C. J. This cause was submitted upon abstracts of the record filed here on June 7, 1897. No exceptions were filed to such abstracts until August 10, 1897, after the lapse of the time for their filing, as prescribed by the rules. Upon taking the case up for final disposition in its regular order on the docket, the court finds that if the cause is considered solely upon said abstracts of the record, there will necessarily be a reversal of the judgment below, upon the ground of a want of evidence to support the verdict upon which it is predicated; but it is admitted in the briefs of counsel for the plaintiff in error that there was some testimony at the trial tending to sustain the verdict found. This admission in the briefs of counsel is tantamount to an admission upon his part that the abstracts of the record filed by him fail to state the case fairly, fully, and correctly, and that by such failure error is made to appear where otherwise none might exist. Were there any evidence before us that the omissions in the abstracts were intentionally made, this court would not hesitate to dismiss the writ of error; but there being no such evidence, we conclude that such abstracts were prepared by counsel under a misapprehension of the scope and purpose of the rules governing the preparation of abstracts. Appellate courts will sometimes, *sua motu*, order certiorari or other proper proceeding for the correction of records, for the purpose of informing its conscience, in order to affirm a judgment; though never to reverse one or make error. *Bank v. Grunthal*, 39 Fla. 388, 22 South. 685.

To decide the case upon an admittedly incorrect abstract of the record, whereby error is made to appear where none may exist were the true record of the case presented, seems to us to present a case where the demands of justice require us to exercise our discretion to call, *sua motu*, for either true and correct abstracts of the record, or, in their stead, for two additional copies, under the rules, of the transcript of the record; and, upon failure to comply therewith, to dismiss the case, under the power reserved by the abstract rule No. 20. 26 South. v. It is therefore hereby ordered and adjudged that the plaintiff in error, within 20 days from the date of the filing of this order, file with the clerk of this court

either perfected and correct abstracts of the record, or, in their stead, two copies of the transcript of the record, and, if he shall fail so to do, the cause shall stand dismissed.

MABRY, J. (dissenting). Rule 20 (26 South. v), for the government of the supreme court in reference to abstracts, does not, in my opinion, authorize the order made in this case. The rule imposes upon a plaintiff in error or appellant the duty of making such an abstract as therein provided, and the case shall be tried upon the abstract, without reference to the transcript, unless the defendant in error or appellee shall question its sufficiency or correctness, in some particular to be specified, within 15 days after the return day of the cause. If no exceptions are filed to the abstract within the time prescribed, its sufficiency and correctness shall be deemed to have been agreed upon by the parties. In this case an abstract was filed, and no exceptions thereto were made within the time prescribed, and, therefore, the abstract must be deemed to have been agreed upon by the parties. The defendant in error is making no objection to the abstract in the way permitted by the rule, but the court finds from a statement in the brief of counsel for plaintiff in error that some testimony has been omitted from the abstract, and for this reason new abstracts or copies of the record are now ordered to be prepared within a time specified, upon which the case will be tried.

Rule 20 (26 South. v) expressly provides that if the plaintiff in error or appellant fail to comply with its requirements, the cause may be dismissed, upon motion of defendant in error or appellee, or the court may do so of its own motion. I agree to the view that the court has the power, under the rule, to dismiss a cause for an intentional misrepresentation of it in the abstract, but the remedy clearly pointed out in the rule is to dismiss the cause. It is found that there was no intentional misrepresentation of the cause in the present abstract, but that, in analogy to the rule sometimes employed by the courts of its own motion, in aid of the affirmance of a judgment, to send to the lower court for a part of the record (stated in *Bank v. Grunthal*, 39 Fla. 388, 22 South. 685), the court will in this case order new abstracts or copies of the record to be made. I agree that there is no sufficient showing of an intentional misrepresentation of the case as shown by the abstract, but I think the *Grunthal* Case affords no ground whatever for the order made. We are not sending down a certiorari to perfect a record, and, as stated, there is no sufficient showing on the face of the abstract that it is defective in reference to a statement of evidence. The analogy in the *Grunthal* Case, instead of affording an authority for the order, would, it seems to me, be misleading. One of two courses should be pursued by the court in dealing with abstracts under rule 20,—either to dispose of the case on the agreed abstract, or

to dismiss the cause for a failure to comply with the rule. The rule under which the order is made affords no other remedy.

HATHORNE v. PANAMA PARK CO.

(Supreme Court of Florida. Jan. 30, 1902.)

TRIAL BY JURY—MECHANICS' LIENS—ENFORCEMENT—RIGHTS OF SUBCONTRACTOR—ENFORCEMENT.

1. The provision of the constitution that "the right of trial by jury shall be secured to all and remain inviolate forever," guarantees such right only in those cases where at the time of the adoption of the constitution the law gave that right, and not in those cases where the right, and the remedy with it, are thereafter created by statute, nor where the cause was already the subject of equity jurisdiction.

2. Section 1744, Rev. St., providing for enforcement of the liens of mechanics and materialmen by bill in equity, is not in derogation of the provision of the constitution that "the right of trial by jury shall be secured to all and remain inviolate forever."

3. The provision in section 1743, Rev. St., that the lien in favor of a subcontractor shall exist for the amount due by the owner to the contractor at the time of the service upon the owner of notice of the subcontractor's claim of lien, refers to the amount due by the owner on account of the improvements made by the contractor for the owner. Other indebtedness of the owner to the contractor at the time of the service of such notice will not entitle the subcontractor to a lien under this statute.

4. A bill filed by a subcontractor to enforce his lien, not praying discovery, but alleging facts upon which such lien is claimed, which does not make it appear that at the time of the service of the notice required by section 1743, Rev. St., any amount was due the contractor by the owner on account of the improvements made by the contractor for such owner, is demurrable.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; Rhydon M. Call, Judge.

Bill by Joseph Hathorne against the Panama Park Company. Decree for defendant, and plaintiff appeals. Affirmed in part, and reversed in part.

Stephen E. Foster, J. W. Archibald, and A. H. King, for appellant.

MAXWELL, C. The appellant, Joseph Hathorne, filed in the circuit court of Duval county his bill against the Panama Park Company, a corporation, and certain parties doing business as the Jacksonville Construction Company, to enforce a lien for labor and materials upon certain real estate, the property of the Panama Park Company.

The bill alleged that the Jacksonville Construction Company had contracted with the Panama Park Company to put certain improvements upon its property, and that complainant had, under contract between himself and the construction company, performed a certain part of said contract in the year 1896, for which he claimed a lien upon the property in question.

¶ 2. See *Jury*, vol. 21, Cent. Dig. §§ 25, 27, 23, 207.

The bill was demurred to by the Panama Park Company as being without equity; as depriving defendant of its right of trial by jury; as attempting to condemn its property not by due course of law; as being too vague, in showing whether complainant claimed to be in privity with the owner; and as not clearly setting forth which of the statutory liens was claimed.

The demurrer was sustained, the decree rendered by the court further stating that, as there was no equity therein, the bill should be dismissed. From this decree complainant appeals.

It does not distinctly appear from the decree upon what theory the court sustained the demurrer, but from a motion made here to advance the cause because of the great interest and importance of having a determination by this court of the correctness of the ruling of the lower court in holding section 1744 of the Revised Statutes to be in derogation of section 3 of the declaration of rights in the constitution, from the brief of counsel, and from the fact that, without giving the complainant an opportunity to amend, the court dismissed his bill, we infer that the decree was based upon the ground that equity had no jurisdiction of the case, as such jurisdiction would deprive the defendant of his right of trial by jury. We therefore discuss first that ground of the demurrer.

Section 3 of the declaration of rights provides that "the right of trial by jury shall be secured to all and remain inviolate forever." This, however, guaranties to the citizen a right of trial by jury only in those cases where at the time of the adoption of the constitution the law gave that right; and not in those cases where the right, and the remedy with it, are thereafter created by statute, nor where the cause was already the subject of equity jurisdiction. *Lavey v. Doig*, 25 Fla. 611, 6 South. 259; *Hughes v. Hannah*, 39 Fla. 365, 22 South. 613; *Buckman v. State*, 34 Fla. 48, 15 South. 697, 24 L. R. A. 806; *Wiggins v. Williams*, 36 Fla. 637, 18 South. 859, 80 L. R. A. 754.

The statute under which this lien is claimed in section 1744 of the Revised Statutes expressly authorizes its enforcement by bill in equity or by proceedings at law. That statute creates a new right, unknown to the common law, and it was competent for the legislature to provide for the enforcement of that right either at law or in equity. *Wiggins v. Williams*, supra; *Railroad Co. v. Bartola*, 28 Fla. 82, 9 South. 853; *Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743. In equity parties have not, and never had, an absolute right to a jury trial, and the provision of the constitution quoted does not guaranty such right. As the legislature had power to grant jurisdiction to courts of equity to enforce this new right created by it, and did not provide for a jury trial, the court of chancery has jurisdiction to enforce

the lien as against the appellee in this case, according to the regular course of procedure in that court, without a jury, and the grounds of demurrer questioning that right were not well taken.

There is another respect, however, within the scope of the demurrer, wherein the bill is defective. The lien sought to be enforced was that of a subcontractor, one not in privity with the owner. In order that such lien be acquired by him, he must notify the owner of the property that he claims a lien thereon, and the lien which he acquires is limited by "the amount due by the owner to the contractor or other person for whom the work was done or the materials furnished." Section 1743, Rev. St.

The bill alleges that "after the service of said notice on Panama Park Company the said Panama Park Company paid over to the Jacksonville Construction Company large sums of money, and at one time \$1,600, and that the Panama Park Company still owed a further sum to said Jacksonville Construction Company; the exact amount thereof being unknown to complainant." It nowhere appears from the bill that this indebtedness of the Panama Park Company to the construction company was in any wise connected with the contract for the improvements made by the complainant. It is quite consistent with the bill that the indebtedness growing out of this contract had been paid in full by the owner, the Panama Park Company, before receiving notice of complainant's claim of lien, and that the indebtedness referred to in the bill was the result of some other transaction between the parties. If this was the case, no lien would arise in favor of complainant from the notice of lien given by him. The statute does not authorize the subcontractor, by giving notice to the owner of the property of his claim of lien, to transform into a lien of superior dignity upon real estate any other indebtedness which might be owing by the owner to the contractor. Such a construction of the statute would enable the subcontractor to create a lien of this character from a simple personal liability of the owner to the contractor of a character which had no connection with the real property of the owner. This was not the purpose of the law. The demurrer to complainant's bill was for this reason properly sustained, but, as the averments of the bill in this respect are, if the facts warrant it, readily amendable, the case will be remanded, with directions that the decree, in so far as it sustains the demurrer to complainant's bill, be affirmed; that in dismissing complainant's bill it be reversed; and that complainant have leave to amend the bill within such reasonable time as may be fixed by the circuit judge, in default whereof the cause will be dismissed. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, text 413, 12 Sup. Ct. 188, 85 L. Ed. 1053.

GLEN and HOCKER, CO., concur.

PER CURIAM. The foregoing opinion has been examined by the court, and is hereby approved and adopted, and ordered to be filed as the opinion of the court in said cause.

STATE ex rel. BIRMINGHAM TRUST & SAVINGS CO. v. REEVES, Judge.

(Supreme Court of Florida. March 18, 1902.)

EXTORTION—RECOVERY OF PENALTY—JURISDICTION—MANDAMUS.

1. Under the provision in section 1305, Rev. St., that when any officer shall willfully and knowingly charge or levy more than he is really entitled to he shall forfeit and pay to the party injured four times the amount so unjustly claimed, to be recovered on motion before the court wherein the services were rendered, the circuit court has jurisdiction to determine in the manner provided by the statute the correctness of any charge or charges made for costs in cases pending in said court, though the amount involved be less than \$100. The jurisdiction conferred by the statute in such cases is not prohibited by any provision in the constitution.

2. When a circuit court refuses to exercise jurisdiction that it clearly possesses and ought to exercise, mandamus is the proper remedy to compel its exercise.

(Syllabus by the Court.)

Application by the state, on the relation of the Birmingham Trust & Savings Company, for writ of mandamus against L. J. Reeves, judge. Writ granted.

D. L. McKinnon, for the motion. L. J. Reeves, in pro. per.

MABRY, J. The alternative writ of mandamus in this cause alleges that the Birmingham Trust & Savings Company, a corporation, was plaintiff in a suit against the Jackson County Mill Company, pending in the circuit court for Jackson county, and that the trial of said cause at the spring term, 1901, of said court, resulted in a verdict and judgment against plaintiff for costs amounting to \$40.77, which sum was paid by plaintiff; that plaintiff sued out a writ of error to the supreme court, where said cause is now pending; that the said Birmingham Trust & Savings Company, feeling itself aggrieved by a number of the charges made by Moses Guyton, clerk of said court, for official fees included in his bill of costs taxed in said cause, applied, after due notice to said clerk, as required by statute, to respondent at a regular term of said circuit court, to have the correctness of said charges determined as provided by law. The notice given to the clerk states that said plaintiff felt aggrieved by charges willfully and knowingly made for costs by said clerk in said cause, on account of charges for constructive service, charges twice for the same service, for service not performed, and for fees in excess of those allowed by law, and it particularly specifies

various items, amounting in all to \$18.28; that a demurrer was filed to the application alleging, among other grounds, that the amount sued for was not within the jurisdiction of the court; and that respondent, as judge, sustained said demurrer, and decided that the circuit court had no jurisdiction to determine the matter for the want of jurisdiction, and dismissed said cause. The command of the alternative writ is that respondent judge, etc., proceed to try and determine said matter, or show cause why he should not do so.

The return of respondent states that the allegations contained in the writ are true, but that movant intended in and by his said motion and notice to demand and recover from the defendant in said proceeding, Moses Guyton, the penalty provided by paragraph 2, § 1305, Rev. St., for unauthorized charges willfully and knowingly made by officers, and it was so understood and treated by the parties; that respondent has not refused, and does not refuse, to exercise his right as judge of the First judicial circuit to supervise and correct the taxing of costs, but respondent did refuse, and still refuses, to take jurisdiction of said motion as an original action for the recovery of the penalty provided by paragraph 2, § 1305, Rev. St., as said demand was less than \$100.

Relator moves for a peremptory writ of mandamus on the grounds that the return admits the allegations in the writ, and that it shows no sufficient cause by the peremptory writ should not issue.

It is provided by statute that all officers of this state who are allowed to charge fees and costs shall keep a book in which they shall record an itemized account of all costs and fees which they charge against parties having business with them, and that in all cases the party recovering the judgment shall recover also all his legal costs and charges, which shall be included in the judgment, except in certain cases of executors and administrators. Sections 1303, 1304, Rev. St. It is also provided in paragraph 1, § 1305, that no officer shall make two charges for the same official act or service, nor charge for any constructive service, and no fees shall be charged in any case, or for any official service performed or claimed to be performed by any officer within this state, unless said fees be expressly authorized, and their amount be specified by law. The second paragraph of the same section provides that, "when any officer shall willfully and knowingly charge or levy more than he is really entitled to, such officer shall forfeit and pay to the party injured four times the amount so unjustly claimed, to be recovered on motion before the court wherein the services were rendered." The statute also provides a method of procedure in such cases. The party aggrieved by any charge made for costs by the officer shall have the correctness of same determined by the court and jury on giving five days' previous notice to the officer making the objectionable charges, stating the time and

¶ 2. See Mandamus, vol. 33, Cent. Dig. §§ 74, 75.

place when and where the same shall be inquired into, and for other proceedings in reference thereto.

Judge Reeves submits the view that the proceeding under the statute is an original one, to recover a penalty against an officer, not involving simply the taxation of costs in a case, and that the circuit court had no jurisdiction because the amount in controversy is less than \$100. Moses Guyton, the clerk, who was granted leave to file a brief in opposition to the granting of a peremptory writ, relies upon the same ground suggested by the judge, and also insists that the proceeding by motion against the clerk resulted in a final judgment by the circuit court, and is reviewable only upon writ of error. Conceding that the proceeding is of the character suggested, we will first consider the question of the jurisdiction of the circuit court in respect to the amount involved, noting in this connection that we are dealing only with the jurisdiction of circuit courts. The statute clearly gives the circuit court jurisdiction in the present case, regardless of the amount involved, as the express provision is that the officer shall forfeit and pay to the party injured four times the amount so unjustly claimed, to be recovered, on motion, before the court wherein the services were rendered. The services in respect to which the present controversy has arisen were rendered in the circuit court, and the proceeding was instituted there. The contention made, however, goes to the extent that the legislature could not confer jurisdiction in the circuit court where the amount involved does not exceed \$100. The constitution as amended provides that "the circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts, * * * and original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide." Article 5, § 11. The county judge shall have original jurisdiction in all actions at law in which the demand or value of property involved shall not exceed \$100, of proceedings relating to the forcible entry and unlawful detention of lands and tenements, and of such criminal cases as the legislature may prescribe. They also have jurisdiction in matters of probate, etc. The legislature may also organize county courts, which shall have certain jurisdiction not necessary to refer to in this case. "Justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed \$100, and in which the cause of action accrued or the defendant resides in his district," etc. It does not appear to us that there is any provision in our constitution denying to the legislature the right to confer the jurisdiction in cost matters contained in section 1305 of the Revised Statutes upon circuit courts. Such courts have exclusive original jurisdiction in all cases at law not cognizable by inferior courts, but they may exercise original jurisdiction of such other matters

as the legislature may provide. The jurisdiction conferred upon county judges and justices of the peace in cases involving less than \$100 is original, but not exclusive, and it is not apparent why the legislature cannot also confer upon circuit courts jurisdiction in cases involving a less value than \$100. Before the act of the legislature expressly granting the jurisdiction can be held inoperative, there must be some plain provision of the constitution violated by it, and none is to be found. The result is that the circuit court had the undoubted jurisdiction conferred by the statute, and should have proceeded to try and determine the matter submitted in the manner therein provided.

It is settled in this state that, when a court refuses to exercise jurisdiction that it clearly possesses, mandamus is the proper remedy to compel its exercise. *Ex parte Henderson*, 6 Fla. 279; *State v. Young*, 31 Fla. 594, 12 South. 673; *State v. Call*, 36 Fla. 305, 18 South. 771. The return shows that respondent declined to proceed in the matter and dismissed the motion on the sole ground that he considered the circuit court to be without jurisdiction because the amount involved was less than \$100. On this state of the case, the jurisdiction clearly appearing, mandamus is the proper remedy to enforce its exercise.

What is said in reference to the application of mandamus sufficiently answers the further contention made by the clerk why the peremptory writ should not be granted.

The motion for peremptory writ is granted, but, as we do not doubt that the circuit judge will proceed to exercise the jurisdiction in the matter brought before him as herein indicated, we will direct this opinion to be certified to him, and withhold the issuance of the peremptory writ unless further directed.

OLEM et al. v. MESEROLE.

(Supreme Court of Florida. May 7, 1902.)

EJECTMENT—EVIDENCE—SHERIFF'S DEED—JUDGMENT.

1. Before a sheriff's deed is admissible in evidence for the purpose of proving title thereunder, a valid judgment and execution must be shown, whether such judgment emanated from a court of general or one of limited jurisdiction, and whether the party against whom the judgment was rendered be the party against whom it is offered or not. To the extent that the decision in *Hartley v. Ferrell*, 9 Fla. 374, conflicts with this rule, it is overruled.

2. Prior to the enactment of chapter 4723, Acts 1899, a judgment entry alone, unaccompanied by any other part of the record of such judgment, or a sufficient explanation of its absence, when offered in evidence for a purpose other than to show the mere fact of its rendition, was inadmissible if seasonably objected to, and the rule was the same even though such judgment emanated from a court of general ju-

¶ 1. See *Ejectment*, vol. 17, Cent. Dig. §§ 277, 287; *Evidence*, vol. 20, Cent. Dig. § 1536; *Execution*, vol. 21, Cent. Dig. § 941.

risdiction, or contained general recitals of jurisdictional facts.

Mabry, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Orange county; John D. Broome, Judge.

Action by Frank B. Meserole against David R. Clem and others. Judgment for plaintiff, and defendants bring error. Reversed.

L. D. Browne (R. H. Terry, on the brief), for plaintiffs in error. Arthur F. Odlin, for defendant in error.

PER CURIAM. This cause was referred by the court to its commissioners for investigation, and a majority of them report that the judgment ought to be reversed.

The action was ejectment in the circuit court of Orange county, brought by defendant in error against plaintiffs in error. The plea was not guilty. The abstract states that plaintiff, to prove his title to the land in controversy, offered in evidence a judgment recovered in the circuit court of Orange county January 2, 1894, in a suit wherein the Sanford Loan & Trust Company was plaintiff and the defendant David R. Clem and J. F. Fitzsimmons, formerly copartners trading as J. F. Fitzsimmons & Co., were defendants. The judgment was declared to be a lien on certain lands therein described, being in part the lands in controversy, and which were the individual property of defendant Clem. The document so offered in evidence was as follows: "And now, on this 2d day of January, A. D. 1894, comes the plaintiff in the above-entitled cause, by A. M. Thrasher and Arthur F. Odlin, its attorneys, and produces the original notes mentioned in the declaration filed by plaintiff in this action; and it appearing to the court that this action was commenced by the attachment of certain real estate in Orange county, Florida, as the property of David R. Clem, one of the defendants in this action, and that notice of said attachment has been duly published as required by law, and that a default was duly entered on the rule day in January, A. D. 1894, against the said defendant David R. Clem, for want of appearance herein, it is therefore considered and adjudged that the plaintiff, the Sanford Loan & Trust Company, a corporation, do have and recover of and from the said defendant David R. Clem the sum of two hundred and twenty-eight dollars as principal, two hundred and four dollars as interest, and forty dollars as attorneys' fees, and the costs of this action, which are taxed at twenty-six dollars and twenty-five cents. But this judgment is a lien on no other property, and said real estate is described as follows, to wit." Here follows a description of real estate, which it is not necessary to set out, and the document concludes as follows: "Done and ordered at chambers at De Land, Florida (Volusia county), this 2d day of January, A. D. 1894. John D. Broome, Judge 7th Judicial Circuit of Florida."

Defendants objected to the admission of said judgment in evidence on the grounds that said judgment must be shown to be a valid judgment, and that, where it emanates from a court of limited or statutory jurisdiction, it is not a valid judgment, unless it affirmatively appears on its face that the court had jurisdiction of the person or subject-matter of the suit in which such judgment was rendered. The objection was overruled, and the document admitted, to which ruling defendants excepted. Plaintiff then offered in evidence the execution issued upon said judgment under which the lands in controversy were sold. This document was objected to upon the grounds that, before such execution could be admitted in evidence, a valid judgment must be shown, and that, where execution is based upon a judgment rendered by a court exercising statutory powers, there is no presumption of regularity of the proceedings, but it must affirmatively appear by the record that the court had jurisdiction; but the court overruled the objections, and admitted the document in evidence, to which ruling defendants excepted. Plaintiff then offered in evidence the sheriff's deed, based on said judgment and execution, conveying the lands in controversy to him. Defendants objected to its being admitted on the ground that plaintiff's deed was not admissible without previously showing his power to make such deed, and that, before a sheriff's deed can be admitted for the purpose of proving title thereunder, a valid judgment must be shown, and that, where judgment is rendered by a court exercising statutory jurisdiction, there is no presumption of regularity of the proceedings, but it must affirmatively appear from the record that the court had jurisdiction of the person or subject-matter; but the court overruled the objection, and admitted the document, to which ruling defendants excepted. The trial resulted in a verdict and judgment for plaintiff, from which judgment this writ of error was taken.

The court is of opinion that the objections urged to the admission in evidence of the documents mentioned are sufficiently broad to raise the question whether it was necessary to introduce the record of the suit which culminated in the judgment, offered in evidence, along with such judgment, or whether the judgment entry alone (that being all that was offered or admitted) was properly admissible. Under the decisions in this state it is clear that a judgment entry alone, unaccompanied by any other part of the record of such judgment, or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact of its rendition, is inadmissible if seasonably objected to. Unless there is something in this case to take it out of the rule, the court below was in error in the ruling admitting the judgment entry alone. It is suggested that the circuit court is a court of general jurisdiction; that its judgments import

verity, and in their support the law presumes that the court rendering them had jurisdiction of the person and the subject-matter and to render the judgment; and also that the judgment here offered in evidence contained recitals showing jurisdiction; and therefore the rule prevailing in this state, as held in *Watson v. Jones*, 41 Fla. 241, 25 South. 678, and other Florida cases cited therein, should not apply to the present case. The court is of opinion that the rule is a rule of evidence, and that it is not qualified by the fact that the judgment offered is from a court of general jurisdiction, nor by the fact that it may contain general recitals of jurisdiction. A party is entitled to have the whole record, so far as it concerns the formal stages, produced, because such record is a material part of the judgment, and because he has a right to insist that the presumptions applicable to judgments of courts of general jurisdiction shall be applied only when it is ascertained from an inspection of the whole record that it does not affirmatively appear therefrom that the court did not have jurisdiction to render the judgment. General recitals of jurisdiction are, as to many matters, merely conclusions drawn by the court from inspecting other parts of the record proper, and as to which, in case of conflict between the matters of record proper and the recitals, the former will control. The record proper and the judgment constitute together one entire document, every part of which is relevant to the question whether the judgment is a valid one; and the party has a right to insist that every part of that relevant document be submitted when the judgment is offered in evidence to prove a title under sheriff's sale against him. *Hargis v. Morse*, 7 Kan. 415; *State v. Hawkins*, 81 Ind. 486; *Brown v. Eaton*, 98 Ind. 591; 1 Whart. Ev. § 824. A party may unquestionably waive the production of the entire record, if he chooses, by not objecting to the introduction of the judgment entry (*Simmons v. Spratt*, 20 Fla. 495); but in this case the objections are broad enough to cover the point. The trial of this case was prior to the enactment of chapter 4723, Acts 1899, and the question just considered cannot, therefore, be affected by the provisions of that act.

It is also suggested that in *Hartley v. Ferrell*, 9 Fla. 374, as limited and explained in *Davis v. Shuler*, 14 Fla. 438, it was held that a plaintiff in ejectment, who claims under a sheriff's sale under an execution against the defendant in ejectment, has only to show his deed and execution, and to prove possession by defendant since rendition of the judgment, in order to cast the onus probandi on the opposite party; and that, as *Clem*, the defendant in the judgment, was one of the defendants in the ejectment suit, it was unnecessary for plaintiff to introduce his judgment in evidence, and therefore error in admitting it should not result in a reversal of the judgment. In *McGehee v. Wilkins*, 31 Fla. 83, 12 South. 228, it is held

that, before a sheriff's deed is admissible in evidence for the purpose of proving title thereunder, a valid judgment and execution must be shown. In that case the defendant in possession of the property was claiming title under a sheriff's sale under execution against plaintiff. In the latter case *Hartley v. Ferrell* is not referred to, but it cannot be denied that it asserts, contrary to the rule laid down in the third headnote in that case, that a valid judgment must be shown as the basis for a sheriff's deed. The rule laid down in *Hartley v. Ferrell* was also doubted in *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871, and *L'Engle v. Reed*, 27 Fla. 345, 360, 9 South. 213. While *Hartley v. Ferrell* has never been formally overruled upon the point now being considered, the principle announced there has not been followed, and is entirely inconsistent with that laid down in *McGehee v. Wilkins*. The rule stated in the latter case is, in the judgment of the court, the correct one (3 Freem. Ex'ns, § 350), and to the extent that *Hartley v. Ferrell* conflicts with the rule there laid down it is overruled.

For the error found, the judgment is reversed, and a new trial granted.

MABRY, J. (dissenting). In *Hartley v. Ferrell*, 9 Fla. 374, it was broadly announced that a purchaser at a sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution, or possession since the rendition of the judgment, and the onus probandi is cast on the opposite party. The facts of the case were that the sale was under proceedings had in a court of general jurisdiction. In *Davis v. Shuler*, 14 Fla. 438, it was held that, to establish a title under an execution sale, there must be shown, as against a stranger to the proceedings, a valid judgment and execution binding the estate of defendant in the judgment, and that the defendant had some title or interest in the property sold. In this case it is said: "We do not understand that the court in the case of *Hartley v. Ferrell*, 9 Fla. 374, decided that the title of the plaintiff in ejectment is shown by proof of the execution and the deed, without also showing the judgment, when the defendant in ejectment is a stranger to the judgment, and was not in possession at the time of the sale. The headnote to the case referred to applies appropriately to the circumstances of the case there decided." It was decided in *Donald v. McKinnon*, 17 Fla. 746, that a simple transcript of a judgment entry does not prove a judgment in a collateral proceeding. Enough should appear to show jurisdiction. This was said in reference to a judgment of a court of limited jurisdiction. It was said: "The court ruled correctly that there must be proof of the judgment in order to derive title from a sale thereunder. But what we have in the record is a simple transcript

from the docket or book of entries of the magistrate of the entry judgment. This is not sufficient. * * * It is essential that in all cases where a judgment is sought to be proved that so much of the proceedings as show jurisdiction should appear. As to the general subject, see 2 Phil. Ev. (4th Am. Ed., by Cowen & Hill) note 406." The authority mentioned has special reference to courts of limited jurisdiction. (This last case, dealing with a judgment of a court of limited jurisdiction, has become the basis of several subsequent decisions in this court, to some of which reference will be briefly made. Prominent among them is the case of *McGehee v. Wilkins*, 31 Fla. 83, 12 South. 228, where it was again broadly announced that, before a sheriff's deed is admissible in evidence for the purpose of proving title thereunder, a valid judgment and execution must be shown. It was said in the opinion: "Conceding, for the purposes of this case, and without deciding, that where a judgment is rendered by a court of general jurisdiction the presumption is, in the absence of proof to the contrary, that the court had jurisdiction, where a judgment is rendered by a court of limited powers and jurisdiction, there is no such presumption, but it must affirmatively appear from the record that the court had jurisdiction of the person and subject-matter." Among the cases cited to support this view is *Donald v. McKinnon*, supra. The cases of *Ashmead v. Wilson*, 22 Fla. 255, and *Watson v. Jones*, 41 Fla. 241, 25 South. 678, announce—correctly, I think, under their facts—that, when it became necessary to prove a valid judgment under which rights are acquired or lost, the record, so far as it concerns the formal stages, must be produced, or its absence properly accounted for. These two cases were decided in reference to judgments entered by circuit clerks, as to which, certainly prior to Acts 1890, c. 4723, no presumptions could be indulged beyond the entry itself. In no case decided by this court, so far as I can find, has it been decided that in proving title in ejectment under a sale by virtue of execution emanating from a court of general jurisdiction it was necessary for the party claiming thereunder to introduce the record of the proceedings back of the judgment. All of the cases holding this view have been decided on facts showing that the judgments were entered by courts of limited jurisdiction or circuit clerks. In *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871, the court was dealing with the question of privity as shown by a sheriff's deed, and it was said: "A sheriff's deed is not of itself evidence of that officer's authority to levy and sell. In England it has been held that proof of the writ of execution is sufficient (*Batten v. Murless*, 6 Maule & S. 118; *Emmett v. Thorn*, 1 Maule & S. 425), and so in Georgia in *Whatley v. Newsom*, 10 Ga. 74; and I am not satisfied that this was not the view of this court in

Hartley v. Ferrell, 9 Fla. 374; yet subsequent authorities hold that a valid judgment must also be shown (*Davis v. Shuler*, 14 Fla. 438, text 447; *Donald v. McKinnon*, 17 Fla. 746, text 748), and this is said to be the rule in several states." In the later case of *L'Engle v. Reed*, 27 Fla. 345, 9 South. 213, where another principle in ejectment law was applied, it was said that in doing so it was not intended to approve the holding there made that a sheriff's deed can be introduced in evidence without showing the judgment and execution upon which it is based. The intimation in the two last-mentioned cases would seem to indicate that the rule as to proving title under a sheriff's sale announced in *Hartley v. Ferrell* was questioned; still there was nothing in the language of those decisions, or the facts upon which they were based, to afford any ground for holding that *Hartley v. Ferrell*, in the particular mentioned, was overruled. If the broad statements in *McGehee v. Wilkins* and other decisions following *Donald v. McKinnon* must be applied to judgments of courts of general jurisdiction, then it must be conceded that they have the effect to overrule, though they do not do so in terms, the decision in *Hartley v. Ferrell*. As there is no decision directly overruling this case, it seems to me that it can be reconciled with the others on the theory that it has reference to judgments of courts of general jurisdiction, and the others to judgments of courts of limited powers. There has been no question in our previous decision as to the correctness of the rule on common-law grounds stated in *Hartley v. Ferrell*,—cases at common law being cited in its support in *Kendrick v. Latham*,—and if it has not been overruled, it seems to me that it should be followed. I do not believe it has been overruled, and after due reflection I am convinced that the rule in reference to judgments of courts of limited jurisdiction should not be extended to those possessing general powers, such as our circuit courts.

In the present case the judgment recites the jurisdictional facts, and in view of the court rendering it there should be attached to it a prima facie showing of validity. There was no error, in my judgment, in the ruling of the court admitting the judgment in evidence, and, if it was properly admitted, it follows that there was no error in admitting the execution and sheriff's deed. Under the ruling in *Hartley v. Ferrell*, it was sufficient to introduce the execution and deed.

ANTHONY v. STATE.

(Supreme Court of Florida. March 18, 1902.)
RECEIVING STOLEN PROPERTY—EVIDENCE—
DECLARATIONS OF THIEF—DEFENDANT'S
CONFESSION—TRIAL—ASSIGNMENTS OF ER-
ROR.

1. A question as to the admissibility of evidence cannot properly be raised by an assign-

ment of error that the verdict is contrary to law.

2. Under an information charging defendant with receiving stolen property, acts and declarations of the thief made at the time of, and in connection with, and tending to prove, the larceny, are admissible.

3. An objection made to evidence as a whole, part of which is competent, is properly overruled.

4. It is within the discretion of the trial court to permit leading questions, and the exercise of that discretion is not reviewable on writ of error.

5. A trial court should not permit the introduction of evidence of a defendant's confession until sufficient proof of the corpus delicti is first given, but if the confession be admitted without such proof, and additional evidence upon that subject is afterwards introduced, independent of the confession, which would have justified the admission of such confession, the error in prematurely admitting it will be cured.

6. The statement of a codefendant made subsequent to an alleged offense is admissible in evidence against a defendant on trial, where it is shown that the statement was made in his presence and expressly assented to by him.

7. On the trial of a person charged with receiving stolen property, testimony on the part of the state tending to prove an arrangement or plan made between the alleged thief and the defendant, whereby the thief was to steal and the defendant was to receive from him a certain kind of property, as the defendant should need it, is admissible, where the testimony tends to show that the particular property charged in the indictment was received by defendant in pursuance of such arrangement or plan.

8. After a criminal case has been closed on both sides, and the argument of counsel is being made, it is within the sound discretion of the trial court to permit the state to introduce additional evidence in furtherance of justice.

9. An accused has the right to have the trial court instruct the jury, on request, that the testimony of an accomplice, as well as his own confessions, while proper to be considered, should be received with great caution, but he has no right to require the court to go beyond the expression of this caution in calling attention to the nature or weight of such evidence.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; John L. Doggett, Judge.

M. Q. Anthony was convicted of receiving stolen property, and brings error. Affirmed.

Barrs & Bryan, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. This case was referred by the court to its commissioners for investigation, who have reported that the judgment should be affirmed. After due consideration, the court concurs in this result.

Information was filed in the criminal court of record for Duval county against plaintiff in error, Thomas Moore, and Henry Sloan, the first count thereof alleging that said parties on the 20th day of April, 1901, in Duval county, state of Florida, "two hundred and eighteen pounds of pork loin, of the value of twelve cents per pound, all of the value of twenty-six dollars and sixteen cents, the property, goods, and chattels of Armour and Company, a corporation doing business in the state of Florida,

being found feloniously did steal, take, and carry away."

The second count charges that the same parties, on same date, feloniously did have, receive, buy, and aid in the concealment of the same property alleged to have been stolen, they then well knowing that said property was then and there stolen, contrary to the form of the statute, etc.

Plaintiff in error was tried separately, and found guilty as charged in the second count of the information, and from the sentence of the court sued out writ of error.

The disposition of the first and third assignments of error will be postponed until the other assignments are first considered. The second assignment is that the verdict is contrary to the law, and it is contended under it that there was not sufficient evidence to permit the alleged confession of the accused to go to the jury, and that the alleged confession of Tom Moore should not have been received in evidence against defendant.

The question of the admissibility of evidence cannot properly be raised by an assignment that the verdict is contrary to law. Objections should be made to the admission of evidence when offered, and if overruled an exception should be taken, and the question of admissibility should be presented on an assignment based upon the ruling of the court admitting the evidence. Other assignments made by plaintiff in error relate to the admission of the alleged confessions of the accused, and also of Tom Moore, and such matters will come up under such assignments.

The fourth assignment is that the court improperly denied defendant's motion to strike out that portion of the testimony of Henry Sloan detailing a conversation between witness and Tom Moore. It is contended that it was hearsay evidence, and should have been excluded. Under the second count of the information it was incumbent upon the state to prove—First, that the property described therein, or part of it, was stolen; and, second, that the accused, knowing it to have been stolen, bought, received, or knowingly aided in its concealment. The theory of the prosecution was that Thomas Moore stole the property, and plaintiff in error, knowing it to have been stolen, received it. Sloan, a drayman, was introduced for the prosecution, and stated that on a Tuesday morning Moore told him he had a box that he (Moore) wanted him to take to Anthony. Witness told him all right, and took it out. Witness further stated that he went back of Armour's establishment on that Tuesday morning, and got some meat, and it was taken from him by an officer on his way out to Anthony's. Witness also stated that some more meat was carried out there on the Saturday preceding, and was asked where he got it. An objection to this was made on the ground that any conversation between Moore and witness was incompetent; and also a motion was made to strike out the testimony of the witness already given as to what Moore

told him. The court reserved its decision to see the connection the state would make. No grounds of objection were stated in the motion and no exception taken to the ruling. The witness then stated that on the Saturday mentioned Moore told him to go round to the back of Armour & Co.'s place, and there would be a box there, and he (Moore) went through, and directed witness to take it. Motion was made to strike out this answer on the ground that it was hearsay, and an exception was taken to the ruling denying the motion. Witness further stated that he went around to the back of the place, and Moore gave him the meat, and told him to take it to Anthony, and that he did so. A similar motion, ruling, and exception appear. At the conclusion of witness' examination counsel for the accused made a motion to strike out of the testimony of the witness that portion detailing the conversations between witness and Moore on the ground that it was hearsay. This motion was denied, and excepted to by the accused. It appeared from the evidence that the box taken from the business place of Armour & Co. contained pork loins, and also that Tom Moore was an employé of that company in its fresh-meat department, but without any authority to sell meat. It was competent for the state to put in evidence acts and declarations of Moore tending to prove larceny by him of the property described in the information. This was a part of the case which the state had to prove in order to secure a conviction, and all that Moore said and did in the immediate connection of taking became a part of the res gestæ. *State v. Smith*, 37 Mo. 58; *State v. Sweeten*, 75 Mo. App. 127; *Copperman v. People*, 56 N. Y. 591; *Coleman v. Same*, 58 N. Y. 555. The objection to all that part of Sloan's testimony detailing acts and declarations of Moore in reference to the asportation of the pork loins on the Saturday, and that went into the possession of the accused, was therefore without foundation, and properly overruled. There was no ground of objection stated in the first motion to exclude what was said and done in reference to the meat on Tuesday. In the subsequent motion to exclude all conversations of Moore had with Sloan the ground is hearsay, but it included the conversations had on Saturday as well as on Tuesday, and we have seen that those on Saturday were properly admitted in evidence. The objection finally made included all the evidence, and as part of it was competent we need not examine the propriety of admitting the other. *Richard v. State*, 42 Fla. 523, 29 South. 413.

The fifth assignment is that the court erred in overruling the objection of defendant to the following question propounded to the witness Conroy, viz.: "What duty did he have there? Did he have any authority to sell meat?" The question referred to Tom Moore, and the objection to it was on the ground it was leading. The trial judge may in his discretion permit leading questions, and in this

state the exercise of such discretion is not reviewable by the supreme court upon writ of error. *Myers v. State*, 43 Fla. —, 31 South. 275; *Brown v. State* (decided at this term) 32 South. 107.

The sixth, seventh, ninth, eleventh, and twelfth assignments may be disposed of together. The ninth was not referred to in the argument in chief, but, conceding that it was argued in the reply brief, it may be classed with the others mentioned, all involving the questions of the admissibility of confessions on the part of the accused. Confessions at different times were put in evidence by the state. The state witness Conroy was asked to state what, if anything, Anthony said at the jail in reference to meat, and again what did Anthony say. The allowance of these questions constitutes assignments numbered 6 and 7. The ninth is a general assignment based on the admissions of confessions deposited to by the witness Conroy. The accused made certain statements inculcating himself when he was brought before the committing magistrate for examination, and the allowance of these statements, given in evidence by the magistrate, form the basis of the eleventh and twelfth assignments. The objection urged to all of the statements, included in the assignments mentioned, is that the corpus delicti had not been sufficiently shown when the confession was allowed to go to the jury for consideration. Counsel rely upon the rule stated in *Lambright v. State*, 34 Fla. 564, 16 South. 582, that the court must decide in the first instance whether the evidence of the corpus delicti is prima facie sufficient to allow the confessions to go to the jury. It was held in *Holland v. State*, 39 Fla. 178, 22 South. 298, that while courts should not permit the introduction of evidence of a defendant's confession until sufficient proof of the corpus delicti is first given, yet if the confession be admitted without such proof, and subsequently additional evidence (independent of such confession) of the corpus delicti sufficient to justify the admission of confessions is introduced, the error in prematurely admitting them will be cured. If it be conceded that at the time some of the confessions were put in evidence the corpus delicti had not been sufficiently shown to admit confessions, yet this will not result in a reversal of the judgment in this case. Upon the entire testimony introduced before the jury we are satisfied that there was ample testimony, independent of the confessions, to show the corpus delicti, and, under the rule stated, there is no reversible error in reference to the admission in evidence of the alleged confessions of the accused.

The eighth assignment is that the court erred in permitting the witness Conroy to detail the statement of Tom Moore as to his having sent pork loins to the defendant. This assignment has reference to a statement made by Moore and assented to by defendant when they were before the committing magistrate.

They were warned by that officer that any statement they made might be used against them. Moore made a statement in reference to six pork loins taken by him and sent to Anthony on the 20th of April, 1901, and the latter said, "Yes, that is right." In a colloquy between them at that time Anthony stated that he paid Moore \$5 for the lot on Monday, and they did not agree as to the payment being made on Monday, but finally both agreed that the payment was on Sunday. The contention is that the confession of Moore, being a defendant, was inadmissible as against defendant Anthony, under the rule stated in *Anderson v. State*, 24 Fla. 139, 3 South. 884, that, when two parties have been engaged together in an offense, the confession of one, after the completion of the offense, is not allowable as evidence against the other. The record before us shows that only that part of Moore's statement that Anthony expressly assented to and stated to be correct was put in evidence against him, and we do not see what ground of complaint he has on this account. It was a statement not simply acquiesced in, but stated by him to be correct, and to this extent it was his own statement.

The tenth assignment is that the court erred in denying the motion to strike out the testimony of witness Conroy as to the shortage of pork loins at or about gala week, 1900. The witness was interrogated as to what Anthony said about an arrangement between him and Moore in reference to the delivery of meat by the latter to the former, and stated that Anthony said there was a shortage of pork loins; and at this point counsel for defendant moved to strike out the answer on the ground that it was too vague, indefinite, and uncertain, and did not give defendant sufficient notice of the offense with which he was charged. This motion was denied, and exception taken. The witness then completed his answer by stating that Anthony said during the last gala week there was a shortage of pork loins in Jacksonville, and he went to Moore and asked him if he could not take care of him, and Moore said he could. Anthony said that was the time he started this arrangement with Moore, and it was because he could not get pork loins anywhere else. The gala week referred to was in 1900. We do not think there was any ground of objection on the part of the accused to the introduction of this evidence. It tended to show the beginning, not too remote, of the very arrangement under which the pork loins alleged in the information to have been stolen were received by the accused, and bore on the question of his guilty knowledge. *Copperman v. People*, and *Coleman v. Same*, *supra*.

The thirteenth assignment is that the court erred in permitting the witness Conroy to be recalled after the state had closed its case and during the argument of counsel to the jury. The record shows that this was done,

but it is not error for the court, in the exercise of sound discretion, to permit the state to introduce further evidence, after it has been closed on both sides, in furtherance of justice. *Barber v. State*, 5 Fla. 199; *Burroughs v. State*, 17 Fla. 643. It is not contended that the ends of justice were not promoted by permitting the witness Conroy to be recalled, and we see no ground for reversing the judgment on this account.

The fourteenth and fifteenth assignments impute error to the trial court in the refusal to give the following requests on behalf of the accused, viz.: "The evidence of verbal confessions of the guilt of the accused is to be received with great caution; for besides the danger of mistake from misapprehension of the witness, misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it is to be recollected that the mind of the defendant is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue statement." "An accomplice is an admissible witness, but he comes before the court under suspicious circumstances; his testimony ought to be received with great caution. As a general rule it is unsafe to convict upon the testimony of an accomplice alone, uncorroborated by other testimony. It ought to be corroborated in material facts, connecting the defendant with the same; but the degree of credit to be given to the testimony of an accomplice, and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury." Text-writers use language similar to that employed in the requests in reference to the credibility of evidence of accomplices and of confessions of accused persons detailed by witnesses. Some courts have regarded such statements as rules of law which a defendant has a right to have given in charge to the jury, while many others reject this view. They hold that the trial judge may, in his discretion, caution the jury in such language, but that it is not error for him to refuse to do so. By statute in this state (section 1088, Rev. St.) trial judges are restricted in charging juries to the law of the case, and cannot intimate to them their views as to the effect, weight, or credibility of the evidence. Notwithstanding this statute, it has been decided in this state that an accused has a right as matter of law to have the trial court instruct the jury that the testimony of an accomplice, as well as his own confessions, should be received with great caution. *Bacon v. State*, 22 Fla. 51; *Coffee v. State*, 25 Fla. 501, 6 South. 493, 23 Am. St. Rep. 525. To this extent the trial court should go as to such testimony, and a refusal to so charge when requested will be error. It has not been decided here, however, that the court should go to the extent requested in the charges refused in this case, and we think it is not error to refuse such requests. A caution, as indicated in our previous deci-

sions, is a matter of right to the accused; but beyond this, and to the extent indicated by the liberal approved view favorable to an accused, it must be left to the discretion of the trial judge. As the requests went beyond what the accused had a right as matter of law to ask, their refusal was not error.

There is no error under the first and third assignments, that the verdict is contrary to the evidence and the charge of the court. The evidence is of such a character as forbids its disturbance by this court under the settled rule on the subject, and there is nothing in the charges of the court in conflict with such a result.

No error having been made to appear in any of the assignments of error, the judgment must be affirmed. Ordered accordingly.

DAVIS v. STATE.

(Supreme Court of Florida. April 1, 1902.)

CRIMINAL LAW—HOMICIDE—INDICTMENT—EXPERT WITNESSES IN INSANITY—EVIDENCE—PROCEEDINGS DE LUNATICO INQUIRENDO—INSANITY AS DEFENSE—ORDER OF ADMITTANCE OF EVIDENCE.

1. Under the laws of Florida the circuit court of the county where the fatal blow has been struck has jurisdiction to try the homicide, though the death may occur in another county or state.

2. The proceedings and judgment of the county judge's court adjudging a party insane under the provisions of chapter 4357, Laws 1895, are not admissible in evidence upon the trial of a criminal charge against the party therein adjudged to be insane, where insanity is relied upon as a defense to such charge.

3. It is the province of the trial court to determine whether or not a witness offered as an expert has such qualifications and special knowledge as to make his opinions in answer to hypothetical questions admissible, and the decision of such trial judge is conclusive upon the question unless it appears from the evidence to have been erroneous, or to have been founded upon some error in law. The qualifications necessary to enable witnesses to give expert or opinion evidence are prescribed as well as ascertained by rules of law, and, if these rules are violated by the trial judge, his action is subject to review by the appellate court.

4. The rule laid down in McNaghten's Case, 10 Clark & F. text, pp. 209-211, as to insanity as a defense to crime, adopted and approved. The phase of insanity commonly known as the "irresistible impulse" doctrine is not recognized in Florida, and a charge announcing such doctrine to be a defense in homicide here is erroneous, but is not reversible error in this case, as it tended to favor the accused, and not to prejudice him.

5. Sanity being the normal condition of man, when charged with crime he is presumed to be sane, and the mere fact of the commission of the crime is not in itself sufficient to overcome this presumption.

6. It is within the discretion of the trial court to permit the introduction of evidence by the state after the conclusion of the defendant's case, though the same may not be strictly in rebuttal, if it was admissible in the main case; and, unless such discretion is abused to the detriment of the defendant, it will not be ground of reversal.

(Syllabus by the Court.)

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 179, 230; Homicide, vol. 26, Cent. Dig. § 211.

Error to circuit court, Suwannee county: John F. White, Judge.

Eugene M. Davis was convicted of murder, and brings error. Affirmed.

M. F. Horne, J. N. Stripling, C. J. Hardee, and C. A. Hardee, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. This cause was referred by the court to its commissioners for investigation, and they have reported that the judgment ought to be affirmed.

The plaintiff in error was convicted of murder in the second degree in the circuit court of Suwannee county, and brings his case to this court by writ of error.

I. The first assignment of error is that "the court erred in denying the motion of the defendant to strike the evidence of C. S. Brown as to the death of the deceased." The witness was a doctor, and testified that the death of Dr. W. S. Airth, for whose killing plaintiff in error was on trial, was caused by a wound from a pistol shot inflicted by the accused in Suwannee county, Fla.; that after the shooting, the deceased, then still living, desired to be taken to Atlanta, Ga., and witness started for Atlanta with him the same night, having put him under the influence of an opiate; that they reached Atlanta next day, and took deceased to a sanitarium, where he was examined, and it was decided that it was not necessary to attempt an operation, as he could not possibly recover; that he died in Atlanta the next day after arriving there, and his body was embalmed, and brought back to Live Oak for burial. The bill of exceptions shows that "defendant's counsel moves the court to strike out all the evidence of this witness as to the death of the deceased upon the ground that the proof does not correspond with the allegations of the indictment, which said motion was overruled by the court, to which ruling defendant, by his counsel, excepted." The only ground of error asserted in the briefs of counsel for plaintiff in error is that "the allegation that he then and there died is equivalent to an allegation that he died in Suwannee county, Florida," and it could not be supported by proof of death in Atlanta, Ga. But the indictment contains no such allegation. It charges that the mortal wounds were inflicted in Suwannee county, Fla., "from which two said mortal wounds the said W. S. Airth did languish and live until the 1st day of July, A. D. 1900, on which said last-mentioned day the said W. S. Airth, of and from the two mortal wounds aforesaid, did die." The place of the death of the deceased is not stated in the indictment. The circuit court of Suwannee county had jurisdiction of the crime, if committed in that county, although consummated in another state. Rev. St. § 2360; Roberson v. State, 42 Fla. 212, 28 South. 427; Smith v. State, 42 Fla. 605, 28 South. 758.

II. The second assignment of error is that "the court erred in denying and overruling the motion of defendant's counsel to strike the

evidence of Mr. Bevans so far as the same relates to Mrs. Davis on her deathbed, to the effect that she said in the presence of her husband that the medicine that Dr. Airth had given her was hastening her death." The motion made was to withdraw the testimony of the witness Bevans, and not to strike it as stated in the assignment. This witness was the father-in-law of the defendant, and was introduced as a witness on the part of the state. He testified that Dr. Airth, the deceased, was the physician who attended Mrs. Davis in her last illness prior to her death on the 21st or 22d of November, 1899, and was asked this question: "Did you hear her make any remark prior to her death as to the treatment Dr. Airth was giving her?" to which he replied, "I heard her say that Dr. Airth's medicine was carrying her off;" that this remark was made perhaps six or eight hours before her death, and was made more than once. On cross-examination he testified that the accused was present when remarks of this character were made. No objection was made to the questions propounded to the witness at the time of his examination, nor until the testimony of the state had closed. The ground of the motion finally made was that the testimony was impertinent. It also appears that counsel for the accused put in evidence substantially the same fact by another witness introduced for the defense. Waiving the point that the objection came too late, and also that by introducing evidence of like import the accused has no right to object, we are of the opinion that the testimony sought to be withdrawn was pertinent. It appeared that the accused, in repeated conversations with parties in reference to the death of his wife, stated that the deceased had given her medicine which she stated had caused her death. On one occasion a short time before the shooting of the deceased, in conversation with W. W. Hawkins, the accused stated that deceased had caused the death of his wife, and he would kill deceased if he crossed his path; and at the very time of the killing the accused said the deceased had killed his wife, and he had killed deceased for it. The fact that the wife of the accused, just before her death, stated in his presence that the medicine administered by the deceased was carrying her off, was pertinent as tending to show motive for the killing, and there was no error in admitting it on this theory on the part of the state.

III. The third assignment of error is that "the court erred in sustaining the objections of the state attorney to the introduction and reading in evidence the copy of the petition, order appointing a committee, the report of the committee, and the judgment of the county judge's court based thereon; the same being a copy of all the proceedings in a cause wherein Eugene M. Davis was adjudged insane on June 30, 1900." The papers mentioned in this assignment of error were offered in evidence by defendant upon the statement of his counsel that they were offered "for the purpose

of establishing the fact that he was insane at the time of those proceedings on June 30th." The proceedings were had on the day after the homicide, and were based upon the provisions of chapter 4357 of the act approved May 20, 1895, the sixth section of which provides that the provisions of the act shall not apply to persons charged with criminal offenses and who plead insanity. This court is of opinion that the circuit court was right in excluding the proffered evidence for the reason that under the section mentioned proceedings had in pursuance of that act cannot be used in evidence upon the trial of a criminal charge against the person adjudged therein to be insane, where insanity is relied upon as a defense upon such trial, as was the case here.

IV. The fourth assignment of error is based upon defendant's objection to a question propounded by the state to the witness Conner, inquiring whether, at the time the proceedings mentioned in the preceding paragraph of this opinion were had, it was not a well-known notorious fact, and the talk of the town, that defendant had on the preceding night shot the deceased. The court permitted the question upon the theory that the answer would tend to show that defendant was charged with a criminal offense at the time the proceedings were instituted, within the meaning of the sixth section of the act above referred to. The fact that defendant did, at the time stated in the question and answer, shoot the deceased, was proven by eyewitnesses, was not contested at the trial, and there is nowhere in the evidence a suggestion or intimation to the contrary. Defendant could not have been and was not injured by the testimony adduced in reply to the question objected to, and any error in the ruling here assigned as error is harmless.

V. The sixth, seventh, and eighth assignments of error all depend upon the question whether or not the trial court correctly ruled that the witness Dr. T. S. Anderson was not qualified to testify as an expert on the subject of insanity, and may be considered together. The witness testified that he had been practicing medicine about 21 years; that he was a graduate of the State University of Iowa, and a licensed physician in Florida. He testified that he had not made a particular study of diseases of the mind, although he had studied that branch at college the same as any other branch of study; that he had only treated a very few patients for insane delusions or insanity, and only for a short time; that, with the exception of one, he sent them to the asylum, and could not send that one because he died too quick; that he could not say he acquired additional knowledge on the subject in treating these patients to that he acquired at college; that he would not have known how to treat them if he had not gotten it from the books at college; that he treated them by the knowledge there obtained; that he never treated any case through with the exception of that

one; that they were only treated until he could get them away to the asylum; that he understood we had an asylum for insane patients, and doctors there to attend them, and when he had one he got him there as quick as possible, where he belonged; that he did not consider himself an expert. Upon that testimony the court ruled that the witness could not testify as an expert on the subject of insanity. It is the duty of the trial court to determine whether or not a witness offered as an expert has such qualifications and special knowledge as to make his opinions in answer to hypothetical questions admissible, and the decision of the trial judge is conclusive upon this question, unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law. *Perkins v. Stickney*, 132 Mass. 217. While it appears from the evidence respecting the qualifications of this witness that he was, and had been for about 21 years, a practicing physician and surgeon, a graduate of the State University of Iowa, and licensed to practice his profession in this state, and had at college made a study of diseases of the mind, it does not appear how long or to what extent his studies upon that subject were pursued, nor that since leaving college he had devoted any attention to or pursued the study of the subject to any extent; and as the judge had the witness before him, and saw the evident reluctance manifested by the witness to being regarded as an expert, caused no doubt by a conscientious belief on his part that his studies upon the subject were too limited and desultory to entitle him to be regarded as an expert, we cannot say that the judge could not legally find from the testimony that the witness was not qualified to give opinions upon the question of insanity based upon the strictly hypothetical questions sought to be put to him. *McEwen v. Bigelow*, 40 Mich. 215; *Abbott v. Com. (Ky.)* 55 S. W. 196; *Com. v. Rich*, 14 Gray, 335; *Russell v. State*, 53 Miss. 367; *Reed v. State*, 62 Miss. 405; *Lawson, Exp. Ev.* p. 125 et seq. Some courts hold that the trial judge has a discretion not subject to review in passing upon the facts relating to the qualifications of a witness offered as an expert, but a discretion of this nature cannot be admitted to exist in the jurisprudence of this state. The qualifications necessary to enable witnesses to testify as experts are prescribed as well as ascertained by rules of law, and, if these rules are violated by the trial judge, his action will be erroneous, and subject to review. The question whether a particular witness possesses the necessary legal qualifications of an expert is a question of fact to be determined by the trial judge from testimony bearing upon that question, and, if he clearly errs in his decision upon this question of fact, his decision will likewise be erroneous, and subject to review. Of course, his decision upon such question of fact will be entitled to weight in the appellate court, because of the

superior advantages possessed by the trial judge, who hears the testimony and observes the witnesses; and his decisions will not be pronounced erroneous unless they are clearly so. He must decide the question of fact like he would other questions of fact arising for his decision upon the trial, and his decision will be given due weight; but if he has erred in matter of law, or if his decision upon the evidence is clearly erroneous, it is subject to review and control by an appellate court. The ruling of the trial judge in this case did not preclude the witness Dr. Anderson from testifying to facts and circumstances known to him in relation to the defendant, and expressing his opinion as to the sanity of the latter, based thereon, as recognized in *Armstrong v. State*, 30 Fla. 170, 11 South. 618. 17 L. R. A. 484, for the witness was permitted to so testify, and the objections embraced in these assignments of error relate solely to hypothetical questions put to the witness as an expert on insanity. We cannot see that the rulings were clearly erroneous, and these assignments of error are therefore not well taken.

VI. The fifth assignment of error is as follows: "The court erred in using the following language in the hearing of the jury, to-wit: 'The court having ruled that this is not an expert witness, Mr. Stripling, I want this matter of examination of the witness to stop. He cannot answer that question unless he is an expert, and I have said that the question ought to have been objected to by the state attorney; that I do not want to appear as prosecuting in the matter, but that it has been gone over, and I want it to stop.'" Previous to this remark the court had ruled that the witness Dr. Anderson was not an expert, and that questions propounded to him on the theory that the witness was an expert could not be answered. Other questions along the same line were propounded, which the court excluded, and thereafter another question of the same nature was asked, which elicited the remarks from the court embraced in this assignment of error. It is proper for the court, after having distinctly ruled that a witness was not qualified as an expert, to insist that the time of the court shall not be consumed in propounding questions to such witness on the theory that he was an expert. We see nothing in the remarks injurious to any right of the defendant.

VII. The ninth assignment of error is not argued, and is therefore abandoned.

VIII. The tenth assignment of error relates to a portion of the charge to the jury on the effect of intoxicants on the mind of an accused when committing a homicide. The objections urged to this portion of the charge are: First, that there was no basis in the evidence for a charge on the subject; second, that the court assumed in the charge that the accused was intoxicated, or drinking; and, third, that the rule stated was in-

correct, and also tended to deprive the accused of the defense of insanity,—the only one upon which he relied. It is true that the defense of insanity is the only one, so far as disclosed by the evidence, relied on by the accused; but there was sufficient evidence of the use of intoxicants by the accused to authorize the court to instruct the jury on the subject. The fact alone that the accused did not request or desire any instruction thereon did not render the charge erroneous. *Garcia v. State*, 34 Fla. 311, 16 South. 223. The court did not assume in the charge that the accused was drinking or intoxicated, nor does the charge exclude from the jury the defense of insanity relied upon by the accused, which defense was fully covered and distinctly submitted to the jury in other portions of the instructions given. The only other contention is that the instruction did not correctly state the rule on the subject. If the defense relied on was not maintainable under the proof, the accused was clearly guilty of murder in the first degree, unless it be that by the use of intoxicants he was unable to form a premeditated design to take the life of the accused. The undisputed evidence is that on the evening of the homicide the accused sought the deceased at his home, and, not finding him there, went to a drug store and inquired for him, saying he wanted to see him. Being informed that he was out, he said he would wait for him, which he did. After a short time the deceased walked in the drug store at a back door, and, after greeting the accused, passed behind a counter, and walked towards a cigar case in front. The accused walked in the same direction on the outside of the counter, both being engaged quietly in a friendly conversation, audible to other persons present. The deceased reached the cigar case, and got out a cigar, and at that time the accused shot him with a pistol. After the firing by accused of several shots in quick succession, the deceased crouched behind the counter, and the accused stepped towards the door, turned back, reached over or around the counter, and fired again, and as he walked out of the store said, "He killed my wife, and, G—d d—n, I will kill him." There was also testimony tending to show that the accused was drinking intoxicating liquors a short time before the killing, and to some extent under its influence, but it did not go to the extent of indicating fixed or temporary insanity on his part. The defense was insanity, and this, of course, involved the mental capacity of the accused to distinguish between right and wrong, and to comprehend the nature of his act in taking life. The court instructed the jury as to the effects of intoxicants on the mind, in connection with the defense of insanity, as a result of a diseased mind, and the most favorable view that the jury could have taken of the testimony in reference to the use of intoxi-

cants was that the accused did not have capacity by reason thereof to form a premeditated design to take life, and hence could not be guilty of murder in the first degree. The court instructed the jury that if the accused, at the time of the homicide, was so much under the effects of intoxicants as to be unable to form a premeditated design to effect the death of the deceased, then he could not be convicted of murder in the first degree nor manslaughter; but that if the evidence satisfied them beyond a reasonable doubt that at the time of the killing the accused knew he was doing wrong, and then had will power sufficient to enable him to resist the temptation to do the wrongful act, and under the influence of passion and a spirit of revenge or injury, either real or imaginary, slew the deceased, he could be convicted of murder in the second degree. Aside from the defense of insanity, which the jury rejected, if the accused was not guilty of murder in the first degree by reason of his incapacity resulting from the use of intoxicants to form a premeditated design to take life, he was clearly guilty, under the testimony, of murder in the second degree. The latter part of the charge, though not stating the conditions of the second degree of murder as defined by the statute, was not erroneous as applied to the facts of the case. The court had already defined the offense in the language of the statute in a prior part of the charge. We think there is no tenable ground for reversing the judgment in the particulars of which complaint is made.

IX. The eleventh assignment of error is predicated upon the following charge to the jury: "The important question for you to decide is, was the accused, at the time the fatal shot or shots were fired, laboring under an insane delusion or insanity to such an extent as not to know that he was violating the law and doing wrong, it not being sufficient that he was insane before or after that time? Where insanity of a permanent type or continuing nature or possessed of the characteristics of an habitual or confirmed disorder of the mind is shown to have existed prior to the commission of the act, it is presumed to continue, until the presumption is overcome by testimony to the contrary. But this presumption does not apply to spasmodic mania, or to disorders of the mind produced by the violence of disease, or any form of temporary insanity." The main ground of objection urged to the charge is that it adopts as a test of responsibility for crime the mental ability to perceive the wrongfulness of the act, when it is asserted the correct rule is that enunciated by some modern authorities in this country that mere capacity to distinguish between right and wrong as applied to the particular act is not a legal test of responsibility for crime, but that such capacity may be coexistent with an absence of ability to resist the impulse

to commit the wrongful act, in which event there will be no criminal responsibility.

The nineteenth assignment of error relates to a clause of the charge immediately preceding the charge set out above, and both clauses together constitute a single paragraph in the charge, intended to be construed as an entirety; so that these assignments of error may be considered together. The clause embraced in the nineteenth assignment reads as follows: "To justify an acquittal or verdict of not guilty, it is not sufficient to show that the defendant was insane before or after, or both before and after, the time of the killing, although such evidence is admitted to enable you better to decide on the probable condition of the mind at that time." So far as the first sentence of the charge is concerned, which is objected to under the nineteenth assignment of error, there is no merit in the objection. The entire paragraph was intended to and did announce the rule that the jury must find the defendant to have been insane when the fatal shots were fired, in order to justify an acquittal on the ground of insanity. It was not sufficient that he was insane before or after, or both before and after, the firing of the fatal shots, but he must be insane at that particular moment. If, however, insanity of a permanent type or continuing nature, or characterized by an habitual and confirmed disorder of the mind, not temporary or occasional, were shown to have existed prior to the commission of the act, it would be presumed to continue up to the commission of the act, unless the presumption were overcome by competent testimony. *Armstrong v. State*, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484.

Recurring now to the eleventh assignment of error, it is apparent from the entire instruction that the object of this instruction was not to give a comprehensive or authoritative definition of the test of mental responsibility, but merely to define the period at which mental irresponsibility must be shown in order to warrant an acquittal on that ground; and the charge must, therefore, be considered in connection with the other charges given on the subject in determining whether or not it was objectionable on the ground urged under this assignment of error. The entire charge of the court should be considered as a whole in determining the propriety of an exception to any portion thereof, and, if the charge as a whole is correct, there is no ground of exception. *Clifton v. State*, 26 Fla. 523, 7 South. 863. Exceptions to other charges, however, directly present the question as to the proper test in determining mental irresponsibility, and the question may be considered under this assignment of error. *McNaghten's Case*, referred to in *Copeland v. State*, 41 Fla. 320, 26 South. 319, is the leading English authority on the subject. In that case Chief Justice Tindal, in his charge to the jury, said that: "The question to be determined is whether, at the time the act in question was committed, the prison-

er had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him." There was a verdict of "not guilty, on the ground of insanity," and the case, which was tried in 1843, afterwards became the subject of debate in the house of lords, whereupon it was determined to take the opinions of the judges on the law governing such cases. Two of the questions propounded to the judges were as follows: "What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?" And "in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" In their response the judges say: "As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jurors ought to be told in all cases that a person charged with crime will be regarded as sane unless at the time of the committing of the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did not know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that

was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." *McNaghten's Case*, 10 Clark & F. 200, 209-211. Section 2369 of our Revised Statutes provides that "the common law of England in relation to crime, except so far as the same relates to modes and degrees of punishment, shall be of full force in the state where there is no existing provision by statute on the subject." There is no statute defining what degree of irresponsibility shall constitute incapacity to commit a criminal act, and hence the common-law rule must govern. The rule announced in *McNaghten's Case* is substantially the rule laid down in all the modern English authorities, and the weight of authority in this country supports the English rule. *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *Mackin v. State*, 59 N. J. Law, 495, 36 Atl. 1040; *Gens v. State*, 59 N. J. Law, 488, 37 Atl. 69, 59 Am. St. Rep. 619; *State v. Miller*, 111 Mo. 542, 20 S. W. 243; *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *Ford v. State*, 73 Miss. 784, 19 South. 665, 35 L. R. A. 117; *Cunningham v. State*, 56 Miss. 260, 21 Am. Rep. 360; *State v. McIntosh*, 39 S. C. 97, 17 S. E. 446; *State v. Alexander*, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; *Wilcox v. State*, 94 Tenn. 106, 118, et seq., 28 S. W. 312; *State v. Murray*, 11 Or. 413, 5 Pac. 55; *Burgo v. State*, 26 Neb. 639, 42 N. W. 701; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *Walker v. People*, 26 Hun. 67; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *State v. Brandon*, 53 N. C. 463; *Spencer v. State*, 69 Md. 23, 13 Atl. 809; *U. S. v. Young* (D. C.) 25 Fed. 710; *U. S. v. Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; 3 *Witthaus & B. Med. Jur.* 446 et seq. Two cases in accord with the views here expressed, and reviewing a large number of the authorities, are *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224, and *State v. Knight*, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373. A leading case holding the contrary view is *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193. The policy of introducing such an innovation on the common-law rule does not seem to have commended itself to legislative assemblies in England or in this country. An unsuccessful attempt seems to have been made to enact the "irresistible impulse" doctrine in England, and it has been ignored in adopting the penal codes of several states here. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275; *State v. Scott*, 41 Minn. 365, 43 N. W. 62; *Maas v. Territory*, 10 Okl. 714, 63 Pac. 960, 53 L. R. A. 314. From what has been said it follows that there was no error in the charge of which the plaintiff in error can complain.

X. The twelfth assignment of error alleges error in giving a charge to the jury as follows: "In the case at bar the defendant insists that he is not guilty, because he was

laboring under homicidal insanity when the fatal shots were fired,—of insanity, or partial insanity, or inability to form a design to take the life of the deceased,—and is not responsible for the acts, because he was incapable of knowing right from wrong." The succeeding part of the same paragraph in the charge reads as follows: "You are instructed that, in order to constitute the crime of murder, the slayer must have a responsible and sane mind. An irresponsible, insane man can no more commit murder than a sane man can do so without killing. His condition of mind cannot be separated from the act. If he is laboring under a disease of the mental faculties to such an extent that he does not know what he is doing, or does not know that it is wrong, then he cannot be held accountable for a homicide committed while laboring under such disease of his mental faculties to that extent." There is no exception to the latter part of the charge, and the entire charge, taken together, furnishes no just ground of exception to the plaintiff in error.

XI. The thirteenth assignment of error is as follows: "The court erred in charging the jury as follows: If, however, there arises from the evidence coming from any quarter, a reasonable doubt of the sanity of the accused, the presumption of the law is overcome, and the accused is entitled to an acquittal, unless the state by evidence meets and overcomes this reasonable doubt arising in his favor by testimony to the contrary." Objection is taken to the use of the words "unless the state by evidence meets and overcomes this reasonable doubt arising in his favor by testimony to the contrary." There is no merit in the objection. The clause objected to under this assignment of error has been expressly approved by this court. *Armstrong v. State*, supra.

XII. The fourteenth assignment of error alleges error in the following charge: "The true test of criminal responsibility, when the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature and consequences of the act with which he is charged, and to understand that it was wrong for him to commit it; that, if this was the fact, he was criminally responsible for it, whatever peculiarity may be shown about him in other respects. Whereas, if his reason was so defective, in consequence of mental disorder, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person, and acquitted." The only ground of objection urged to the charge is that it adopts as a test of responsibility the ability to distinguish between right and wrong in the commission of the act, and this assignment of error, for reasons stated in paragraph IX of this opinion, is without merit.

XIII. The fifteenth assignment is that the court erred in charging as follows: "Now, as

the law presumes every one sane and responsible, the question is, what is there in this case to show to the contrary as to this defendant's mental condition on the 29th day of June last? You are instructed that you are not warranted, as a jury, in inferring that a man is insane from the mere fact alone of his committing a crime, or from the enormity of the crime, or from the mere absence of adequate motives for its commission." There was no error in this charge. Sanity is the normal condition, and a party charged with the commission of crime is presumed to be sane. The mere fact of the commission of the crime is not itself sufficient to overcome this presumption. *Armstrong v. State*, supra; *Copeland v. State*, supra; *Kerr*, *Hom.* § 477.

XIV. The sixteenth assignment of error is only insisted upon in connection with the claim that the court erred in charging as to the legal test of mental responsibility in accordance with the law announced in instructions already considered, as to which it has been shown there was no error.

XV. The seventeenth assignment of error is that the court erred in charging the jury as follows: "If a man's nerves were so irritated by a baby's crying that he became vexed, and instantly killed it, his act would be murder. It would not be less murder if the same irritation and corresponding desire was produced by some internal disease. The great object of criminal law is to induce people to control their impulses; and there is no reason why, if they can, they should not control their insane as well as sane impulses. Whether or not, in the case at bar, there were such insane impulses, and, if there were, whether or not they were irresistible, or could have been resisted, you are to decide from the evidence." The court, in addition to the instructions already considered as to the legal test of responsibility for crime claimed to have been committed by an accused while insane, instructed them upon the subject of irresistible impulse, telling them that though defendant, at the time of committing the act, had sufficient mental capacity to distinguish between right and wrong with respect to the act he was committing, and knew that it was wrong to do the act, yet if, by reason of mental disease, the defendant had not sufficient will power to enable him to refrain from doing the act, he would not be guilty; and in the course of his charge upon this subject of irresistible impulse he used the illustration mentioned in the first clause of this instruction, which is the only clause claimed to be erroneous in the briefs. As we have stated, the "irresistible impulse" doctrine does not obtain in this state, and such impulse is not recognized as affecting responsibility for a crime committed by one who has sufficient mental capacity to distinguish between right and wrong with respect to the particular act, and who knows that he is doing wrong when he commits it;

but, of course, the defendant does not and cannot complain that the irresistible impulse theory was submitted to the jury, for it was entirely favorable to him. We can see no objection to the illustration used by the judge in the instruction we are now considering, for it is entirely correct when applied to causes of partial insanity, as was done in this case, particularly when used in connection with and immediately preceding the language used in the same paragraph as set out above.

XVI. The eighteenth assignment of error alleges error in the following charge: "If a person under an insane delusion as to existing facts commits an offense in consequence thereof, his guilt or innocence depends on the nature of the delusion. If such person labors under partial delusions only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of taking his life, and he kills that man, as he supposes, in self-defense, then he would be exempt from punishment. But if his delusion was that the deceased had inflicted a serious injury to his character or property, or to his happiness in any way, and he killed him in revenge for such supposed or real injury, he would be liable to punishment, if he had mind to enable him to distinguish right from wrong at the time the homicide occurred." The plaintiff in error had no proper ground for exception to this charge. The charge, without the qualification contained in the last clause, is almost in the identical language used by the judges in answer to the fourth question propounded to them in *McNaghten's Case*, supra.

XVII. The twentieth assignment of error alleges error in the following remarks made by the court to the jury at the conclusion of the charge: "Inasmuch as the present term of this court expires at 12 o'clock to-night, I deem it my duty to instruct you that [if], after due and thorough deliberation on a cause, a jury shall return into court without having agreed upon a verdict, the court may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but, if they shall return a second time without having agreed upon a verdict, they shall not be sent out again without their own consent, unless they shall ask for some further explanation of the law. I mention these facts that you proceed with judicious activity in the consideration of the evidence, as your verdict, to be effective or valid, must be presented in court during this term, which ends, as already stated, at 12 o'clock to-night." The bill of exceptions shows that the case was submitted to the jury at 6 o'clock p. m., and that they returned their verdict at 10:30 o'clock p. m. on the day the charge of the court was given

them, and, as there is nothing in the record showing the contrary, we must assume that the term of the court expired at the time stated in the instruction objected to. It was proper for the court to give the charge under the circumstances, and it had no tendency, that we can see, to influence the jury to render a verdict without due consideration, or to withdraw their minds from the importance of their duties and the responsibilities devolving upon them as jurors. *Sigsbee v. State*, 43 Fla. —, 30 South. 816; *Myers v. State*, 43 Fla. —, 31 South. 275.

XVIII. The twenty-first assignment of error is that "the court erred in not sustaining the motion of the defendant to strike the evidence of W. W. Hawkins, given in rebuttal, about a threat alleged to have been made by the defendant." The testimony which was the subject of the motion was to the effect that on the 17th of June—12 days prior to the homicide—the witness was in company with the defendant, and the latter, in course of a conversation, remarked, "Boys, I have no wife, but I would have had one if Dr. Airth had not killed or poisoned her," or words to that effect; and, further, "He said he believed that he had killed her, and always would believe it, and the first time he crossed his path he would kill him." There was no objection to the question in response to which the testimony was elicited, but the bill of exceptions shows that after the admission of the testimony "defendant moved the court to strike out and withdraw from the jury the evidence of W. W. Hawkins, given in rebuttal, and because the defendant has no opportunity to disprove it." The assignment of error is without merit. It is within the discretion of the trial court to permit a witness for the state, after the conclusion of the defendant's case, to testify to matters not strictly in rebuttal, but which might have been introduced as part of the main case; and it does not appear that there was any abuse of that discretion. *Anthony v. State* (decided at this term) 32 South. 818. If the defendant had desired to contradict or impeach the testimony of the witness, he should have offered evidence for that purpose, which he could properly have done.

XIX. The twenty-second and only remaining assignment of error is that the court erred in denying defendant's motion for new trial. It is only argued on the ground that the evidence fails to sustain the verdict, and that ground is untenable. The only questions for the jury to determine were whether or not the defendant was insane, and, if not, the degree of his offense. Upon these questions there was conflicting testimony, and it was the peculiar province of the jury to settle it. The jury did so, and there is ample testimony to support the verdict.

There is no error disclosed in the record prejudicial to the plaintiff in error, and the judgment of the court below should be affirmed, and it is so ordered.

WITHERS v. SANDLIN.

(Supreme Court of Florida. Feb. 13, 1902.)

ACTION ON ACCOUNT STATED—EVIDENCE—ADMINISTRATOR—PRESENTATION OF ACCOUNTS—WITNESS—COMPETENCY.

1. An account sued on as the cause of action with an ex parte affidavit attached, to the effect that the account stated is just and true as stated, and no part of same has been paid, is not evidence per se of the correctness of the account, and it is error to admit it in evidence as such.

2. An administrator of an estate may become bound in his representative capacity upon an account stated by him with a creditor of the decedent of whom he is representative, but the mere silence of an administrator or failure to object, when an account against his intestate is presented to him for payment, is not alone sufficient to authorize the inference that he has thereby stated the account and relieved the claimant of the necessity of establishing it in the usual way, or put upon the administrator the burden of affirmatively establishing mistake or error.

3. Section 1095, Rev. St., disqualifying certain interested persons from testifying against the estates of deceased persons, does not prohibit a person interested in the result of the suit from testifying to a conversation had exclusively between the decedent and a third party as against decedent's administrator, provided the interested witness took no part in the conversation, either actually or by acquiescence.

4. Though an account stated be proved, yet, if it clearly appear that such account or particular items charged therein be wholly unfounded, no recovery can be had for the unfounded claim or items.

(Syllabus by the Court.)

Error to circuit court, Hamilton county; John F. White, Judge.

Action by W. Y. Sandlin against J. B. Withers, administrator of the estate of E. J. Baker. Judgment for plaintiff. Defendant brings error. Reversed.

Roberson & Small, for plaintiff in error. B. B. Blackwell and D. B. Johnson, for defendant in error.

MABRY, J. This cause was referred by the court to its commissioners for investigation, who have reported that it should be reversed. After a careful consideration, the court is of the opinion that the judgment should be reversed for reasons stated in this opinion.

The suit was by the defendant in error against plaintiff in error, declaration originally filed containing common counts for goods, wares, and merchandise sold and delivered, for work and labor done, for money lent, for money paid, for money received, and for an account stated. Subsequently a special count was added alleging that E. J. Baker, deceased, in his lifetime contracted with I. T. Carter in his lifetime for the latter to locate and survey lands situate in the counties of Echols and Clinch, state of Georgia, and for such services it was agreed by and between said parties that Carter's compensation should be equal to one-half the value of the lands so

¶ 2. See Account Stated, vol. 1, Cent. Dig. § 37.

located; that under said agreement Carter, in the lifetime of Baker, located and surveyed large tracts of land, to wit, 25 lots in Clinch county, and 25 lots in Echols county, each of said lots being of the value of \$200; that Carter, for value received, transferred and assigned all of the said claims and demands against Baker to plaintiff, of which defendant had due notice; and that he neglected and refused to pay the same, though often requested to do so, to the damage of plaintiff in the sum of \$3,500. Pleas were filed to the original declaration, and one to the special count, which were treated in the trial court as the general issues to all the counts. The trial, which was a second one, subsequent to the reversal in this court (*Withers v. Sandlin*, 36 Fla. 619, 18 South. 856), resulted in a judgment against plaintiff in error, administrator of the estate of E. J. Baker, deceased, for \$3,016.84, to be levied of the goods and chattels, lands and tenements, of the estate of E. J. Baker, deceased, in the hands of said Withers, administrator, to be administered. The writ of error is from this judgment.

The case was presented in the trial court in a very confused way, and there is some doubt whether the suit is against plaintiff in error in his representative capacity as administrator or individually, and also whether the pleas filed are sufficient.

As no objection was made by demurrer or otherwise to any of the pleadings, we will consider the case here as it was treated in the trial court, as one against plaintiff in error in his representative capacity as administrator of E. J. Baker, deceased, and examine such of the objections presented as are deemed essential.

To maintain the issues on his behalf, plaintiff below offered in evidence the following account, with affidavit and indorsement thereon, filed as bill of particulars, viz.:

"E. J. Baker to I. T. Carter, Dr.	
Sept. 15, 1888. For surveying and locating fifty-eight lots of land in Echols and Clinch counties, state of Georgia	\$2,750 00
To five months' services rendered E. J. Baker, ending Nov. 23rd, 1888..	125 00
	<hr/> \$2,875 00

"State of Florida, Hamilton County. Before me personally came I. T. Carter, who, being duly sworn, says that the above-stated account is just and true as stated, and that the same is due, and that no part thereof has been paid. I. T. Carter.

"Sworn and subscribed to before me this June 12th, A. D. 1889. D. B. Johnson, Notary Public, State at Large."

Indorsed: "For value received I hereby transfer, assign, and set over to W. Y. Sandlin the within account, with full power to collect the same by suit as fully as I myself would or could have done. I. T. Carter.

"\$572.78. Received on within claim, \$572.78. Oct. 3rd, 1890."

Defendant objected to the introduction of the paper in evidence on the ground that it was not evidence of any indebtedness by E. J. Baker to I. T. Carter, and that it was improper to allow the same with indorsements, especially the affidavit of I. T. Carter, to be read to the jury. The objection was overruled, and the paper admitted in evidence, to which ruling the defendant excepted. We are of the opinion that the court erred in permitting the account, with the affidavit attached, to be introduced in evidence. The account was not evidence per se of any liability against the defendant administrator. *Belote v. O'Brian's Adm'r*, 20 Fla. 126. In connection with proof that the account had been stated between the parties, it might have been admitted. *Navigation Co. v. Wariner*, 35 Fla. 197, 16 South. 898. The affidavit attached to the account was entirely ex parte and inadmissible as evidence in any view, and this is apparent from the paper itself. It appeared from the pleadings that defendant was sought to be held liable as administrator of E. J. Baker, deceased, on a claim in favor of I. T. Carter against Baker, transferred to plaintiff, and Carter made the affidavit to the account, and therein stated that the "above-stated account is just and true as stated, and that the same is due, and no part thereof has been paid." If we were to concede that a party holding an account against the estate of a deceased person, in which there were items for services rendered the deceased, could, under our statute (section 1095, Rev. St.), testify that the account was just and true as stated, that would not authorize an ex parte affidavit to that effect to be admitted in evidence. The benefit of cross-examination would entirely be gone if such a rule should be established.

The following portion of the charge of the court to the jury was excepted to by defendant, viz.: "You are instructed that part payment of an account presented for payment is not conclusive evidence that the whole account is a valid or just account, but it may be evidence and is prima facie evidence that a part of the account thus paid was just and valid, and may, in the absence of evidence showing that the balance of the account was objected to, go to show that the justice of the whole account was acquiesced in by the debtor. If from the evidence, or weight of the evidence, you should find that the account of I. T. Carter against E. J. Baker, defendant's intestate, sued on, was presented to the defendant for payment as administrator, he was bound to examine it and to have stated his objections thereto within a reasonable time, if he had any, and if he did not do so such account, under ordinary circumstances, will be treated presumptively by acquiescence a stated account. And a stated account establishes prima facie the correctness of the items of the account, and, unless this presumption is overcome by proof of fraud, mistake, or error, it becomes conclusive. Still an account stated

may be impeached for fraud, mistake, or error. The party impeaching it has the burden of proof thrown upon him of such impeachment. You are also instructed that what is a reasonable time within which a party must object or become bound depends upon the relation of the parties and the usual course of business between them. If from the weight of evidence you should find that the account here sued on was presented by I. T. Carter, the assignor, to the defendant for payment, and that the defendant made the payment of \$572.78 on the same, and that he made no objections to said account then and there, and that afterwards the said account was assigned the plaintiff, Sandlin, and that the defendant had knowledge of said assignment, and demand of payment was made upon the defendant for payment, and he made no objections to said account until after suit thereon, in this case, unless the defendant has shown by a preponderance of evidence that said account is erroneous or fraudulent, you should find for the plaintiff such sum as is just from the evidence." This portion of the instructions given to the jury in favor of the plaintiff is unobjectionable, except that part to the effect that if the account of I. T. Carter against E. J. Baker was presented to the defendant as administrator for payment he was bound to have examined it, and to have stated his objections thereto, if he had any, within a reasonable time, and if he did not do so such account, under ordinary circumstances, will be treated presumptively by acquiescence as a stated account. The court doubtless was influenced in this portion of the charge by the decision in *Martyn v. Arnold*, 36 Fla. 446, 18 South. 791; but the rule there stated as to the acquiescence in an account rendered had reference to parties in their own right, and not to the case where the party against whom the account stated is claimed is an administrator of an estate. The mere silence of an administrator or failure to object, as the charge seems to imply, when an account against his intestate is presented to him, is not sufficient to authorize the inference that he has thereby stated the account, and so relieve the claimant from establishing it in the usual way, or put upon the estate the burden of affirmatively establishing mistake or error. *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780. It is well settled that an administrator may become bound in his representative capacity upon an account stated by him with a creditor of the decedent of whom he is representative. *Ellis v. Bowen*, Forest, 98; *Segar v. Atkinson*, 1 H. Bl. 102; *Powell v. Graham*, 7 Taunt. 580, 1 Moore. 305; *Ashby v. Ashby*, 7 Barn. & C. 444; *Schutz v. Morette*, supra; 3 Williams, Ex'rs (7th Am. Ed.) 289; 1 Chit. Pl. (16th Am. Ed.) 227. As stated above, however, the mere silence or failure to object is not sufficient to show the statement of account against administrator.

We think there was no error in the court's refusal to give the charges requested by de-

fendant below. The request numbered 2, if it had been confined to the special count of the declaration, should have been given, but as drawn was applicable to the entire declaration, and was therefore properly refused.

Exception was taken to the ruling of the court permitting John M. Carter to testify against the defendant administrator. The objection made by counsel is that John M. Carter was interested in the result of the suit, and therefore disqualified as a witness, under section 1006, Rev. St. The ordinary bill of exceptions shows that objection was made to the witness on the ground stated, but there is no showing there that the witness had any interest in any way in the suit or the result thereof, and to the extent of the assignments of error on this point there are no sufficient facts to authorize their consideration. As the case has been twice tried, and must again be sent back, and the point sought to be raised may be presented again, as appears in the evidentiary bill of exceptions, we will settle it, especially as under previous decisions of this court (*Stewart v. Stewart*, 19 Fla. 846; *Tunno v. Robert*, 16 Fla. 738, text 750) it might become the duty not only of the circuit court, but this court, to disregard the testimony of a witness that was incompetent to testify under the section of the statute mentioned. John M. Carter testified that he was a son of I. T. Carter, and that, as he understood, the balance of the account sued on, after paying W. Y. Sandlin the amount of I. T. Carter's indebtedness and all expenses of collecting the same, was to go to the estate of I. T. Carter, and in that way he was interested in the result of the suit. He then testified that he was present when Baker and Carter made an agreement for surveying the lands; that they talked the matter over in his presence; that Carter was to have one-half of the lands for the work, and Baker agreed to settle with Carter for his half interest on a basis of \$100 a lot, viz., that he was to receive \$50 a lot; that there were about 40 lots; that about 15 of the lots Carter was to be paid a salary for the work, but he did not know how much; that the lands lay in Clinch and Echols counties, Ga.; that he helped Carter to survey the lands about one week, but did not know how many lots were surveyed during that time. On cross-examination the witness testified as follows: "The work that I. T. Carter was to do was to survey and locate those lands and quiet the titles so that E. J. Baker could work them for turpentine and sawmill purposes. My understanding was that I. T. Carter was to put Baker in peaceable possession of the lands. Other parties were claiming the lands, and objected to any one's working the timber. The Moodys claimed, and it was to quiet these claims that Carter was employed, which he failed to do. I know that Baker never did work nor get the possession of the lands, and that J. B. Withers never got possession of them nor worked them, and that other parties

are in possession of them." Conceding that the testimony showed such a direct and certain interest on Carter's part as to have disqualified him from testifying to any transaction or communication between himself and the deceased, it did not appear from the testimony that the witness undertook, or was permitted, to testify to any such transaction or communication between himself and the deceased. The statute referred to, it has been held, was adopted from New York, and it is almost identical in language with the New York statute. *Adams v. Board*, 37 Fla. 266, 20 South. 266. It has been construed by the courts of New York, both before and since its adoption in this state, not to prohibit a party to a suit, or a person interested in the event thereof, from testifying to a conversation had exclusively between a decedent and a third party, as against the decedent's administrator, provided the interested party so testifying took no part in the conversation, either actually or by acquiescence. *Simmons v. Sisson*, 26 N. Y. 264; *Lobdell v. Lobdell*, 36 N. Y. 327, text 333; *Cary v. White*, 59 N. Y. 336; *Hildebrand v. Crawford*, 65 N. Y. 107; *Holcomb v. Holcomb*, 95 N. Y. 316, text 325. See, also, 29 Am. & Eng. Enc. Law (1st Ed.) p. 722 et seq. It nowhere appears that the witness Carter participated in any manner in the communication or transaction between I. T. Carter and E. J. Baker concerning which he testified, and it does not appear, therefore, that his evidence as to that transaction was inadmissible as against the defendant below.

If we eliminate the testimony of the sworn account, held to have been improperly admitted in evidence, the verdict rendered by the jury cannot be sustained on the showing before us. It cannot support a verdict for plaintiff upon the special count under any view that may be taken. It shows affirmatively that the transaction out of which the claim of plaintiff's assignor arose was a contract between him and Baker, whereby the former was to survey and locate certain lots of land, and quiet the titles, so that the latter could work them for turpentine and sawmill purposes, and that Carter never performed that contract, so far as quieting the titles was concerned, and neither Baker nor his administrator ever got possession of the lands or worked them. The testimony shows affirmatively that Carter failed to substantially perform the contract proved in evidence, and therefore had no rightful claim thereunder against Baker or his administrator, which could be the basis of a verdict upon the special count. The account stated declared upon and sought to be proved consisted of two items only, the larger for \$2,750, the smaller for \$125. But the larger item consisted of the alleged sum claimed to be due upon the contract sought to be proved under the special count, and it affirmatively appeared from the evidence without contradiction that nothing was due Carter by Baker under that contract. Though the evidence upon the ques-

tion of account stated was sufficient to prove it, that account, in so far as the large item was concerned, was proven by uncontradicted evidence to be without foundation, and the only other claim attempted to be proved was the small item of \$125, which would not justify a verdict for the large sum rendered by the jury. Though an account stated be proved, yet, if it clearly appears that such account or any particular item charged therein is wholly unfounded, no recovery can be had for such unfounded claim. *Petch v. Lyon*, 9 Q. B. 147; *Gough v. Tindon*, 21 Law J. Exch. 58, s. c. 8 Eng. Law & Eq. 507; *Martyn v. Arnold*, 36 Fla. 446, 18 South. 791.

The judgment will be reversed; and it is so ordered.

FLORIDA CENT. & P. R. CO. v. ASH-MORE.

(Supreme Court of Florida. Jan. 8, 1902.)

PLEADING—WAIVER OF DEFECTS—DEMURRER—DEFECTIVE DECLARATION—INCONSISTENT ALLEGATIONS.

1. A demurrant should be held to waive or abandon all objections to his adversary's pleading not stated as a matter to be argued on demurrer, except those extending to such essential and vital defects in pleading as to show no cause of action or matter of defense, and such as are incapable of being cured by the statute of jeofails.

2. If a declaration which is demurred to is defective only in containing inartificial allegations of the facts necessary to show a cause of action, those imperfections not assigned as grounds of demurrer will be thereby waived. But if there is in the declaration no allegation, suggestion, or allusion to facts necessary to create liability, and such facts are not implied from those which are alleged, the defect is not waived, nor would it be cured by verdict.

3. When the allegations of a declaration containing only one count are repugnant to and inconsistent with each other, such allegations neutralize each other, and the declaration will be held bad on demurrer.

4. Where a person has been constituted the special agent of another to do a particular thing, and his authority to do this particular thing has been revoked before he acts in the matter, the principal will not be bound by a subsequent performance of the act, where the latter has not held the agent out as having the authority notwithstanding such revocation, and has not subsequently ratified the act.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhodon M. Call, Judge.

Action by J. K. Ashmore against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John A. Henderson and John C. Cooper for plaintiff in error. Alex. St. Clair-Abrams, for defendant in error.

PER CURIAM. The defendant in error sued the plaintiff in error to recover damages for alleged unlawful ejection from a car of the defendant, and filed a declaration

as follows: "J. K. Ashmore, a resident and citizen of Kentucky, by St. Clair-Abrams & Bryan, his attorneys, sues the Florida Central & Peninsular Railroad Company, a corporation existing under the laws of the state of Florida, in an action for trespass on the case, for that whereas, on the 5th day of November, 1891, the plaintiff, desiring to travel from Georgetown, in the state of Kentucky, to the state of Florida, purchased a through ticket from the New Orleans & Texas Pacific R. R. Co., commonly known as the Queen & Crescent Route, said railway being then and there the agent of the defendant, the Florida Central & Peninsular Railroad Co. in the sale of said through ticket, which said through ticket was composed of divers coupons guarantying to this plaintiff first-class passage over divers railroads named in said coupons, one of which coupons provided for a passage by the holder thereof on the line of the defendant's road from Lake City, in Florida, to Tavares, in said state, which said coupon was in words and figures in print following, that is to say: 'Issued by Queen & Crescent Road, Florida Central & Peninsular Railroad, Lake City to Tavares, Arcadia, Bowling Green, Charlie Apopka, Cleveland, Fort Ogden, Fort Meade, Homeland, Liverpool, Nocatee, Punta Gorda, Trabue, Wauchula, Zolfo Springs, on conditions named in contract G 397. One passage. Not good if detached. Unpunched figures indicate class of ticket, 1st, 2nd, 40 via Q. C. & A., C. G., G. S. F., F. C. & P., T. O. & A., S. F. F. S. If limited, punch here,'—which said coupon bore on the reverse part thereof the stamp as follows: 'N. O. & T. P. R. R., Georgetown, November 5th, 1891,' which said coupon was by the said agent of the defendant punched in two places with the letter 'L,' and punched with six round holes in the body of said coupon. And the plaintiff having purchased said through ticket and paid the purchase money thereof to the agent of the N. O. & T. P. R. R., commonly known as the Queen & Crescent Route, said railway acting as the agent of the defendant in the sale of said tickets, and said ticket, by one of its coupons, providing for the passage of this plaintiff over the Georgia Southern & Florida Railroad, and this plaintiff having no notice and never having been informed that the defendant had prohibited the sale of through tickets over the line of the said G. S. & F. R. R., and the said through ticket, with coupons, being good on its face for the passage over defendant's line of railroad from Lake City to Tavares, the plaintiff, acting, therefore, in good faith, purchased said ticket from the agent of the defendant in Georgetown, paying therefor the sum demanded of him for the same, proceeding on his trip from Georgetown, in the state of Kentucky, and, having arrived at Lake City, proceeded to Hampton over the G. S. & F. R. R., and entered the defendant's train (said train being in charge

of J. C. Russ as conductor) on November 7, 1891, said train being on defendant's road at Hampton, Florida, for the purpose of proceeding on his trip to said town of Tavares. But the plaintiff says that after the train of defendant had started, and left Hampton, and this plaintiff, being still ignorant and uninformed that the defendant had prohibited the sale of through tickets over the defendant's road where such tickets called for passage over the road of the G. S. & F. R. R., tendered to the defendant's conductor, a duly authorized agent on said train, the coupon attached to the other coupon on the said conductor demanding his ticket, tendering him the same for his passage from Hampton to the town of Tavares; but this plaintiff says that the said conductor, J. C. Russ, refused to receive the said coupon, or to recognize the same, or to take it for plaintiff's passage from Lake City to Tavares, but demanded that this plaintiff pay to him, the said conductor, as a duly authorized agent of the defendant, a sum of money for his said passage from Hampton to Tavares; and on this plaintiff declining to pay this said sum of money, but insisting on the said conductor receiving the coupon for said passage, the said conductor, J. C. Russ, acting then and there as the agent and representative of the defendant on said train, as aforesaid, refused to permit the plaintiff to remain on said cars, but thereupon, at the hour of 3 o'clock in the morning, unlawfully ejected the plaintiff from defendant's cars, and compelled this plaintiff to submit to the outrage, insult, and ignominy of being unlawfully ejected from defendant's cars; this plaintiff being powerless to resist his being ejected, and having no means whereby to compel the defendant to give him passage on said cars from Hampton to Tavares, as the defendant had, by his agent in Georgetown, Kentucky, promised and agreed to do, and for which passage from Lake City to Tavares this plaintiff had paid the agent of defendant, receiving in return the coupon herein described. And this plaintiff says that he was compelled to leave said cars at 3 o'clock in the morning, as aforesaid, at the station which this plaintiff subsequently learned was called 'Waldo'; this plaintiff being a stranger at that place, unacquainted with any person therein,—whereby and by reason of the illegal and outrageous act of the defendant, the plaintiff was damaged in the sum of \$10 for car fare from Waldo to Tavares, and in the sum of \$10 for expenses incurred by him at Waldo by reason of his having been unlawfully ejected from the said cars, and in the sum of \$20 expenses incurred by plaintiff lying over at Orlando by reason of the unlawful act of the defendant, and in the sum of \$500 expenses incurred by the plaintiff in instituting and prosecuting this action, and in the further sum of \$9,410 damages incurred by the plaintiff for the

wrong, outrage, and ignominy inflicted and perpetrated upon this plaintiff by the wrongful, illegal, and unlawful act of the defendant, Florida Central & Peninsular R. R., in unlawfully ejecting the plaintiff from defendant's cars as before stated. Wherefore the plaintiff brings this his suit, and claims \$10,000 damages."

This declaration was demurred to, the demurrer overruled, pleas were filed, and, after issue joined, a jury was waived, and the case submitted upon evidence to the court. Judgment was rendered for plaintiff for \$1,000, from which defendant sued out writ of error to this court, its first assignment of error being based upon the action of the court in overruling its demurrer to the declaration.

The grounds of demurrer to the declaration are: (1) It shows no cause of action. (2) It fails to show what authority the alleged seller of the ticket had to sell tickets over defendant company's line,—whether general or special; and, if special, what authority. (3) The declaration is indefinite, in that it does not state what train by number or time of departure from Hampton, or what conductor by name, is referred to in the declaration. (4) The declaration does not show any unlawful expulsion of plaintiff, or any one else, from cars of defendant. (5) The declaration does not show that plaintiff held any written contract of defendant compelling defendant to carry the said plaintiff as mentioned in said declaration. (6) The declaration fails to show that said coupons attached to said ticket described was the contract of defendant. (7) The said coupons, as described in the declaration, do not make a contract binding on defendant company to carry plaintiff as alleged. (8) The declaration does not show that in fact plaintiff was ejected at all from said cars, or what acts constituted ejection, but states a conclusion in that respect. (9) The declaration is vague, uncertain, and indefinite as to what the alleged expenses and damages constituting the alleged claim attempted to be set up in said declaration consist of. (10) The alleged expenses incurred in prosecuting suit are not a proper subject for damages. (11) The alleged sum for damages generally for wrong and injuries for the alleged ejection are not proper subjects for damages to be recovered in said suit. (12) The declaration fails to show any authority in the conductor to eject said party so as to bind defendant. (13) The declaration fails to show what authority, if any, was given plaintiff to ascertain and inform said conductor as to the genuineness or correctness of the alleged ticket claimed to be held by said plaintiff, or what was made by said conductor to carry said plaintiff upon receipt of said information.

In arguing the assignment of error based on the order of the court overruling the demurrer to the declaration, counsel for plain-

tiff in error say that the substance of the demurrer is that the declaration does not sufficiently show that the coupon tendered to the conductor of defendant was a binding contract upon it, and does not sufficiently show facts to make it the contract of defendant; that facts are not stated showing the authority of the seller of the ticket to sell tickets over defendant's line, but the declaration states a mere conclusion as to such matters; and, further, the declaration does not state facts showing the alleged ejection of plaintiff from the cars, and that the alleged expenses, attorney fees, and damages set up in the declaration are not the proper subject-matter for recovery in the action. The brief of counsel is confined to such matters as are stated to be the substance of the demurrer.

Sections 1050, 1053, Rev. St., provide that "either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence or reply, as the case may be, and when such demurrer shall be disposed of the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto said court, without regarding any imperfection, omission, defect in or lack of form." "The form of a demurrer shall be as follows, or to the like effect: 'The defendant (or plaintiff) says that the declaration (or plea) is bad in substance.' And the substantial matters of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court." Both of these sections are taken from the act of 1861 (chapter 1096), with some modifications. Section 36 of the act of 1861, from which section 1053 of the revision is taken, is a copy of section 89 of the English common-law procedure act of 1852. Day's Com. Law Proc. Act, p. 118. § 89. Section 36 of the act of 1861, after giving the form of demurrer as stated in the revision, provides: "And in the margin thereof some substantial matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court, and leave may be given to sign judgment as for want of a plea." The italicized clause, as will be observed, has been eliminated in the Revised Statutes, and, instead of stating that in the margin of the demurrer some substantial matter of law intended to be argued shall be stated, it is provided that "the substantial matters of law intended to be argued shall be stated." Section 1050 of the revision is substantially the same as section 14, c. 1096, of the act of 1861, with the following provision omitted, viz., "And no judgment shall be arrested, stayed or reversed for any such infection, omission, defect in or lack of form." In another provision (section 1182, Rev. St.) we find a general cura-

tive statute, or statute of jeofails. The English common-law procedure act, supra, abolished special demurrers, and so did our act of 1861, which has been retained in the revision. Section 1040, Rev. St. Under another provision in the same act, and found in section 1043, Rev. St., if any pleading be so framed as to prejudice or embarrass or delay the fair trial of the action, the opposite party may apply to the court to strike out or amend such pleading, and the court shall make such order respecting the same, and also respecting costs, as it may see fit. *Camp v. Hall*, 39 Fla. 535, 22 South. 792. See, also, *White v. Cannada*, 25 Ark. 41. Prior to and at the time of the adoption of the English common-law procedure act, rules of their courts required the parties to give notice in demurrer books of the points or matters intended to be insisted on in argument, but such practice has not prevailed in our courts, at least since the adoption in 1873 of the circuit court rules now in force. Our rules of practice make no provision as to what shall be stated in a demurrer, and we must rely upon the sections of the Revised Statutes to which reference has been made.

Speaking in reference to the statement of facts sufficient to constitute a cause of action, this court said in *Pittman's Adm'r v. Myrick*, 16 Fla. 692, that: "A mere neglect to observe forms of pleading does not constitute such a defect as to make the complaint so insufficient, but, if there be a total absence of the allegation, suggestion, or allusion to facts without which there can be no liability inferred, there is then a failure to state facts sufficient to constitute a cause of action. An incurable defect is not waived by any pleading, but may be taken advantage of whenever the parties are before the court." This decision was made under the Code, but has subsequently been regarded as announcing a sound rule in reference to pleadings. Thus, in *Crawford v. Feder*, 34 Fla. 397, 16 South. 287, the rule as to curing defects by verdict, given by Gould, is quoted as follows: "If the declaration omits to allege any substantive fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect;" and it was also stated that the "presumption which, after verdict, cures a defective statement, is not founded on the idea that the plaintiff on the trial made out a good case independent of the declaration, but that in proving the allegations as actually made the omitted fact was necessarily involved." Again, it was held in the case of *Jordan v. Sayre*, 24 Fla. 1, 8 South. 329, that grounds of demurrer not noticed in brief of counsel for appellant who demurred may be regarded by the appellate court as abandoned. This was in a chancery proceeding, but the authority relied on to sustain it is *Express*

Co. v. Van Meter, 17 Fla. 763, 35 Am. Rep. 107, which was an action at law. The change made in section 1053, Rev. St., requires the substantial matters of law intended to be argued to be stated, and under this section it is the opinion of the court that the demurrer should be held to waive or abandon all objections not stated, except those extending to such essential and vital defects in pleadings as to show no cause of action or matter of defense, and such as are incapable of being cured by the statute of jeofails. Such defects cannot, of course, embrace defective statements of formal matters, but must be such as to exhibit a total absence of allegation of facts without which there can be no liability inferred. In determining the sufficiency of a demurrer the court will be confined to the grounds stated, and will examine no others unless they extend to an omission to allege substantive facts which are essential to a right of action or matter of defense, and which are not implied in or inferable from those that are alleged.

A careful examination of the declaration in the present case will reveal a looseness of statement as to several matters not embraced in the specific grounds of demurrer that are apparently matters of substance, but under the rule stated the consideration of the demurrer will be confined to the points stated and argued.

The only point argued arising upon the demurrer to the declaration that we deem necessary to discuss is whether the declaration shows that the defendant was bound by the ticket issued to plaintiff by the New Orleans, Texas & Pacific Railroad Company. It is nowhere alleged that said railroad was an agent of the defendant for the sale of through tickets to Florida over its line, nor generally that it had authority to issue the particular ticket held by the plaintiff, nor that the defendant, by its agent, issued the ticket. It is recited that the plaintiff purchased a through ticket, with coupons, one of which read over the Georgia Southern & Florida Railroad, and one over the defendant's line, and that the road selling the ticket "being then and there the agent of the defendant in the sale of said through ticket," and that "said railway acting as the agent of the defendant in the sale of said tickets," and that "plaintiff having no means whereby to compel the defendant to give him passage on said cars from Hampton to Tavares, as the defendant had, by his agent in Georgetown, Kentucky, promised and agreed to do"; but these allegations, it will be observed, amount to nothing more than an averment that the New Orleans & Texas Pacific Railroad Company had authority to sell the particular ticket purchased by plaintiff, which would be a special authority, and not that said railroad was a ticket agent, or authorized generally to sell tickets, or through tickets of any description, to Florida, binding the defendant. The au-

thority described is special to sell one ticket to plaintiff over certain lines including the Georgia Southern & Florida Railroad, and, if nothing more had been alleged in the declaration relating to the authority of the alleged agent, these allegations might be sufficient to entitle plaintiff to recover in this case. But the declaration proceeds to allege that plaintiff, when he purchased the ticket, had "no notice, and never having been informed that defendant had prohibited the sale of through tickets over the line of the G. S. & F. R. R.," and again, "This plaintiff being still ignorant and uninformed that the defendant had prohibited the sale of through tickets over the defendant's road where such tickets called for passage over the road of the G. S. & F. R. R.," thus admitting that previous to the purchase of the ticket the special authority of the New Orleans & Texas Pacific Railroad to sell the ticket had been withdrawn. These allegations are in direct contradiction of each other, for it is impossible that the New Orleans & Texas Pacific Railroad could have had the special authority claimed, when in fact it had previously been withdrawn. Where the allegations of a declaration containing only one count are repugnant to and inconsistent with each other, they each neutralize the other, and the declaration will be bad on demurrer. *Railway Co. v. Thompson*, 34 Fla. 348, 16 South. 282, 26 L. R. A. 410. We do not wish to be understood as holding that, where a general agency exists, it can be revoked as against parties subsequently dealing with the agent within the apparent scope of his authority without notice of such revocation, nor that a principal's secret instructions to his agent limiting his authority will bind third persons having no notice of such instructions, who deal with the agent within the apparent scope of his authority; for those questions are not here involved. What we do hold is that, where it appears that a person has been constituted a special agent to do a particular thing, and his authority to do this particular thing has been revoked before he acts in the matter, the principal will not be bound by a subsequent performance of the act, where the principal has not held the agent out as having the authority notwithstanding the revocation, and has not subsequently ratified the act. *Mechem*, Ag. § 225. While this declaration alleges that the New Orleans & Texas Pacific Railroad was the agent of the defendant in selling the particular ticket, other facts are alleged which shown that it was not such agent, and therefore the declaration is defective in substance, and consequently demurrable. *Everett v. Drew*, 129 Mass. 150.

The declaration being defective, other questions sought to be raised are not open for consideration. *Telegraph Co. v. Maloney*, 34 Fla. 338, 16 South. 280.

The judgment is reversed, with directions for further proceedings in accordance with this opinion.

KIRBY v. STATE.

(Supreme Court of Florida. March 25, 1902.)

CRIMINAL LAW—ASSIGNMENT OF ERRORS EN MASSE—CONFESSIONS—ADMISSIBILITY—QUESTION FOR COURT—HEARSAY EVIDENCE—COMMITTING MAGISTRATE'S DOCKET ENTRIES NOT EVIDENCE—GENERAL OBJECTIONS TO EVIDENCE.

1. Where a single general assignment of error is made to embrace refusals to give two or more requested instructions that state separate and distinct propositions of law, the settled rule here is that the appellate court will go no further in the consideration of such an assignment after finding that any one of the instructions so assigned was properly refused, and such assignment will then be overruled.

2. The question as to whether a proposed confession was freely and voluntarily made is one for the court exclusively to decide, and a requested charge that proposes to submit such question to the jury to determine is properly refused.

3. The following charge given to the jury: "You are to determine the credence which shall be attached to the alleged confessions, and every part thereof, and it is your duty to give such confession a fair and unprejudiced consideration. The confession should be taken as a whole. You should give effect to such part as you believe to be true, and reject from your consideration all that you find sufficient reason to reject,"—held to state the law correctly.

4. Where a state witness testifies that he went to the scene of the homicide because of a remark made to him by another party, it is proper for him to state such fact, but it is not proper for him to repeat in evidence the substance of such remark that was the cause of his going, as it is hearsay.

5. A fact that is pertinent and relevant to the issue, and that tends to establish the commission of the crime charged, is not rendered inadmissible in evidence because it may have a tendency collaterally to prejudice the defendant with the jury.

6. The docket entries of the committing magistrate who conducted the preliminary examination of the accused, to the effect, "And the defendant was on this day given a hearing on said charge, and the court being satisfied that there is probable cause to hold the defendant, and believing the presumption of his guilt to be great, he holds the defendant to the circuit court without bail," are wholly inadmissible as evidence on the ultimate trial of such defendant, under any circumstances or for any purpose; and their admission in evidence held to be reversible error.

7. The general rule to the effect that "general objections to evidence proposed, without stating the precise ground of objection, are vague and nugatory, and are without weight before an appellate court," is subject to the exception that if the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances, then a general objection thereto is sufficient.

(Syllabus by the Court.)

Error to circuit court, Columbia county: John F. White, Judge.

Johnson Kirby was convicted of manslaughter, and brings error. Reversed.

T. B. Oliver and Boozer & Gillen, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER OURIAM. This cause was referred by the court to its commissioners for investi-

gation, who reported that the judgment of the circuit court ought to be reversed, in which view the court concurs.

The plaintiff in error was indicted for murder in the first degree in the circuit court of Columbia county, and on his trial there in June, 1901, was convicted of manslaughter, and, to review the judgment, takes writ of error from this court.

The first assignment of error is the denial in the court below of the defendant's motion for new trial. The first six grounds of this motion are presented together, and question the sufficiency of the evidence to support the verdict. As there will be a reversal of the judgment below because of other errors hereinafter to be pointed out, it will be improper to discuss the sufficiency of the evidence for conviction. The seventh ground of the motion for new trial is as follows: "Because the court erred in refusing to give the following charges, numbered 1, 2, 3, 4, 5, 7, and 8, respectively, as requested by the defendant, by and through his counsel, which are as follows." Then follows at length in the motion a copy of the several refused instructions. This ground of the motion, treated as an assignment of error, must be held to be the grouping together in a single general assignment of refusals to give more than one requested instruction, and, as such instructions announce separate and distinct propositions of law, the settled rule here is that the appellate court will go no further in the consideration of such an assignment after finding that any one of the instructions so assigned was properly refused. *Shiver v. State*, 41 Fla. 630, 27 South. 36; *Eggart v. Same*, 40 Fla. 527, 25 South. 144; *McCogle v. Same*, 41 Fla. 525, 26 South. 734. Acting upon this rule, the court finds that the seventh requested instruction was erroneous because by its first clause it proposed to submit to the jury the question whether or not the confessions introduced in evidence were freely and voluntarily made. This was a question to be determined by the court before admitting evidence of the confessions, and not a question for the jury to determine under instructions from the court. *Holland v. State*, 39 Fla. 178, 22 South. 208, and cases cited therein. For the reason stated, the seventh requested instruction was properly refused.

The seventeenth assignment of error is as follows: "The court erred in refusing to charge the jury in the several matters and things requested, and appearing of record,—charges 1, 2, 3, 4, 5, 6, and 7." What has already been said in reference to the seventh ground of the motion for new trial applies alike to this assignment, and it must fail for the same reasons. The eighth, ninth, tenth, and eleventh grounds of the motion for new trial question severally the giving by the court of four several instructions as follows: "You are to determine the credence which shall be attached to the alleged confession, and every part thereof, and it is your duty to

give such confession a fair and unprejudicial consideration. The confession should be taken as a whole. You should give effect to such part as you believe to be true, and reject from your consideration all that you find sufficient reason to reject." There was no error in this instruction. *Marshall v. State*, 32 Fla. 462, 14 South. 92; *Gantling v. Same*, 40 Fla. 237, 23 South. 857.

The next charge questioned is as follows: "If you have, after having considered all the evidence, both as to facts and circumstances, entertain a reasonable doubt as to whether or not the deceased was shot by the defendant with a pistol at the time and place of the alleged homicide, then you should find the defendant not guilty." There is no prejudicial error in this instruction, inasmuch as the indictment charged the shooting with a pistol; nor in the next one questioned, as follows: "The law, in its humanity, presumes all persons charged with the commission of crime to be innocent, and this humane presumption continues until every material element that constitutes the crime is proven to the satisfaction of the jury trying such person beyond a reasonable doubt." The court, after charging the law upon hypothesized cases of murder in the first and second degrees, respectively, followed it up, as a continuation of the same charge, with the following: "But should you not so find, and from the evidence, beyond a reasonable doubt, that the defendant, at the time and place and by the means and in the manner set forth in the indictment, slew the deceased unlawfully in the heat of overwhelming passion, superinduced by sudden and sufficient provocation on the part of the deceased, to throw a reasonable and cautious man into a sudden and uncontrollable passion, and that the defendant then and there instantly fired upon and slew the deceased, then you may find the defendant guilty of manslaughter." The only assault made here on this charge is that it deprives the defendant of his defense of justifiable homicide. The court had already charged fully on the law of justifiable homicide, and the questioned charge is qualified by requiring the killing to have been "unlawful." The charge as framed, however, is calculated to confuse and mislead, as there have been left out of it some material words necessary to make it intelligible to a jury. And inasmuch as there may be other objections to it that we are not now called upon to consider, we think it should be omitted upon another trial or entirely reconstructed.

The twelfth ground of the motion for new trial is for the alleged error of the court in charging the jury as follows: "And should you further find from the evidence that on the morning of the homicide they fell out with each other in regard to language used by the deceased in regard to the mother of the accused; and should you further find from the evidence that the defendant was without fault, and that the deceased was

then and there armed with a deadly weapon, or with the wooden mallet offered and shown in evidence, made an assault on the defendant before the defendant had attempted to do any wrong or act of violence to him; and from the evidence should further find that the deceased attempted to strike the defendant with said wooden mallet, and thereby designed to do the defendant great bodily harm, and that the defendant, as a reasonable man, believed the danger of such design being accomplished was then and there imminent and impending, and that he fired the fatal shot that killed the deceased, alone to prevent his own life from being taken, or alone to prevent great bodily injury being inflicted upon him by the deceased,—then you should find a verdict of not guilty on the ground of justifiable homicide. But to entitle the defendant to the benefit of this law of lawful self-defense, the defendant must either be without fault himself, or attempted to withdraw from the contest, if such withdrawal could have safely [been] done before firing the fatal shot." The first objection made to this charge is that the words "and thereby [i. e., by assault with a mallet] designed to do the defendant great bodily harm" operated to "take away from the defendant the right to act upon his belief, and what he saw and felt to be imminent and impending, independent of the design hidden in the mind of his assailant." The objection is not well founded, as will be seen from reading the charge. The further criticism is made of this charge that it assumes that the defendant fired "the pistol shot" that killed deceased, thus relieving the state of the necessity of proving that a pistol was used. In the motion for new trial the language used in setting out the charge is "pistol shot," but the charge, as set out in the bill of exceptions, states it as "fatal shot." In determining what charge was given, we are governed, of course, by the bill of exceptions, and the objection must be dismissed as being without basis of fact for its support. As there has to be another trial of the case, we will say, however, that the last clause of this charge should be omitted, as it puts a party at fault in an encounter on the same footing with one without fault, in the duty to retreat before exercising the right of self-defense, and it is not in every case that a party assaulted is required to retreat before defending himself, where he is reasonably free from fault in bringing on the difficulty. What has been said disposes of the thirteenth ground of the motion for new trial. The fourteenth ground of the motion for new trial, viz., "and for other good and sufficient reasons apparent upon the record," is too general, vague, and indefinite to merit consideration.

II. The second assignment of error is abandoned.

III. The third assignment of error is based upon the ruling of the court below in ad-

mitting the testimony of one Sanasy, a witness for the state, to the effect that Miss Ives said to him that Kirby (defendant) had shot Ed. (the deceased), which led him to go to the scene of the shooting. This was objected to as being hearsay evidence. It was proper for the witness to say that he went to the scene of the shooting because of something said to him by Miss Ives, but not to repeat the assertions of fact made by her in said conversation, the defendant not being present.

IV. The fourth assignment of error states matter that is erroneous for the reason last stated.

V. To the matter assigned as the fifth error there was no exception, consequently it cannot be considered.

VI. The next error assigned is the ruling of the court in permitting the state's witness Edwards to testify as to the instructions or caution given the defendant by the committing magistrate before he testified at the preliminary hearing. The objection made to this is that the best evidence on this point is the testimony of the justice, and his docket, both accessible to the court. When this objection was made it was first sustained by the court, and the committing magistrate examined without shedding light upon the question, nor did his docket do so. Edwards was then recalled and examined as stated. Under these circumstances, there was no merit in the objection made, as the "best evidence" rule had no application.

VII. The same ruling applies to the next assignment of error.

VIII and IX. A state's witness, one Futch, was called to prove admissions made to him by the defendant in relation to the homicide, and, before relating such admissions, was asked the following questions by the state attorney: "Q. You can state whether or not, before he made such statements to you or any one else present, you spoke any words to him as an inducement to make a statement, either from fear, or from hope of reward or betterment?" "Q. Then, if he made a statement to you that morning, or answered any question from you or any one else present, was what he said freely and voluntarily said, or not?" The first of these questions was objected to by the defendant on the ground that it calls for the opinion of witness, and the second question was objected to on the ground that it was too general and leading. The court overruled both objections, and such rulings constitute the eighth and ninth assignments of error. The first of these questions, though clumsily worded, sought, in substance, to draw from the witness the proper predicate for the detail of admissions,—i. e., whether or not anything was done or said by him or any one else present to put the defendant in fear or under duress, or excite in him the hope of reward or escape from punishment, as an inducement to the admissions, or whether

such admissions were freely and voluntarily made; and there was no error in either of such rulings.

X. The tenth is that the court erred in overruling defendant's objection to the following question propounded to Miss Ives, witness for the state, i. e.: "Now state what you know about his [defendant's] habits as to carrying a weapon, and the kind of weapon, with him to the college at the time of this homicide, and for some time previous?" This was objected to as being collateral matter that might prejudice the defendant with the jury, and because defendant's character was not in issue. It appeared from the evidence that the defendant was employed as cook, and the deceased as a waiter, at the college in Lake City, and that the homicide occurred in the kitchen of that institution; that defendant was under the supervision of Miss Ives, as matron; that she was frequently in the kitchen each day, and saw the defendant there every day for several months prior to the homicide; and in answer to the question objected to, and other questions, she testified that defendant always had a pistol at the college, on a shelf; that she always saw it when she went into the pantry to make bread; and that defendant claimed the pistol which she saw so often. The indictment charged that the offense was committed with a pistol, and evidence was introduced tending to show the death of the deceased from gunshot wounds, and that the report of a pistol was heard in the kitchen about the time the homicide was committed. While the question objected to was improper, we think the testimony adduced was relevant and material, as tending to prove the allegation that the homicide was committed with a pistol. If it could be shown that the defendant had a pistol at hand at the time and place of the shooting, it would be a circumstance proper to be considered with the rest of the evidence, which was circumstantial, in determining whether he was guilty as charged; and this evidence, we think, tends to prove that fact. If the evidence was proper to prove a material allegation of the indictment, its admissibility would not be affected by the fact that it would also prejudice the defendant's case before the jury. *Ortiz v. State*, 30 Fla. 256, 11 South. 611; *Roberson v. Same*, 40 Fla. 509, 24 South. 474; *Wallace v. Same*, 41 Fla. 547, 28 South. 713. Most of the material facts serving to show his guilt of the crime charged would have that tendency.

XI. There is no merit in the eleventh assignment of error, nor is it contended that the question objected to was leading, which was the only ground upon which objection was made to it in the court below.

XII and XIII. The twelfth and thirteenth assignments are that the court erred in rejecting the evidence of the witness Vaughn, as offered by the defendant as to statements made by defendant, after the state had used such statements against him, and in refusing

to allow said Vaughn to testify on behalf of defendant whether the defendant had previously made the same statement as that made by him at the preliminary hearing, and after the state had in part used that against him. The record shows that Vaughn was permitted to give his version of the statements or confessions as to which evidence had been offered by the state, and that which was excluded was testimony as to other statements made by defendant at some previous time. The defendant endeavors to support these assignments only by citation of authority to the effect that, where testimony as to a confession is offered, the whole statement should be given. No violation of this rule is shown.

XIV. The fourteenth assignment of error is based upon the action of the court in permitting the docket entry of the committing magistrate to be read to the jury, as follows:

"State of Florida vs. Johnson Kirby.

"Murder in 1st Degree.

"Affidavit of C. A. Finley taken. Warrant issued and returned, served by W. N. Cone, sheriff. And the defendant was on this day given a hearing on said charge, and the court being satisfied that there is probable cause to hold the defendant, and believing the presumption of his guilt to be great, he holds the defendant to circuit court without bail. Given under my hand and seal this 4th day of April, 1901.

O. R. Parker,

"Justice of the Peace."

The only apparent purpose for which this record was offered at this time was to show that the committing magistrate, who at the time of the trial was one of the defendant's attorneys, had, as such magistrate, found the presumption of defendant's guilt to be great. This was clearly improper, and was highly prejudicial to defendant's case. The objection to the docket entry should have been sustained, and the failure to do so was error for which the judgment of the court below must be reversed. The only objection urged to the introduction of this matter in the court below was the general objection "that it was improper." While this court has repeatedly announced the general rule to the effect "that general objections to questions addressed to witnesses, without stating the precise ground of objection, are vague and nugatory, and, if entitled to weight anywhere, are without weight before an appellate court" (*Gladden v. State*, 12 Fla. 562; *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land Transp. & Mfg. Co.*, 27 Fla. 1, 9 South. 681, 17 L. R. A. 83; *Johnston v. State*, 29 Fla. 558, 10 South. 686; *Camp v. Hall*, 39 Fla. 535, 22 South. 792), to this general rule there is, however, an exception: If the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances, then a general objection thereto is sufficient. *Espalla v. Richard*, 94 Ala. 159, 10 South. 137; *State v. Patrick*, 107 Mo. 147,

17 S. W. 666; Connor v. Black, 119 Mo. 126, 24 S. W. 184; State v. Soule, 14 Nev. 453; Ward v. Wilms, 16 Colo. 86, 27 Pac. 247; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698; Brumley v. Flint, 87 Cal. 471, 25 Pac. 683. The evidence above objected to was wholly inadmissible and incompetent for any purpose or under any circumstances,—palpably so upon its face,—and, under the circumstances, highly prejudicial to the accused. A general objection, therefore, to its admission was all that was necessary to exclude it.

XV. The fifteenth assignment of error is that the court erred in permitting the state's witness Saussy to testify that the defendant's witness Bird had pointed out to him (Saussy) the spot where he saw the pestle lying when he found Barnes on the floor wounded, and that the place pointed out was about four feet from the hand of Barnes. Bird had testified that the pestle was about one foot from Barnes' hand, and this was in the nature of impeaching testimony, and is objected to on the ground that no proper predicate had been laid for it in the examination of Bird. Upon cross-examination, when recalled, Bird had been asked whether he had not, at the time and place mentioned, pointed out to Saussy the place where the pestle stood, and he denied that he had done so then or at any other time. This sufficiently directed the attention of Bird to the matter, and it was proper to admit this testimony of Saussy.

The remaining assignments of error have been disposed of in considering the propriety of the refusal of the court below to grant defendant's motion for a new trial.

For the errors found, the judgment of the circuit court is reversed, and the cause remanded for new trial.

HENDERSON et al. v. HALL et al.

HALL et al. v. HENDERSON et al.

(Supreme Court of Alabama. June 27, 1900.)

EQUITY—JURISDICTION—POWER TO SUBJECT CHOSSES IN ACTION OF JUDGMENT DEBTOR TO SATISFACTION OF JUDGMENT—REMEDY AT LAW—GARNISHMENT—CORPORATE ASSETS—"TRUST FUND DOCTRINE"—ELECTION—JURISDICTION BY ESTOPPEL—PLEADING—MULTIFARIOUSNESS—MISJOINDER OF PARTIES—SUBMISSION OF CAUSE—INCLUSION OF DEMURRER—RES ADJUDICATA—DEPOSITIONS—WHEN CAUSE IS AT ISSUE—AMENDMENT—MATERIALITY—DISCOVERY IN AID OF EXECUTION—EXTENT OF REMEDY.

1. A bill by a judgment creditor of a corporation against certain stockholders therein, to subject alleged unpaid stock subscriptions to the satisfaction of his claim, averred, in anticipation of a plea of payment, that the president of the corporation, "pretending he was authorized thereunto, but not having such authority," proposed to defendant stockholders that they pay their subscriptions, and he would cancel their obligations in respect thereto, and deliver to them certain bonds, which were assets of the company, to an amount equal to the amount of the subscriptions paid, or pay them for their stock in funds of the corporation. *Held* that, on demurrer, the bill could not be construed as alleging that the corporation was in any way

bound by the transaction, and more clearly so in view of the fact that the application of the rule that the bill must, on demurrer, be construed against complainants, excluded any possibility of construing the allegation of want of authority to refer to the corporation, and not the president thereof.

2. The president of a corporation, acting without authority, proposed to certain subscribers to stock that if they would pay their subscriptions in cash he would cancel their obligations, and transfer to them certain bonds owned by the corporation to an amount equal to their subscriptions so paid, or purchase their stock with funds of the corporation, and this plan was executed. Code 1886, § 2972, was in force at the time of the transaction, and provided that a judgment creditor of a corporation having execution returned unsatisfied might sue out a garnishment to subject the unpaid subscription of any stockholder to the satisfaction of his judgment. *Held*, that as the corporation was not bound by the unauthorized acts of its president, and might sue on the subscription notes illegally canceled, an unsatisfied judgment creditor of the corporation could not maintain a suit in equity to reach the unpaid stock subscriptions, because having a plain and adequate remedy at law, by garnishment, under Code 1886, § 2972.

3. In the absence of statute, and where there is no allegation of fraud, mistake, the existence of a trust, or some other fact recognized as a basis of equitable jurisdiction, a court of equity has no power to subject the choses in action of a judgment debtor to the satisfaction of an execution returned nulla bona.

4. Inasmuch as, by statutes authorizing garnishment proceedings, a judgment creditor is given a legal right to reach choses in action of his judgment debtor, such right may be enforced in equity when, because of some impediment, it cannot be enforced at law.

5. The capital stock of a corporation and debts due the corporation for subscriptions to capital stock do not constitute a trust fund for the payment of corporate debts, and hence the jurisdiction of a court of equity to subject debts due a corporation for stock subscriptions to the satisfaction of a judgment against the corporation cannot rest on the "trust fund" doctrine.

6. By its express terms, Act Feb. 18, 1895, now embodied in Code, §§ 823, 1282, authorizing a judgment creditor of a corporation to file a bill in equity to subject unpaid stock subscriptions to the satisfaction of his judgment, has no application to suits pending at the time of its enactment.

7. Respondents to a bill in equity of which the court had no jurisdiction procured an order requiring complainants to elect whether they would further prosecute the bill, or proceed with garnishment proceedings pending in a court of law, and involving the same matters involved in the bill; and complainants elected to dismiss the proceedings in garnishment, and prosecute the bill. *Held*, that respondents were not estopped to thereafter object to the jurisdiction of the court of equity.

8. Even if this were not so, jurisdiction cannot be conferred by estoppel.

9. In view of Code, § 29, providing that, where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered the sole party on the record, the fact that a party suing to subject stock subscriptions of a judgment debtor corporation to the satisfaction of the judgment is assignee thereof does not impede his legal remedy by garnishment, so as to give him standing to maintain his suit in equity.

10. A bill by a judgment creditor of a corporation against various subscribers to the stock

¶ 10. See Corporations, vol. 12, Cent. Dig. § 1111; Equity, vol. 19, Cent. Dig. § 371.

of the corporation, to subject their subscription notes to the satisfaction of the judgment, was not multifarious or objectionable for misjoinder of parties respondent, though the interests of respondents among themselves were independent and distinct.

11. In order that demurrers to the bill be included in the submission of the cause, it is not necessary, or even proper, that they be mentioned in the note of the testimony of respondents, but without such mention, if there is a written submission of the cause embracing all questions of law and fact, the demurrers are included in the submission.

12. The president of a corporation, in order to induce the payment of overdue stock subscription notes, offered to purchase the stock of subscribers who would pay their notes. The president had no authority to make such arrangement, but pretended to have. Certain subscribers paid their notes, and their stock was purchased, and paid for with corporate assets. *Held*, that as the corporation and its creditors received the full benefit of the amounts so paid, and only suffered injury by the illegal and unauthorized diversion of assets in payment for the stock, a judgment creditor of the corporation had no remedy in equity to enforce payment of the subscription notes again, but was entitled at law to recover the corporate assets unlawfully disposed of.

13. Where stock subscribers to a corporation, intending to defraud the corporation and hinder its creditors, sold their stock to a nonresident, not believing, and having no reason to believe, that the buyer was able to perform his promise to pay the subscription notes, a judgment creditor of the corporation had no standing in equity to compel the original subscribers to pay their subscription notes, because having a plain and adequate remedy at law, by garnishment.

14. Respondents, who were subscribers to the stock of a corporation, fraudulently sold their stock to an irresponsible party, to avoid paying their subscription notes, and complainants, who were judgment creditors of the corporation, began garnishment proceedings to subject respondents' liability to the corporation to the satisfaction of complainants' judgment. Respondents answered, complainants contested their answer, and judgment was thereafter rendered discharging the garnishees. Subsequently, complainants filed a bill in equity to subject respondents' alleged unpaid subscriptions to the payment of the same judgment. *Held* that, as the necessary issue in the garnishment case was the indebtedness of the garnishee, the judgment therein was res adjudicata of complainants' right to recover in the suit in equity.

15. A party defendant to a bill in equity died before answering, and before the rendition of a decree pro confesso against him. An order of revivor was entered against his administrator, against whom a decree pro confesso was subsequently rendered. This was set aside, and he was allowed to answer. Depositions were taken in the cause after the administrator had been made a party, and before the decree pro confesso, and also after the decree had been set aside, and before he answered. *Held*, that these depositions were taken before the cause was at issue, and under Chancery Rule 49 (Code, p. 1211), providing that testimony cannot be taken until the cause is at issue by sufficient answer or decree pro confesso, should have been suppressed.

16. In a bill against several respondents whose liabilities were separate and distinct as among themselves, material facts denied by any of respondents should have been proven, though admitted by a majority of the respondents.

17. An amendment to a bill in equity alleging facts which would cure a variance between the proof and the bill as originally filed is material, and should not be stricken out.

18. In a bill by a judgment creditor of a corporation against certain stockholders, to subject their unpaid stock subscriptions to the satisfaction of the judgment, one of the respondents filed a cross bill against a co-respondent, alleging that cross complainant sold a certain amount of stock to cross respondent, he agreeing to pay the subscription, and hold cross complainant harmless. It was alleged that the president of the corporation, having authority so to do, consented to the sale, that cross complainant's subscription note was canceled, and that the cross respondent was, at the time of the sale and still, financially able to pay the subscription. The cross bill prayed that, if complainants recovered against cross complainant, a decree in favor of the latter might be entered against cross respondent for the amount of the stock sold, but there was no allegation that cross respondent had not paid for the stock, or that cross complainant was liable therefor. *Held*, that the cross bill showed no liability on the part of cross respondent, and was demurrable.

19. A judgment creditor of a corporation sued subscribers to the stock to subject their alleged unpaid subscriptions to the satisfaction of his judgment. Anticipating a defense of payment, complainant averred that the president of the corporation had without authority induced respondent to pay their subscription notes by buying their stock, and paying for it in assets of the corporation. Subsequently, an amendment was added, alleging that some of the respondents had not paid their subscription notes in cash, but had been illegally allowed credit for certain services, some of which were rendered to other corporations. *Held*, that the amendment was material, because the respondents who were illegally allowed credit would be liable for those credits in addition to the amount of the subscriptions for which the other respondents would be liable, if at all.

On Petition for Rehearing.

20. Code 1886, § 3540, authorizing an unsatisfied judgment creditor to bring a bill in equity against the judgment debtor to compel the discovery of any property belonging to him, and providing that the court may bring any party before it, authorizes bills of discovery only, and does not give a judgment creditor standing in equity to subject known choses in action of his judgment debtor to the satisfaction of the judgment.

Appeal from chancery court, Montgomery county; Jere N. Williams, Chancellor.

Bill by Charles Henderson and others against J. L. Hall and others. From a decree for complainants, respondents appeal, and from a portion of the decree striking from the bill a certain amendment, complainants prosecute a cross bill. Decree reversed, and cause remanded on the main appeal, and decree reversed, and rendered on the cross appeal.

The defendants Charles Henderson, Jere C. Henderson, Gustavus Hendricks, and John S. Carroll and Thomas Murphree, partners using the name of Carroll, Murphree & Co., severally filed a motion in which they averred that at the time of the filing of the bill in this case there was pending in the city court of Montgomery a suit at law by the complainants in this cause, against the said defendants, to recover of them as stockholders of the Alabama Terminal & Improvement Company the amount claimed to be due from them, as such stockholders, as unpaid sub-

scriptions to the capital stock of said Alabama Terminal & Improvement Company, which said suit, pending in the city court of Montgomery, was for the same cause of action as that set out in the bill. The said defendants then moved the court to order the complainants in this cause to elect in which of said suits they would proceed, and that they be required to dismiss the others. This motion was granted, and the complainants elected to proceed with the present suit, and dismissed the suit in the city court.

The said defendants Charles Henderson and others demurred to the bill, which demurrer was as follows:

"(1) That said bill is multifarious in this: That it seeks to enforce a liability against some of the defendants therein based on contracts, and against other defendants therein based on torts. (2) That said bill is multifarious in this: It joins separate and distinct causes of action of different natures, in which the several defendants alone are interested, and which call for relief of separate and distinct natures, in this: Said bill seeks to recover against the defendants Charles Henderson, Jere C. Henderson, O. C. Wiley, and Wiley & Murphree on their several contracts of subscription to the capital stock of the Alabama Terminal & Improvement Company, for the amount claimed to be unpaid thereon, and also seeks to recover against defendants J. D. Henderson, admr. of L. Henderson, surviving partner of L. & W. J. Henderson, Jas. M. Henderson & Co., Gustavus Hendricks, John S. Carroll and Carroll, Murphree & Co., on account of certain torts averred against them severally, by which it is claimed they wrongfully and unlawfully came into possession of certain bonds issued by the Alabama Midland Railway Company, and which were the property of the Alabama Terminal & Improvement Co., and which it is alleged so came into the possession of said several defendants under separate and distinct fraudulent agreements or arrangements between them severally and J. W. Woolfolk, president of the Alabama Terminal & Improvement Co., with which said fraudulent agreements or arrangements it is not shown that the other defendants first herein mentioned had any connection. (3) The said defendant Chas. Henderson further separately demurs to said bill as amended on the following grounds: First. The said bill seeks to recover against him, on an alleged contract of subscription made by him to the capital stock of the Alabama Terminal & Improvement Co., for the amount unpaid thereon, and also seeks to recover certain moneys of the said Alabama Terminal & Improvement Co., alleged to have been wrongfully and unlawfully paid to this defendant by J. W. Woolfolk, president of said company; and also seeks to recover against this defendant on account of an alleged tort in this, that the said defendant is in the wrongful possession of certain bonds issued by the Alabama Midland Railway

Company, and which were the property of the Alabama Terminal & Improvement Co., and alleged to have been wrongfully and fraudulently delivered to this defendant by J. W. Woolfolk, president of said Alabama Terminal & Improvement Company, for which said bonds the said bill seeks a recovery as for a conversion, and the relief sought in respect of said several matters is different and inconsistent. (4) The said J. O. Henderson further separately demurs to said bill of complaint as amended, and assigns the following grounds, to wit: First. That said bill as amended seeks to recover against this defendant on a contract of subscription made by him to the capital stock of the Alabama Terminal & Improvement Co., on the ground that said subscription is unpaid as alleged in the original bill, and also seeks to recover against this defendant upon an alleged additional subscription to the capital stock of said company made by this defendant as alleged in the bill as amended, which last right of recovery is based upon an alleged fraudulent transfer of said subscription by this defendant from one Baltzell; and said bill as amended further seeks to recover against this defendant on account of an alleged tort in this, that this defendant is alleged to have wrongfully and fraudulently come into the possession of certain bonds issued by the Alabama Midland Railway Co., which was the property of the Alabama Terminal & Improvement Co., and that such possession was acquired by unlawful and fraudulent agreements made between this defendant and one J. W. Woolfolk as president of said Alabama Terminal & Improvement Co., and the relief sought by said bill against this defendant on account of said several transactions is of different and inconsistent nature. Second. Said bill is multifarious in this, that it seeks to recover against this defendant on account of the alleged claims and liabilities against him separately, and also against the other defendants named in said bill on account of the several transactions alleged against them, and this defendant is not shown to have had any connection with said last-named transaction, nor are the other defendants shown to be connected in any manner with the said transaction alleged in respect to this defendant. (5) All of the defendants separately and severally further demur to said bill of complaint as amended on the further ground, to wit: First. It appears from the averments of said bill that the complainants have a full and complete and adequate remedy at law against each of said defendants severally. Second. The said defendants demur separately to that portion of the bill of complaint as amended as seeks to recover against the defendants on account of their several alleged contracts of subscription to the capital stock of said Alabama Terminal & Improvement Co., on the ground that it appears from the averments of said bill that complainants have a full, complete, and adequate remedy at law

against each of said defendants severally. (6) Said defendants further severally demur to said bill of complaint as amended on the following ground, to wit: There is a misjoinder of parties defendant in this, that the cause of action alleged against each defendant separately is one in which neither of the other defendants has any connection or interest."

The defendants Oliver C. Wiley and Wiley & Murphree each filed the following pleas: "These defendants, further answering, say and aver by way of plea, as well as answer to the bill of complaint filed in this cause, that complainants ought not to further prosecute this action, for that, to wit, during the year 1893, these complainants commenced a suit, by process of garnishment, in the city court of Montgomery, Alabama, against these defendants, respectively, involving the very matter and thing embraced in this present bill of complaint now pending in this honorable court, to wit, involving the very question as to whether or not the said Oliver C. Wiley and the firm of Wiley & Murphree, a partnership composed of Oliver C. Wiley and Clarence Murphree, were indebted to the Alabama Terminal & Improvement Company by reason of their having executed certain subscription notes to the capital stock of the said the Alabama Terminal & Improvement Company; and these defendants aver that the indebtedness thus sought to be established in said suit, in the said city court of Montgomery, is the very liability now sought to be enforced in said bill against these defendants, if in fact any such liability exists for unpaid subscriptions to the capital stock of the said the Alabama Terminal & Improvement Company; that at the fall term, 1893, of said city court of Montgomery, these defendants filed a written answer, under oath, to the writ of garnishment in said suit, on said city court of Montgomery, a copy of which answer is hereto attached, and marked Exhibit No. 1, and asked to be deemed and taken as a part of this plea; that, upon the filing of said answer [Exhibit No. 1] plaintiffs in said suit [complainants here] objected to said answer upon the ground that the same was not sufficiently full and explicit; and thereupon at the same term of the city court of Montgomery, these defendants filed two other answers under oath in said suit, copies of which are hereto attached, marked Exhibit No. 2 and Exhibit No. 3, and asked to be deemed and taken as a part of this plea; that thereupon, at a subsequent term of the said city court of Montgomery, these defendants, to wit, O. C. Wiley and the said Wiley & Murphree, were by the judgment of said city court duly and legally discharged upon their sworn answers as aforesaid, and were allowed to go hence; that all of this occurred prior to the filing of the bill of complaint in the present suit in this honorable chancery court; and these defendants now aver and plead that the ques-

tion of liability now sought to be enforced, in this present bill of complaint, against these defendants, for and on account of certain notes given by them, respectively, to the capital stock of the said the Alabama Terminal & Improvement Company, is the same matter and thing which was set forth, embraced and involved in said former suit in said city court of Montgomery; that these complainants, in said former suit in the city court of Montgomery, impleaded these defendants in a court of competent jurisdiction upon the same cause of action, disclosing the same question of claim embraced in the present action; that the said city court of Montgomery had jurisdiction of the parties and of the subject-matter, and rendered a final judgment upon the merits of the case, in said former suit, in favor of these defendants, and against these complainants, who were plaintiffs in said former suit; that said judgment of said city court of Montgomery was never appealed from, and remains until this day unreversed, and in full force and effect. And these defendants jointly and severally plead said judgment in said former suit in said city court of Montgomery in bar to the present action."

The defendants J. M. Henderson & Co. and J. M. Henderson as an individual filed their joint and several answers, in which they denied their alleged indebtedness to the said bank, and averred as follows: "That, at the time of the matters and things complained of in the 20th and 21st paragraphs of the bill, the Alabama Terminal & Improvement Company was not indebted to said Farley National Bank, and they aver that the debt upon which said judgment is founded [if, in fact, any such debt exists, which they deny], was created after the time when it is alleged the matters and things occurred set forth in said 20th and 21st paragraphs; and these respondents aver that, if there were any such transactions as are set out in said 20th and 21st paragraphs [but as to these respondents there were never such, as will more fully appear hereinafter], then they aver that said Farley National Bank had full and legal notice of the same, at the time their said debt was thereafter created, if it ever was created, and these respondents further aver that said bank was dealing with said A. T. & I. Co. at the time of said transactions set up in said 20th and 21st paragraphs, and knowingly participated in, and received benefits from, said pretended illegal transactions. After such knowledge and participation, said bank now has no right to complain, and is estopped from setting up said pretended illegal transactions as a creditor of said A. T. & I. Co., they being subsequent creditors. Third. Respondents deny each and every averment contained in the 20th and 21st paragraphs of said bill, and especially those relating solely to these respondents. They aver that they fully paid off and discharged twenty-five hundred dollars of their subscription

to said A. T. & I. Co., and stock to that amount was issued to them, which stock they now hold and own. As to the remaining five thousand dollars, they aver that in the month of January, 1890, these respondents sold to J. C. Henderson, a co-respondent to the original bill in this case, \$5,000 of the stock so subscribed by them to said company, and said J. C. Henderson executed and delivered to these respondents his written obligation, by which, in consideration of \$5,000 of the stock so subscribed by these respondents, which was to be issued to him, he agreed to pay or satisfy \$5,000 of their said subscription, and to hold them harmless against any claim that said company set up, on account of said subscription, to the amount of \$5,000. Said company was immediately notified of said sale of stock to said J. C. Henderson, and of said agreement, and that then and there the said J. W. Woolfolk, who was president of said company, and business manager of same, agreed to look to and hold said J. C. Henderson bound and liable for said sum, and to discharge and release these respondents from all liability on account of same. And these respondents aver that said Woolfolk, as such president and business manager, had full control and management of, and transacted, all the business of said company, and was given all the authority and power to do so that the board of directors could lawfully give and delegate to him, and under this power and authority he had the power and authority and did bind said company by his agreement as above alleged. Fourth. That the said J. C. Henderson was at the time of said agreement, and is now, solvent, and financially strong, and is amply able to pay said \$5,000. Fifth. That the said J. C. Henderson, after making said agreement to pay off and discharge said \$5,000, came to this respondent, and delivered to him his said note, which had been in the possession of the said A. T. & I. Co., and respondent turned over to him [the said J. C. Henderson] the agreement which the said J. C. Henderson had made in writing to pay off said \$5,000. And respondents aver that these facts caused the said respondents to believe that the said J. C. Henderson had paid said \$5,000."

These respondents then prayed that their answer be taken and made a cross bill, and that J. C. Henderson be made a party respondent thereto. The prayer of said cross bill was as follows: "That, on the final hearing of this case, may it please the court, in the event that it shall be determined the said J. C. Henderson has not paid the said sum of \$5,000 which he agreed to pay for these respondents, and these respondents are liable for the same, to enter a decree, in favor of respondents, against the said J. C. Henderson, for the said sum of \$5,000, together with the interest thereon from the time of said agreement. Respondents pray for such other, further, general, or special relief as to the

court may seem meet and proper in the premises; and as in duty bound," etc.

The respondent J. C. Henderson moved the court to strike from the file the cross bill of J. M. Henderson and J. M. Henderson & Co. upon the following grounds: "First. Because said cross bill purports to seek or pray for relief against this respondent alone, and the said cross bill is embodied in his answer to the original bill of complaint, and not filed separately against this respondent. Second. Because said cross bill was not filed at the time or prior to the date of the submission of the above-styled cause, and is now improperly filed in said cause. Third. Because said cross bill prays for relief only as against this respondent, and the complainants in the original bill of complaint are not made parties respondent to said cross bill, and no relief is prayed for as against the complainants in said cause, and no answer is required of the complainants in said cause to said cross bill. Fourth. Because said cross bill has never been legally filed in said cause, but was filed without any order of court allowing the same, and without the consent of this respondent. Fifth. Because there is no equity in said cross bill, in this, that it does not make the original complainant in said cause parties respondent to the cross bill, and does not pay for any relief against them, but only seeks a judgment against this respondent in favor of the said J. M. Henderson & Co. upon a demand for which complainants in said cross bill have a plain, full, and adequate remedy at law."

This motion to dismiss said cross bill was overruled. Thereupon the defendant J. C. Henderson demurred to said cross bill, among others, upon the following grounds: "(1) It appears in and by said cross bill that the complainants therein have been duly and legally discharged and released from their subscription for said five thousand dollars of the capital stock of said A. T. & I. Co., and their said note for five thousand dollars given therefor. (2) It is not averred in said cross bill that the said J. C. Henderson has not paid said note for five thousand dollars. (3) It is not averred in said cross bill that the said J. C. Henderson has not paid, or satisfied, five thousand dollars of complainant's said subscription to seventy-five thousand dollars of the capital stock of said A. T. & I. Co. (4) It is not averred in said cross bill that the said J. C. Henderson has failed in any respect to perform his alleged written agreement with complainant in said cross bill. (5) It appears from said cross bill that this defendant has fully performed said alleged written agreement. (6) Said cross bill shows that the complainant therein is in no manner indebted to or liable to the said A. T. & I. Co., or to complainants in the original bill, in respect of the matters set forth in said cross bill." These grounds of demurrer were sustained.

The defendants Charles Henderson, J. C. Henderson, J. D. Henderson as administrator

of the estate of L. Henderson, deceased, surviving partner of L. & W. J. Henderson, G. Hendricks, John S. Carroll, Carroll, Murphree & Co., O. C. Wiley, and Wiley & Murphree separately moved the court to suppress the depositions of George B. Shellhorn, J. W. Woolfolk, Beverly Chew, O. M. Jessup, E. B. Joseph, A. St. C. Tennille, J. L. Hall, L. B. Farley, and S. Roman, upon the grounds that at the time of the demands for the examination of said witnesses, and at the time of the filing of the interrogatories on behalf of the complainants to said witnesses, the cause was not properly at issue, in this: "That one of the original defendants to said cause, to wit, L. Henderson, as surviving partner of the late firm of L. & W. J. Henderson, died on, to wit, the 24th day of February, 1895, and thereafter, to wit, on the 23d day of May, 1895, a summons was issued to J. D. Henderson as administrator of the estate of La Fayette Henderson, deceased, requiring him to appear and defend said cause as such administrator, which summons was served on the said J. D. Henderson on, to wit, the 27th day of May, 1895; and thereafter, on the 26th day of August, 1895, to wit, within less than six months from the date of the appointment of the said J. D. Henderson as administrator of the estate of the said L. Henderson, a decree pro confesso was entered in said cause, against said J. D. Henderson as such administrator; and at the time said demand for the oral examination of said witness was filed, and the commission thereon issued, no answer had been filed by the said J. D. Henderson as such administrator;" and, further, because the depositions were prematurely taken as against said defendants. This motion to suppress said depositions was overruled.

Subsequently, the bill was amended by adding thereto, at the end of the bill and just before the prayer, what was known as the "Red Ink Amendment," and which was in words and figures as follows: "And the complainants further aver that the said several defendants herein have been improperly, illegally, and fraudulently paid or allowed out of the assets of said Alabama Terminal & Improvement Company, by the said J. W. Woolfolk, in closing the accounts of the said several parties with said Alabama Terminal & Improvement Company, large sums of money for brokerage or commissions for indorsing the paper of said Ala. Ter. & Imp. Co., and for salaries of other corporations, and for other items and matters shown in the accounts of the said several parties with said Ala. Terminal & Improvement Co. on the books of said last-mentioned Co., for all of which they are severally liable to account to complainants as creditors of said Ala. Terminal & Improvement Co., and complainants aver that all of such payments and allowances were secret in their nature, and unknown to complainants, and were never discovered except by the disclosures in the depositions taken in this case." There was a

motion made by the defendants to strike this amendment from the file. The other facts of the case are sufficiently stated in the opinion.

On the final submission of the cause on the pleadings and proof, the chancellor rendered a decree which was as follows: "It is ordered, adjudged, and decreed: First. That the amendment to the bill filed on the 23d day of July, 1897, and described as the 'Red Ink' amendment, be and the same is hereby stricken from the bill, and held for naught. Second. That the pleas interposed by O. C. Wiley and Wiley & Murphree are insufficient in law to constitute any defense to this suit, and are held for naught. Third. That the demurrers interposed to the bill in behalf of the several defendants, filed prior to the filing of the said amendment known as the 'Red Ink' amendment, are not well taken, and the same are hereby in all things overruled. Fourth. It is further ordered, adjudged, and decreed that the complainants are entitled to the relief prayed for in their bill of complaint, except as to the claim against J. O. Henderson, set out and alleged in the amendment to the original bill of complaint, allowed and filed on the 8th day of October, 1895, which said claim, set up and alleged in said amendment, it is ordered, adjudged, and decreed is hereby disallowed. Fifth. It is further ordered, adjudged, and decreed that it be and hereby is referred to the register to hold a reference and ascertain and report." There then follow directions for holding the reference. From this decree, the respondents appeal. The complainants prosecute a cross appeal, and assign as error that portion of the decree of the court striking from the bill what was known as the "Red Ink Amendment," and, further, that the court erred "in not directing that the several defendants receiving bonds and assets of the insolvent Ala. Ter. & Imp. Co. as alleged in the bill and in said amendment mentioned in the first assignment of error, and as shown in the evidence, without any legal or valuable consideration as to these appellants as creditors of said corporation, should be held liable to account for the same as assets of said corporation, to be applied to appellants' judgment, and this assignment is made also separately and severally as to each of the defendants below except J. W. Woolfolk, A. C. Saportas, and Farley National Bank."

Harmon, Dent & Well, W. S. Thorington, Lomax, Crum & Well, M. N. Carlisle and John T. Ashcraft, for Henderson and others. Tompkins & Troy, Gunter & Gunter, J. M. Chilton, and Horace Stringfellow, for Hall and Farley.

MCCLELLAN, C. J. The bill in this case is filed by Joseph L. Hall and Louis B. Farley, as assignees of a judgment recovered for the Farley National Bank, against the Alabama Terminal & Improvement Company, hereinafter called the "Terminal Company."

Within a year after the rendition of this judgment, and before the filing of the bill, execution issued on it, and was duly returned, "No property." The bill was filed March 17, 1894. As originally exhibited, and as prosecuted until after the evidence had been taken, the sole purpose of the bill was to collect from certain persons who are made respondents the amounts which they had severally subscribed to the capital stock of the Terminal Company, the defendant in judgment, which the bill alleged they respectively claimed to have paid, but which it further alleged they had not paid, and to apply the sums so collected to the satisfaction pro tanto of said judgment; and the original prayer for relief, which has never been amended nor attempted to be amended, is "that the said defendants, severally and respectively, be required to pay for the satisfaction of said judgment in favor of the said Hall, receiver [of the Farley National Bank], against the said Alabama Terminal and Improvement Company, their said subscription to the said capital stock of the said company, and their said several promises in writing; and for such other and further relief as to your honor may seem meet, and the facts of the cause require." In respect of the claims of payment asserted by the several respondents, it is averred in the bill, by way of anticipating the defenses which it was supposed would be relied upon, that Woolfolk who was president of the Terminal Company, pretending that, as such president, he was thereunto duly authorized, but not having in fact any such authority, proposed to the respondents, severally, that, if they would pay to the company their subscription notes, the said company would thereupon purchase their shares of stock at par, and pay for the same in some instances in money, and in other instances in bonds of the Alabama Midland Railway Company at the market value thereof, 85 cents on the dollar of their face value; that, accepting and acting upon this proposition, the respondent subscribers paid their subscription notes, and thereupon sold their stock to the Terminal Company, and some of them took such bonds in payment therefor, and others took notes executed by Woolfolk for and in the name of the company, secured by the stock which they had thus sold, left with them for that purpose, and also secured in some instances by bonds of said Midland Company, which bonds were assets of the Terminal Company. That the point we are upon may be more fully presented, we quote the general averment of the bill with reference to all these parties, and the special averment as to one of each of the classes indicated above. The general averment constitutes paragraph 20 of the bill, which is as follows: "Your orators further state that the defendants Charles Henderson, Jere C. Henderson, La Fayette Henderson as surviving partner of the late firm and partnership of L. & W. J. Henderson, Fox Henderson, and

James M. Henderson, partners under the firm name and style of J. M. Henderson & Co., Gustavus Hendricks, John S. Carroll, and said John S. Carroll and Thomas M. Murphree, partners in trade under the firm name of Carroll, Murphree & Co., severally and respectively, claim that they have paid their said subscriptions to the capital stock of the Alabama Terminal and Improvement Company, and that the promises in writing that they severally made as aforesaid for the payment thereof have been canceled and surrendered to them respectively. But your orators aver that there was not in fact any payment of the said subscriptions, or of said promises in writing, or of either of them. And if said promises in writing, or either of them, have been canceled and surrendered to the said defendants, or either of them, such cancellation and surrender was unauthorized and illegal, and said subscriptions and promises in writing remain due and unpaid." And in paragraph 23, the foregoing averment is repeated as to the respondents Brantley & Son. Such are the general averments as to the payments claimed to have been made. The special averments as to such of them as received Midland bonds for their stock are as follows: "(21): Your orators further aver, on information and belief, that the said defendant Woolfolk, pretending that, as president of the Alabama Terminal and Improvement Company, he was authorized thereunto, but not having such authority, proposed to purchase of the said defendants L. & W. J. Henderson, James M. Henderson & Co., Gustavus Hendricks, John S. Carroll, and Carroll, Murphree & Co., severally and respectively, for the said company, their several and respective shares of stock in said company, giving them therefor the bonds of the Alabama Midland Railway Co., a corporation organized and existing under the laws of the state of Alabama, known as the 'Alabama Midland Extension Bonds,' at eighty-five per cent. of the par value of said bonds. These bonds were the property and assets of the said Alabama Terminal and Improvement Company, and that fact was well known to said parties respectively and severally. And it was further proposed by said Woolfolk that said parties should pay him the amount of their said several subscriptions and promises in writing, and he would cancel and surrender to them their said promises in writing, and deliver to them the said Alabama Midland extension bonds. The said parties severally and respectively accepted the said proposition of said Woolfolk, and gave him sums of money equal to the amounts of their said several subscriptions and promises in writing, and he delivered to them, marked 'Canceled,' their several promises in writing, and bonds of said Alabama Midland Railway Company, known as the 'Alabama Midland Extension Bonds,' for an amount, at 85 cents on the dollar of the par value thereof, equal to the amount of money received from them. And this is the

transaction in and by which the said parties severally and respectively claim to have paid their subscriptions and promises in writing." As to one of the class of persons whose stock was purchased by Woolfolk for money, the following is the further averment of paragraph 21: "Orators further aver on information and belief that the said defendant Woolfolk, pretending that, as president of the Alabama Terminal and Improvement Company, he was thereunto authorized, but not having such authority, proposed to purchase of the said defendant Charles Henderson, for the said company, his shares of stock therein at and for the sum of ten thousand dollars [the par value of said shares], to be paid for out of moneys belonging to said Alabama Terminal and Improvement Company, and it was further proposed by the said Woolfolk that the said Charles Henderson should pay him the amount of such subscription and promise in writing, and he would cancel and surrender to him his said promise in writing, and would deliver to him the note of the said Alabama Terminal and Improvement Company for the sum of ten thousand dollars, payable three months after its date, secured by a deposit of ten thousand dollars or other large sum of said Alabama Midland Railway bonds, the property and assets of the said Alabama Terminal and Improvement Company. The said Henderson accepted said proposition of said Woolfolk, and gave him the sum of money equal to the amount of his subscription and promise in writing, and the said Woolfolk delivered to him, marked 'Canceled,' his said promise in writing, and also the note of the Alabama Terminal and Improvement Company, payable as above stated, and secured by a deposit of the said extension bonds; and this is the transaction in and by which the said defendant Charles Henderson claims to have paid his said subscription and promise in writing. Orators are not informed as to whether the said note has been paid, but they aver that, if the same has not been paid, the said Henderson has in his possession the said bonds delivered to him as aforesaid, and that said bonds are the property and assets of the said Alabama Terminal and Improvement Company; and orators aver that said transaction with the said Charles Henderson on the part of the said Woolfolk was a mere device on their part to shield the said Henderson from payment of his subscription for stock, and was and is fraudulent as to orators." Like averments are made in respect of the claim of payment on the part of Jere C. Henderson, except that it is alleged in the alternative that he was to receive, and did receive, either money or bonds for his stock. And in respect of Brantley & Son the averment is that, upon and in acceptance of the aforementioned unauthorized proposition of Woolfolk, they paid their subscription and sold their stock to him for the company, taking the company's notes for the par value thereof, and that these notes were

afterwards paid by Woolfolk with funds of the company.

It is nowhere nor in anyway averred in the bill that the Terminal Company ever authorized Woolfolk to make these settlements, or any of them, with said subscribers to its stock, or that it ever ratified his action therein; but, to the contrary, such authorization is expressly negatived, as we have seen, by the averments of the bill, and no fact is therein stated upon which could be rested a conclusion that the company itself was, or is in any way, bound by either of those transactions. Especially is this true when the rule requiring the averments of the bill to be construed on demurrer most strongly against the complainants is applied in the premises to the exclusion of every possibility of a construction whereby the averments of want of authority might be held to refer to the Terminal Company itself, and not to Woolfolk. But, even without this rule, the bill leaves no room for the conclusion that the claimed payments are attacked because the transactions in which they were made were ultra vires the corporation itself. The passing of the money for these subscription notes to Woolfolk is conceived by the complainants to be ineffectual as payment thereof to the corporation, because Woolfolk, as president of the company, had no authority to receive such money as payment under the conditions which obtained, and which he assumed to carry out, and did carry out, as president, and in the name of the company. It is not even averred that the company ever received the money which was paid. Not having authorized these transactions, nor ratified them, nor been beneficiary of their issues so as to preclude itself, the Terminal Company was in no degree hindered or estopped at the time this bill was filed to treat Woolfolk's unauthorized action as a nullity, to repudiate the transactions as payments to it, and to institute suits at law in its own name and behoof upon the subscription notes which had been illegally and ineffectually canceled and surrendered by Woolfolk to the makers.

The Terminal Company having this right at that time, it of course necessarily follows that the complainants had a plain, adequate, and complete remedy at law for subjecting the amounts due from the subscribers named to the satisfaction of their judgment by the process of garnishment authorized by section 2972 of the Code of 1886, then of force, and that their bill of complaint was subject to the objections taken in this connection by the demurrers of the several respondents to whom we have referred. And, even if complainants did not have this remedy at law, it would by no means follow that they could come into chancery. To the contrary, on the facts averred, as we construe them, but for the statute providing the proceeding by garnishment they would be entirely remediless in the premises.

Against this conclusion, counsel for appellees urge several considerations which we

will examine and discuss. Chief among these contentions is this: That the chancery court has, and all along has had, jurisdiction to enforce, at the suit of a creditor of a corporation, the payment of subscriptions to its capital stock, and that, having this original and inherent jurisdiction, it was not, and is not, ousted of its exercise by statutes which confer like power on courts of law by process of garnishment; and, as they insist, it is well settled that "the enlargement of jurisdiction of courts of law, or the recognition and enforcement by them of equitable rights and interest, even when conferred in terms by statute, does not, in the absence of statutory prohibition, take away or impair the original jurisdiction of the chancery court." But it is not well or at all settled, and it is not true in point of legal fact, that the chancery court ever had or has original jurisdiction at the suit of a corporation creditor to coerce the payment by stockholders of their subscriptions to its capital. Such debts to a corporation stand upon the same footing as indebtedness generally. In the absence of statutes on the subject, no court, whether of law or equity, has any power to reach and subject this class of a debtor's property to the satisfaction of demands against him.

At the common law, choses in action of the debtor were not leviable, and the process of garnishment was unknown. There was under that system an indirect method of reaching such assets by the attachment of the debtor defendant's person, and his incarceration until the judgment against him was satisfied; the theory being that this process would coerce him to a realization upon choses in action belonging to him, and to the application of the funds arising from their collection to the judgment under which he is attached and imprisoned. But that proceeding has no place in our law, and, if a creditor relies upon any other process as a means of applying the choses in action of his debtor to the payment of his claim, he must be able to point out some statutory provision giving the process or remedy he invokes, and he must pursue such remedy either according to the terms of the statute and in the forum prescribed by it, or he must show that the legal right conferred upon him by the statute has been so clogged and impeded of enforcement in the statutory forum—the court of law in garnishment proceedings—as that he is entitled, upon some recognized principle of equity jurisdiction in aid of legal rights, to call to his assistance the powers of the chancery court. And when chancery is thus invoked it is not upon any theory that such court has or had original jurisdiction in the premises, or could have been resorted to before the statute giving the right at law, but upon the idea that by reason of fraud and the like the legal remedy to enforce the right conferred by the statute has become inadequate

thereto, some ground of equity interposition has arisen. Of course, if a chose in action belonging to the debtor has become impressed with a trust in favor of the creditor, chancery, in the absence of statute, has jurisdiction to subject it to the debt; and it is upon that principle, as we shall see, that the present bill is really sought to be maintained; but, as we shall further see, that doctrine does not obtain in the case.

Recurring to the main proposition,—that chancery had no original jurisdiction to subject choses in action of a debtor to the claims of his creditor,—we refer to and collate some of the authorities sustaining it. In *Donovan v. Finn*, 1 Hopk. Ch. 59. 14 Am. Dec. 531, there is a most able and elaborate examination and consideration of the authorities, and discussion of the question, leading up to and sustaining the proposition embodied in the headnote, that "property not subject to execution at law, such as choses in action, cannot be reached in equity unless the case is otherwise of equitable jurisdiction, as where the property was fraudulently converted into choses in action to defraud creditors." The whole of the very learned opinion in that case might be embodied here with advantage, but we content ourselves with some of the most pertinent parts of it. In stating the case before the court and the question for decision, the opinion proceeds thus: "The cause thus considered presents these facts: A creditor has obtained judgment against his debtor in a court of law, an execution has issued against the property of the debtor, and the sheriff has returned that none is found. The debtor has property consisting in a debt due to him, and the creditor, by judgment now asks this court to compel the debtor of his debtor to make payment to him in satisfaction of the judgment. Has this court jurisdiction in such a case, or power to give relief? To apply existing laws to new cases is the duty of courts of justice, and it is not an encroachment; and the application of established principles of equity to new cases in this court is not an extension of its jurisdiction. But this court has no power to assume any jurisdiction really new, and extending beyond the limits of its established authority. It is apparent that this case does not belong to any general head of equitable jurisdiction, such as frauds, trusts, accidents, mistakes, accounts, or the specific performance of contracts. Here is neither fraud, nor trust, nor accident, nor any other ingredient of equitable jurisdiction. It is simply the case of two debtors and two creditors, of whom one is both debtor and creditor,—a case in which the rights and remedies of the respective parties have hitherto been enforced exclusively in the courts of law." And, after discussing English and American cases bearing on the point, Chancellor Sanford proceeds: "According to our distribution of jurisdictions, suits for the recovery of ordinary debts are appropriated to the courts of common law; and the proceed-

ings for enforcing the judgments rendered in such suits are alike allotted to those courts. In any such case, where the subject of the suit is exclusively of legal cognizance, a court of equity has no jurisdiction to enforce the judgment by its own methods of proceeding, or to give a better remedy than the law gives. If the remedies of the law are imperfect, equity, as has been often said in the English chancery, has no jurisdiction to give execution in aid of the infirmity of the law. When any fact giving equitable jurisdiction intervenes in the transactions between creditor and debtor, such a fact becomes a foundation of relief in this court; but in any ordinary case, free from fraud or injustice, the execution of the judgment and the methods of compelling satisfaction are confined to the courts of law. When a creditor comes to this court for relief, he must come, not merely to obtain judgment or satisfaction of a judgment, but he must present facts which form a case of equitable jurisdiction. He must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion, or injustice, against which it is the province of this court to give relief. In such cases this court has jurisdiction, not for the purpose of giving a species of execution which the courts of law do not afford, but for the purpose of giving relief in the particular cases allotted to its jurisdiction; and when the cause, by reason of such facts, is properly here, the court proceeds, upon all the circumstances of the case, to give final and equitable relief. * * * When it is said that a debtor may now convert all his effects into stocks, credits, or other things in actions, and may in his own name, or in the name of a friend, hold his property in these forms, in defiance of his creditors, our laws are reproached by a vague assertion which is partly true and is to a much greater extent erroneous. All conveyances made to defraud creditors are void both in law and in equity. When the fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor, fraudulently transferred, is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. * * * In all such cases this court vacates the fraud, sets aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust which form the great and most vexatious impediment in the course of justice between creditor and debtor. * * * But this court has no power to cause stocks, credits, and rights of action held by a debtor without fraud to be sold or converted into money, to be transferred to the creditor, or to be applied to the payment of debts. The English courts of equity have

never exercised any power like that now proposed over the rights of a debtor; and it is certain that no such power has ever been exercised by any court in this state. But it is said that a failure of justice must take place if such a jurisdiction should not be exercised by some of our courts of justice. How, it is asked, is all that class of personal effects consisting in stocks, credits, and property in action in various forms, a class of property which, in this community, is very great, to be subjected to the payment of debts? That such property should be made subject to the payment of the debts of its owner is not denied. That such property cannot be seized or sold by the sheriff upon an execution is the existing law of the state. That, in the present state of our laws, a debtor sometimes holds and enjoys this species of property while his debts remain unpaid, may be true. These reasons may show that the existing laws are imperfect, and that some convenient method of subjecting this class of property to the payment of debts would be a desirable amendment; but they do not show that this court or any other tribunal has power to make such an amendment. The argument so strongly urged,—that justice requires some new remedy in these cases,—is an argument to be addressed to the legislature, and not to the courts of either law or equity. Our ancient law was not destitute of remedy in such cases. That law was intended and adapted to compel the application of all the property of the debtor to the discharge of judgments against him; and for that purpose different kinds of executions were provided. By executions against his property in possession, that species of effects was subjected directly to the discharge of a judgment; but his things in action were reached only by an execution against his person, upon which he was imprisoned until he should satisfy the judgment. The execution against the person was a method of coercion intended to bring forth, for the satisfaction of the judgment, all such effects of the debtor as could not be subjected to the other execution; and it was a powerful remedy. That remedy has been gradually relaxed by the legislature until it has nearly lost its efficacy, and, while this great change respecting executions against the person has been made, the rule concerning executions against property has remained without alteration. Thus the imprisonment of the debtor, as a remedy, has been, in effect, taken away; no effectual method of execution against his property in action has been substituted; and this change in our laws has been made by the legislature itself. * * * Our law of relief against absconding and absent debtors is a law of attachment. This special statute, containing a system of provisions in detail, is alone a sufficient proof that the proceeding by attachment can be authorized only by the legislature, and that such a process or power belongs not to any court of this state in virtue of its general jurisdiction. The at-

tachment given by this statute embraces all debts due to the debtor, is for the benefit of all his creditors, and is authorized only against absent, absconding, and concealed debtors. The legislature has not given this remedy against debtors residing or found within the state, and subject to the full operation of its general laws. The attachment now proposed is against a single debtor of the judgment debtor, for the benefit of the judgment creditor; and all the parties reside in the state. Thus it is proposed that this court shall institute a new species of attachment against debtors within the state, a new method of justice in favor of creditors, differing greatly from any attachment or any execution hitherto known, and which, however it may be recommended, has not yet been adopted by our law. In several of the states of the Union there are laws of attachment by which a creditor may sequester or attach, for his exclusive benefit, a debt due to his debtor; and it is said that these laws are useful and efficacious in promoting the ends of justice. But in all those states these attachments have been introduced and established by special acts of their legislatures; this proceeding being unknown equally to the common law and to the equity of England. But, while the attachment of the debt due to a debtor for the benefit of the creditor instituting the suit is a proceeding unknown to the general system of English law and equity, it is fully established in the city of London under the name of the custom of foreign attachment, and it there takes place in a local court of special jurisdiction. Thus stand both the general law and the exceptions to it in England; and equity has never altered, but has always followed, the general law. The court is now for the first time asked to do what, in England, is done only in London, by a special custom of that city; what in other states of this Union is done only under the provisions of special statutes; and what in this state has never yet been done or authorized by any law. * * *

Under the constitution, the course of common law, the trial by jury, and the system of equity must all be maintained in their respective spheres of operation. If the existing difficulty in these cases arises from the rule of law that stocks, credit, and rights of action cannot be sold by the sheriff, is that rule salutary, since the remedy by imprisonment of the debtor has been so greatly relaxed? If some new proceeding by way of attachment or execution against the rights in action of a debtor is requisite, on what courts or officers shall such a power be conferred, and in what cases, and under what regulations, shall it be exercised? But I forbear to pursue these inquiries and reflections; and these are suggested merely to show the magnitude of the innovation now proposed. Should this court take cognizance of these cases, they would form a chapter of jurisdiction far more ample than any one which it now possesses, and the assumption would be

a bolder stride of power than was ever made by the English chancery in any single age. The maxim which teaches us that a judge should amplify his own jurisdiction has no place in our institutions. The utility of this court, so important in the general structure of our system, will be best consulted and preserved by preserving its jurisdiction within the limits which are now established. My views of this question terminate in the following results: (1) The cases of authority in which relief has been given to judgment creditors were, in themselves, cases of equitable jurisdiction, involving fraud or trust, or seeking to subject, to the satisfaction of a judgment, property in itself liable to execution, by removing a conveyance which operated as a fraudulent impediment to the execution. (2) This court has no power to compel the debtor of a judgment debtor to make payment to the judgment creditor in satisfaction of the judgment."

This case of *Donovan v. Finn* was decided in 1823. In 1880 it was published in 14 Am. Dec. 531 et seq., with the following note by Mr. Freeman: "It is doubtful, where there has been no legislation upon the subject, whether, in the absence of fraud or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law. This question has been most debated with reference to stocks and choses in action. Notwithstanding a contrary opinion expressed by some very eminent American jurists, we judge that the weight of the authorities is in support of the view that equity has no power in ordinary cases to compel the appropriation of choses in action to the payment of their owner's debts. *Watkins v. Dorsett*, 1 Bland, 533; *Stewart v. English*, 6 Ind. 176; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *McFerran v. Jones*, 2 Litt. 219; *Dundas v. Dutens*, 1 Ves. Jr. 196; *Nantes v. Corrock*, 9 Ves. 138; *Rider v. Kidder*, 10 Ves. 368; *Grogan v. Cooke*, 2 Ball & B. 233."

Another able and exhaustive opinion on this subject was delivered by the supreme court of Rhode Island (1884) in the case of *Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400, in which the authorities are examined. The case of *Donovan v. Finn*, *supra*, is discussed and approved, and the conclusion is reached that "in the absence of fraud, trust, or other ground of equitable relief, or special statutory jurisdiction, judgment creditors cannot reach choses in action of their debtors by equity proceedings." The same doctrine is announced in the carefully considered case of *Shaw v. Aveline*, 5 Ind. 380; and in *Doyle v. Sleeper*, 1 Dana, 531, 534; in *McFerran v. Jones*, 2 Litt. 219; and doubtless in many other cases; and its soundness is so obvious upon elementary principles that it would seem to require no citation of adjudged cases to demonstrate and sustain it.

As, under our statutes, choses in action belonging to a debtor are leviable in a sense by process of garnishment, they may be reached in equity, as we have intimated, and as follows from the principles declared above, when they have been fraudulently disposed of by the debtor in judgment to hinder, delay, or defraud his creditors, because such fraud gives equity jurisdiction whether there be a remedy at law or not by which the chose in action could be reached in the hands of the transferee. But as a transaction in form a transfer, or disposition of choses in action, and even made in the name of the defendant in judgment, but which is wholly unauthorized by him, and hence of no binding efficacy upon him, can neither involve fraud on his part, nor prevent him to proceed to reduce the choses in action to possession disregarding the transfer, there is in such case no ground of equitable interference,—there is no fraud imputable to the defendant in judgment,—nor is there any obstacle between the judgment creditor and the subjection of the choses in action to his judgment by process of garnishment at law. He not only has no remedy in chancery, nor would have in the absence of statute, but he has an adequate, plain, and complete remedy at law. Assuming that the present bill shows that Woolfolk in fact canceled the notes of Henderson and others as paid, and surrendered them to the makers without consideration, the case supposed is the case presented by this bill, with a distinction without a difference to be presently considered. And, Woolfolk having no authority from the Terminal Company to do what he did, his act is not binding on the company; it can now sue the makers of these notes just as if no such action had been taken by Woolfolk, and complainants had their remedy by garnishment; and not only so, but as the judgment debtor, the Terminal Company, has been guilty of no fraud, has not disposed of its choses in action, has done nothing in fact, complainants have no standing in equity, and would have none even if there was no statute giving them a remedy by garnishment.

The cases cited and collated above were cases of individual parties,—of natural persons whose choses in action were sought to be subjected in equity to the satisfaction of judgments against them. The party here whose choses in action are sought to be subjected to complainants' judgment against it is a corporation, and the claims in its favor sought to be reached are debts which the other respondents, the Hendersons and others, owe the corporation as subscriptions for or to its capital stock, evidenced by promises under seal to pay stipulated sums severally. And this is the distinction adverted to next above, and which at the time the present bill was filed was supposed—indeed had been held—to be a material one. It was at that time supposed, and had been in effect held, that the capital stock of a corpora-

tion was a trust fund for creditors, and it is fair to assume that this bill was filed and prosecuted on that theory. Of course, if the theory is sound,—if the capital stock of a corporation is a trust fund,—subscriptions to the stock, debts due the fund, have a trust character impressed upon them also, and courts of equity, whether there be a remedy at law or not, may, under their general jurisdiction to administer trust estates, enforce the payment of such debts to the cestui que trust, the creditors of the corporation. This doctrine, considered in and of itself, has in times past received the recognition of this court in dicta at least, and, as part of the broader proposition that the property of a corporation under certain conditions constitutes a trust fund for its creditors, it was at one time supported by express decisions of this court. It is the established doctrine now in many jurisdictions; but not so with us. To the contrary, the proposition as a whole, and in every part, has been repudiated by this court, and it has been directly ruled, adjudged, and settled that the assets of a corporation—and its capital and subscriptions due to its capital are in part its assets—under no circumstances constitute a trust fund for its creditors, but that, so far as creditors are concerned, all its property, including its choses in action of all kinds, is held and owned by it just as property—choses in action or what not—is held and owned by an individual debtor, subject to no trust resting on the artificial character of the debtor entity. *Jewelry Co. v. Volfer*, 106 Ala. 203, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31; *Corey v. Wadsworth*, 118 Ala. 488, 25 South. 503, 44 L. R. A. 760.

There being, then, no such fraud averred in the bill as gives equity jurisdiction, and no element of trust in favor of the complainants being presented, the case made is not one of which the chancery court ever had jurisdiction,—not one of which it would now have jurisdiction if there were no remedy at law,—and, there being a remedy at law, the bill cannot be maintained on the doctrine that original chancery jurisdiction of a subject-matter, or to administer a remedy, is not taken away or impaired by the statutory provision of a legal remedy in the premises.

We are of course considering the question of the 'equity vel non' of this bill with reference to our statutory law as it existed at the time the bill was filed. The act of Feb. 18, 1895 (Acts 1894-95, p. 881), now embodied in part in section 823, and, for the rest, in section 1282 of the Code, was not then of force, this bill having been filed March 17, 1894. That act, therefore, can have no application here, and would not have even without its express provision that it should not apply to any suits pending at the time of its enactment. The bill in the case of *Hall v. Henderson* was filed under that act on June 23, 1896; and, so far as any point decided in that case on the first appeal (114 Ala. 601,

21 South. 1020, 62 Am. St. Rep. 141), or upon the second appeal (recently determined, 28 South. 531, 85 Am. St. Rep. 53), bears an analogy to the point under consideration, the decisions of it on those appeals favorable to the equity of that bill must be rested upon that act.

It is contended, further, that even if the present bill did not have equity when it was filed, or has no equity now abstractly speaking, equity was injected into it, so to say, or the respondents have estopped themselves to now deny its equity, by having, on motion in the court below, procured an order putting the complainants to an election whether they would further prosecute this suit or certain garnishment proceedings then pending at their suit against the respondents in a court of law, and compelling them to dismiss this bill or those proceedings, which order complainants complied with by dismissing the garnishment proceedings. We do not think there is any merit in this position. It would seem to be necessary to say only, in the first place, that jurisdiction of the subject-matter cannot be conferred upon any court by estoppel, or even by affirmative agreement. But, if that could be done, the exercise by a respondent of his right to compel the complainant to dismiss one of two proceedings against him on the same cause of action cannot operate to cut him off from any defense he would otherwise have against the suit the complainant elects to prosecute. The right is given the respondent solely as a means of protecting himself from double prosecution, and he is entitled to that protection wholly irrespective of and apart from the character of his defenses against either suit, and without prejudice to them. The right would be of little if any value in any case, and a resort to it, in many cases at least, would be fatal to the respondent's ultimate rights, if he is to be held by its exercise to insure the jurisdiction of the court in which the complainant elects to proceed, or to forego any other defense. He cannot be so held. He insures nothing. He waives no defense. The complainant elects at his peril. His choice is free and unfettered; and he must take the consequences of making it ill-advisedly and unwisely.

The fact that complainants are assignees of the judgment to the satisfaction of which they seek to subject unpaid stock subscriptions does not prevent their suing at law, or give them a standing in equity. *Bank v. Hall* (Ala.) 24 South. 347, 26 South. 1031. It is of no consequence that they would have to use the name of the assignor in the legal action. They had the absolute right to do this, and, though resorting to this form, they would be in contemplation of law the sole parties to the record. Code, § 29.

The bill is not multifarious or objectionable for misjoinder of parties respondent. The rights complainants attempt to assert are the same against each one of the re-

spondents against whom appropriate relief is sought, and the obligation, if any, of each of them, is to pay complainants as creditors of the Terminal Company their several subscriptions to the capital stock of the corporation. In such case, in avoidance of a multiplicity of suits, the bill, had it been otherwise unobjectionable, was properly filed against them all, notwithstanding their interests and obligations as among themselves were entirely independent and distinct. *Allen v. Railroad Co.*, 11 Ala. 437.

The chancellor seems to have entertained some doubt as to whether the cause was submitted on the demurrers which raise the objections to the bill we have been discussing. We think it clear that the demurrers were embraced in the submission. It is true that they are not mentioned in the note of testimony of several of the respondents, but it was not necessary, or even proper, that they should have been there set down; and, besides, they are mentioned in the note of testimony of one or more of the respondents. But there was a written submission of the cause to a special chancellor which clearly embraces all questions and issues in the case, both of law and fact, as well on the pleadings as on the evidence; and the chancellor properly concluded that these demurrers were to be passed upon by him.

If the bill had averred that the payments made by the respondents on account of subscriptions to the capital stock of the company were made to the corporation itself, and received by it, in such a way as would preclude the company, and estop it to sue at law on the notes evidencing the subscriptions, it is clear, we think, on this assumption, in connection with the averments in the bill, that these complainants could not proceed at law or in equity to enforce such payments over again. The subscription notes were past due when they were paid in the manner detailed in the bill. The obligation of immediate payment was then upon these respondents. It cannot be doubted, and is not questioned, that Woolfolk, as president of the Terminal Company, then had full power and authority to accept, and it was his duty to enforce payment of these notes in money. The bill avers that they were paid in money to Woolfolk. Taking this averment, in connection with the obligation of the respondents to pay money to the company, and Woolfolk's duty and authority to receive the money for the company, as meaning that the payments were made to the company, and looking, also, to the further averment of the bill, that Woolfolk had no power or authority from the company to induce these payments by agreeing, as a part of the transaction in which they were severally made, to purchase the stock thus paid up from the subscribers, for the company, and with the assets of the company, we have the case, simply, of an officer of the corporation inducing payments to be made which the corporation had the

absolute right to have presently made without conditions, and which it was Woolfolk's duty to coerce to be made presently and without conditions, by falsely pretending that he had authority to receive payments upon conditions which he then entered into, and thereupon fulfilled and carried out by purchasing the subscribers' stock for and in the name of the company, and with its assets, without the shadow of authority. On the assumption upon which we are now proceeding, it is to be considered that the money thus paid to the company was legitimately used by the company in the prosecution or winding up of its business, in the payment of necessary current expenses and the debts of the corporation, and that the company and its creditors profited, so far as the money itself is concerned, as fully upon the payments thus rightfully made upon illegal and unauthorized conditions, as if they had been made absolutely and without such conditions. And it is not conceivable that the rightfulness and efficaciousness of payments so made, and so inuring to the benefit of the corporation and its creditors, can be impeached by the circumstance that, to induce them to be made, the president of the company, without authority from it or the semblance thereof, fraudulently and unlawfully purchased in its name the stock of these subscribers, and, likewise without authority or the semblance of authority, fraudulently and unlawfully, executed notes in the name of the company, secured by deposits of choses in action belonging to the company, or appropriated bonds belonging to the company, in payment of the purchase price of such stock. So that the company and its creditors had the full benefit of these payments, and the wrong and injury which resulted from the transactions to the company, and through it to its creditors, is referable in no degree to the payment of their subscription notes by these respondents, nor to the cancellation of said notes, nor to the manner of such payments, but solely to the unauthorized and illegal diversion of choses in action belonging to the company in payment, or to secure the payment, of the price Woolfolk agreed to give for the stock. And it necessarily follows, upon the construction of the bill which we have assumed for the purposes of this discussion, that neither the company nor its creditors have any standing at law or in equity to enforce the payment over again of this money which has been rightfully paid to and received by the corporation, and used by it in the legitimate prosecution of its business; but both the company and its creditors have, or had when this bill was filed, a remedy at law to recover its assets illegally, and without corporate authorization, or attempted authorization, misappropriated by Woolfolk to the purchase of the shares of stock held by these respondents.

As to some of the respondents, O. C. Wiley and Wiley & Murphree, the averment of the

bill is that their subscriptions and promises in writing have never been paid at all, by anybody or in any way; the allegation being in substance, and almost literally, that these respondents assert that they sold and transferred their stock in the Terminal Company to the defendant Saportas, the latter promising and agreeing to pay said company their said subscriptions therefor, and the promises in writing made for the payment thereof; that, if said sales and transfers were made, it was with the intent to defraud the corporation, and to hinder, delay, and defraud its creditors; that said respondents were amply able to pay and satisfy said debts, but were desirous to relieve themselves from liability to pay the same; and, if such sales and transfers were made, they were mere contrivances by which O. C. Wiley and Wiley & Murphree sought to evade and escape from such liability; that they knew said Saportas was not a resident citizen of Alabama, and they did not believe, and had no good reason to believe, that he was of ability to pay for said stock; and that said subscriptions and debts of said respondents are yet due and unpaid to said company, and said company has never agreed to accept any other person as debtors in their places and stead. It is entirely clear on these facts—so clear, indeed, as to render discussion superfluous—that the complainants had a plain, adequate, and complete remedy at law, by garnishment, against these respondents, and that, therefore, the bill presents no ground of equitable cognizance as to them.

The complainants at one time conceived that their remedy against O. C. Wiley and the members of the firm of Wiley & Murphree was at law, and summoned them in garnishment. They answered, and the complainants, as plaintiffs in judgment, contested their answer. When that cause had taken on this status, a judgment was entered therein discharging the garnishees. That judgment is pleaded here by said respondents in bar of the relief prayed in the bill. The plea properly presents the issue of *res adjudicata*. It is claimed for complainants that certain infirmities attach to, and inhere in, this judgment, growing out of the circumstances under which it was taken. They are not such as will avail on collateral attack. There was no direct proceeding to vacate the judgment, and it stands unimpeached on the records of a competent court. On the averments of the present bill to which we have adverted, the plaintiffs in that cause, complainants here, were entitled to judgment against the garnishees. Upon or after the institution of a contest there, judgment was passed for the garnishees. The issue in that case was necessarily indebtedness *vel non* of the garnishees to the Terminal Company, and the judgment foreclosed that issue in favor of the garnishees. That adjudication is a bar to the relief now prayed on the case made by the bill, and the plea which set it

up should have been held sufficient. If there are other facts which preclude the conclusion that the issue of indebtedness was determinable in that proceeding, they are not averred in the bill; and the sufficiency of the plea is, of course, to be determined upon its averments with reference to the allegations of the bill.

La Fayette Henderson as surviving partner, etc., was a party defendant to the bill. He died February 24, 1895. J. D. Henderson was appointed his administrator May 4, 1895. An order of revivor against J. D. Henderson as such administrator was entered May 20, 1895, and notice was served on him on May 27, 1895. On August 26, 1895, a decree pro confesso was entered against him. This was set aside, and leave granted him to answer, on October 8, 1895. He filed his answer on July 3, 1897, as of April 8, 1897. George B. Shellhorn, a witness for complainants, was examined orally on June 3, 1895, under an order made May 27, 1895, after Henderson had been made a party, and served with notice, and before the decree pro confesso had been entered against him, and before he had answered. Interrogatories were filed to Woolfolk by complainants August 2, 1895, before answer by, or decree pro confesso against, said Henderson; he had no notice of these interrogatories. On August 26, 1895, the day on which the decree pro confesso was entered, a commission issued to take Woolfolk's deposition, and this commission was executed, and the deposition taken, on October 18, 1895, after the decree pro confesso against said Henderson had been set aside, and before his answer was filed. La Fayette Henderson filed no answer to the bill, and there was no decree pro confesso against him at the time of his death,—none had ever been entered. The depositions of Chew and Jessup were taken on April 17, 1896, and the depositions of J. L. Hall, Farley, Joseph, Roman, and Tennille were taken in July, 1896, after the decree pro confesso against J. D. Henderson, administrator, etc., had been set aside, and before he had answered. It is clear, on the foregoing facts, that the several depositions referred to were taken when the case was not at issue as to the respondent J. D. Henderson as administrator of La Fayette Henderson, deceased, in palpable violation of rule 49 of chancery practice, which provides, with the force and effect of a statute, that "testimony cannot be taken by either party until the cause is at issue by sufficient answer or decree pro confesso as to all the defendants." Code, p. 1211. We do not find that the motions made by the several respondents and J. D. Henderson as such administrator to suppress these depositions were waived. To the contrary, they were insisted upon, and should have been granted.

It is averred in the bill that the judgment against the Terminal Company was recovered by one Hall as receiver of the Farley National Bank, and that said receiver was after-

wards discharged, and all the assets of the bank were surrendered and delivered to it, including this judgment. This turning over of its assets, including the judgment, is admitted by most of the respondents, but one or more deny it, and one or more neither admit nor deny it, but demand proof of the fact. Such proof was not made. In our opinion, it should have been. We are inclined, also, to think that the transfer of this judgment by the bank to the complainants should have been proven.

There is a variance between the allegations of the original bill and the evidence as to the means used by several of the respondents in the alleged satisfaction of their subscriptions and promises in writing. The bill avers that money to the amount of the subscription notes severally was paid to Woolfolk. The evidence shows that, in several instances, Woolfolk accepted, as payments, claims which the subscribers had against the Terminal Company for brokerage, and in one or more instances claims which they had against the Alabama Midland Railway Company for services rendered to that company. This variance would have been cured by the amendment of April 8, 1897, called the "Red Ink Amendment," and that is one reason why this amendment should not have been stricken.

There appears also to be a variance between the averments and proof in respect of the date of the note executed by J. C. Henderson. The bill alleges that this note was executed March 9, 1887. The answer of said Henderson alleges, and the proof shows, that it was executed March 9, 1888. Then, too, the bill alleges that the Terminal Company was organized with an authorized capital of \$100,000. The fact appears to be that at organization the capital was \$250,000, and that soon afterwards it was increased to \$500,000. An amendment of the bill should be made in this connection.

The cross bill of J. M. Henderson & Co. fails to aver any facts which import a liability to them on the part of J. C. Henderson, the respondent therein. The demurrer to it was properly sustained. The conclusions we have reached on the several questions that have been considered on the appeal of Henderson et al. leave the case in such condition that a discussion of its merits on the evidence would lead to no practical results, and that we deem it more conservative of justice to render no decree here except to reverse the decree below, and to remand the cause.

On the cross appeal of J. L. Hall and L. B. Farley there are only two assignments of error. The first of these challenges the chancellor's action in striking the amendment referred to above as the "Red Ink Amendment" from the files. We construe that amendment to aver that, in the settlement of their subscriptions and promises in writing with Woolfolk, the respondents, instead of paying exclusively in money, as is alleged in the orig-

final bill, were allowed, as credits thereon, claims which they asserted were due them from the Terminal Company as commissions for indorsing the company's paper, and for other alleged services, and also claims which they asserted against other corporations for services to such corporations, for which the Terminal Company was not responsible. The facts concerning the payments made by Woolfolk in the purchase of the stock subscribed for by certain of the respondents with Midland bonds, etc., belonging to the Terminal Company are sufficiently stated in the original bill, and this amendment has no reference to those transactions, and it would be superfluous had it referred to them. And assuming, for the purposes of the cross appeal, that the original bill had equity to the coercion of the payment of the stock subscriptions from the respondents who had settled their notes with Woolfolk by taking credits thereon for the claims referred to, asserted by them against the Terminal Company, or attempted to be allowed by Woolfolk as claims against that company, albeit some of them were for services rendered to other corporations, and paying the balance in money; and who, as a part of the same transactions, sold their stock to Woolfolk for the Terminal Company, and were paid therefor with Midland bonds and other assets of said company,—this amendment was proper, not alone for the purpose of curing the variance between the averments of the original bill and the proof as to how the alleged settlements were made with Woolfolk by them in respect of what they paid or parted with to secure the cancellation and surrender of their notes, but also for the further purpose of affording a basis for recovery against them for the amounts of such illegal credits, in addition to, and cumulative upon, the collection of the amounts they had severally subscribed and promised to pay. For not having paid money to the full amount to secure the cancellation and surrender of their notes, but at the same time, and as a part of the same transaction, having received assets of the company equal in value to the face of the stock for which they had thus settled with Woolfolk, it is manifest that a decree against them severally, for the amounts of their stock notes, would not make the company or its creditors whole, but would leave it and the complainants out of pocket in each instance in the sum of the credits illegally allowed on the notes for the brokerage commissions and claims against other corporations. Hence, our conclusion that the amendment should have been allowed to remain in the bill, both as curing the variance adverted to, and as a basis for an accounting by these respondents for a sum equal to the illegal credits allowed them by Woolfolk. And, considering the cross appeal separately, and as distinct from the original appeal, the decree striking said amendment will be reversed, and a de-

creed will be here entered overruling and denying the motion to strike.

Therefore, on the main appeal the decree will be reversed, and the cause remanded, and on the cross appeal the decree will be reversed, and a decree here rendered.

In Answer to Application for Rehearing.

June 11, 1902.

Further investigation and consideration has but served to confirm us in the opinion that the doctrine so clearly and ably stated and declared in *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531, by Chancellor Sanford, and which we adopted and followed in the original decision of this case, is eminently sound. All the argument that has been submitted against the integrity of that doctrine proceeds upon two utterly gratuitous assumptions: First, that at law, in the absence of statute, the judgment creditor has a right to have his debtor's choses in action applied to the satisfaction of his judgment, and that, therefore, since he cannot have his execution levied upon them, he may have this legal right effectuated in equity; and, second, that the fact that choses in action are not leviable converts them into equitable property held by the judgment debtor,—that is to say, that, notwithstanding the title of the owner of a chose in action is purely legal, and his rights in respect of it are enforceable only in a court of law, yet it is an equitable estate or property in him, and for that reason chancery has jurisdiction over it. And it is because Chancellor Sanford declined to adopt these assumptions, as entirely unfounded as any assumptions can be, and to be led off by these palpable sophistries that it is sought to present him, and those "misguided" judges who recognize the soundness of his views and conclusions, as tyros in equity jurisprudence, and ignorant of its elementary principles. So far as Chancellor Sanford is concerned, his statements of legal fact, and his clear and inevitable deductions from them, may well be left to stand alone and triumphant against all such assaults. As to other "misguided" judges, it would seem to be fair to let them speak for themselves. Among these are the judges of the queen's bench division of the high court of justice of England, who, speaking by Lindley, L. J., so recently as 1893, declare: "We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a court of equity to enforce his judgment against property not capable of being reached by any common-law process. The only cases of this kind in which courts of equity ever interfered [prior to the judicature acts] were cases in which the judgment debtor had an equitable interest in property which could have been reached at law if he had had the legal interest in it, instead of the equitable interest

only. This will be found explained" by Jessell and Chitty and the court of appeals (citing the cases). "It is an old mistake [and perennial it seems] to suppose that because there is no effectual remedy at law there must be one in equity; but the mistake, though old, and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well-known principles capable of great expansion, but the principles themselves must not be lost sight of. The principle on which, alone, the order in this case could be supported before the judicature acts, is well explained by Cotton, L. J., in *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275; it is that courts of equity gave relief where legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the court of chancery had no jurisdiction to prevent him from earning his living, or from receiving his earnings, unless he had himself assigned or charged them. The court could not restrain him from receiving them until his creditor could attach them under the process of garnishment; nor did the court ever presume to enlarge the judgment creditor's rights; nor, under color of assisting him to enforce those rights, did the court of chancery reach by its process a kind of property which was not liable to execution. Before debts and money were made liable to execution by statute, they could not be reached by an ordinary judgment creditor in equity, any more than at law." *Holmes v. Millage*, [1893] 1 Q. B. 551, 10 Eng. Ruling Cas. 604, 608.

To the same effect is the language of Jessell, M. R.: "Prior to the judicature act, the courts of equity, before granting equitable execution, required to be satisfied of two things: First, that the plaintiff in the action had tried all he could to get satisfaction at law; and then that the debtor was possessed of that particular equitable interest which could not be attached at law." *Salt v. Cooper*, 16 Ch. Div. 544; and to like effect are the cases of *Wills v. Luff*, 38 Ch. Div. 187, and *re Shephard*, 43 Ch. Div. 131. And this has, for time out of mind, been the law of England. Lord Thurlow, in *Dundas v. Dutens*, 1 Ves. Jr. 196, 197, the contention being that the chancery court should give execution against shares of corporation stock, said: "Is there any case where a man having stock in his own name has been sued for the purpose of having it applied to satisfy creditors? Those things, such as stock, debts, etc., being choses in action, are not liable. They could not be taken upon a *levari facias*. * * * I have never heard of such a thing." Chancellor Thurlow may have been "a misleader of youth"; but, if

so, it is a strange thing indeed that none of the learned judges of England from his day to this has discovered the fact, but, to the contrary, they all have uniformly followed, reaffirmed, and redeclared the doctrine of *Dundas v. Dutens*, believing in their simple souls that it was the law of the land. Nor was the proposition stated by Lord Thurlow a dictum in that case, according either to the apprehension of all subsequent English judges, or to the fact. It is singular, to say the least, that neither the fact of what Lord Thurlow said being a dictum, nor the fact of his obtuseness and ignorance should have been discovered until now, and has not even yet been realized by any English judge, or American, for that matter. Of his declaration of the law in the case referred to, Lord Chancellor Manners, in *McCarthy v. Gould*, 1 Ball & B. 387, 389, has this to say: "The claim upon dividends of bank stock has been very properly abandoned. I listened very attentively to Lord Thurlow in the case of *Dundas v. Dutens*, which was heard upon decree, and not upon motion, and he was clearly of opinion that choses in action, of which description is stock, could not be reached by the process of this court." The same judge in *Grogan v. Cooke*, 2 Ball & B. 230, said further: "In the case of *Dundas v. Dutens*, the question was whether stock that had been settled could be brought within the reach of creditors. I have a note of that case, which, on this point, is more full than the printed report of it, which I will briefly state. Lord Thurlow says: 'Is there any case where stock standing in a trustee's name can be made available to pay debts, or that debts [and stock is a chose in action] shall be transferred to creditors for that purpose? You cannot have an execution at law against such effects.' So, in this case, how could the creditors have made their policies of insurance available, either at law or in equity, during Cooke's life? For, independent of the objection that a chose in action is neither subject to an execution or to be attached in equity by creditors in the lifetime of the debtor, here Cooke himself could recover nothing upon those policies." Lord Eldon, a chancellor of some repute in his time, referred upon occasion to Lord Thurlow with respect and deference, and held, with him, that choses in action were not leviable, and could not be subjected in equity to the satisfaction of a judgment at law (*Nantes v. Corrock*, 9 Ves. 182, 188; *Rider v. Kidder*, 10 Ves. 360, 368), remarking in the latter case: "It is clear, stock cannot be attached in the life of the party. Such was the language of Lord Thurlow in *Dundas v. Dutens*, and also in the case of Sir Alexander Leith, where a bill was filed to try whether this court would give execution in aid of the infirmity of the law; and it was held that there was no jurisdiction."

So it stands the law in England to-day.

apart from recent statutes, and has always been the law there, that a judgment creditor had no right to subject the debtor's choses in action to the satisfaction of his judgment, and that, there being no such primal legal right, the court of chancery has not, and has never had, any power or jurisdiction to subject such property to the judgment at law. In addition to the American courts and judges who hold the same doctrine referred to in the original opinion, the judges of the courts of last resort in the states of Maryland, New Jersey, Tennessee, and Kentucky are, according to counsel for appellees, youngsters who have been misled by Chancellor Sanford and Lord Thurlow, along with all the great judges of England.

The Maryland court of appeals, on December 3, 1896, in an elaborate opinion reviewing all the authorities, laid down the doctrine declared by the English courts and by Chancellor Sanford, concluding the discussion with this quotation from *Donovan v. Finn*: "When a creditor comes into this court for relief, he must come not merely to obtain a decree or satisfaction of a judgment, but he must present facts which form a case for equity jurisdiction." In the course of the opinion the court says: "In the early cases in England the jurisdiction here contended for, to subject choses in action to the claim of creditors by a creditors' bill, was sustained, but generally upon the ground of fraud, trust, or for some other reason which it was conceded would entitle the creditor to invoke its aid. Thus *Taylor v. Jones*, 2 Atk. 600, lays down the doctrine that where a debtor has, in fraud of his creditors, assigned to trustees certain choses in action in trust for himself for life, and then over to his wife and children, a court of equity will favorably hear the application of such creditors, and decree such trust estate to be sold for the payment of their debts. And this was held to be so notwithstanding such choses in action were not subject to levy and sale upon execution at law. *Rex v. Marissal*, 3 Atk. 192; *Edgell v. Haywood*, Id. 352; *Horn v. Horn*, Amb. 79; *Partridge v. Gopp*, Id. 578; *Smithler v. Lewis*, 1 Vern. 398. But even in cases like that of *Taylor v. Jones*, supra, and the others just cited, which would perhaps be now generally conceded to be within the limits of equity jurisdiction because of the allegation and proof of fraud, it was subsequently held in England that creditors could get no relief in equity because they had no legal right which equity could enforce. *Dundas v. Dutens*, 1 Ves. Jr. 196; *Grogan v. Cooke*, 2 Ball & B. 230. In the case last cited, Lord Manners quoted Lord Thurlow as having said: 'The opinion in *Horn v. Horn* is so anomalous and unfounded that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement which, if set aside, leaves the stock in the name of the person where you could not touch it.' And in *Bayard v.*

Hoffman, 4 Johns. Ch. 450, Chancellor Kent, after a most careful and elaborate examination of the English authorities, came to the conclusion that, while Lord Hardwicke had maintained the jurisdiction of equity thus to proceed against choses in action, it was afterwards denied and overthrown by both Lord Thurlow and Lord Eldon, although his own opinion, as expressed in *Bayard v. Hoffman*, supra, was that 'the better reason is with the earlier authorities.' But, notwithstanding this expression of opinion in the case just cited, the more recent cases upon this point in New York and some other states have vigorously announced and maintained the doctrine that, aside from statute, and in the absence of fraud or some element of trust, chancery has no jurisdiction to subject choses in action to the payment of creditors because there happens to be no remedy at law, and it would seem that the chancellor himself had adopted this view, as will appear by reference to his commentaries (volume 4, p. 61), where he refers to the New York statute as authority for the statement that in that state a chose in action may be reached by process in chancery for the benefit of creditors."

In the Maryland case it was suggested and insisted, as it is in this, that, the creditor's remedy by attachment of the person of the debtor having been abolished, the jurisdiction of equity to reach choses in action at once came into existence as a necessary complement to imperfect legal remedies. This position the court repudiated in the following terms: "Nor do we assent to the view that the mere abolition of the extraordinary remedies of outlawry and attachment of the person would confer jurisdiction on equity. Such a conclusion would be in conflict with reason as well as with modern authority." It would certainly not seem to follow that if the law had always and consistently refused to give an execution against things in action, and had allowed only the extraordinary remedies just mentioned, that, upon the destruction of the latter, the former would not only thereupon spring into existence, but become remedies appropriate for a court of equity. The contrary conclusion would, we think, be more reasonable, namely, that the legislature having abolished execution against the person, which was used for the purpose of getting satisfaction out of the debtor's effects which could not be reached by other executions, and having failed to provide any new remedy to take its place, it was not intended there should be any. And so it has been held in *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531; *Buford v. Buford*, 1 Bibb, 305; *Greene v. Keene*, 14 R. I. 387, 397, 51 Am. Rep. 400. 'Equity follows the law,' and, as we have seen, a rule either of statute or common law is as potent in a court of equity as in a court of law. 1 Story, Eq. Jur. § 64. Whatever may, at one time, have been the vague and general rule

as to the limits and extent of equity jurisdiction, it is now well settled that 'no court of chancery at this day would attempt to supply the defects of law by deciding contrary to its settled rules in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence.' 1 Pom. Eq. Jur. § 47."

The whole of this able and learned opinion might be set out here with advantage to the bench and bar of the state; but we content ourselves with the following additional excerpt: "It would seem to be reasonably clear from the authorities already cited, and the discussion of them, that in the absence of a statute, and in the absence of fraud or some other ground of equity jurisdiction, a court of equity has no power to subject the defendant's unassigned right of dower to the payment of her debts. But this conclusion will, we think, be placed beyond doubt by a brief consideration of some of the adjudications of the highest courts of other states. In the case of *Maxon v. Gray*, 14 R. I. 641, which was decided in 1885, the very question now before us was passed upon. That case, like this, was a bill in equity by judgment creditors for a decree for a sale of an unassigned right of dower, and in an able and elaborate opinion the court came to the conclusion, after reviewing many of the previous cases, that equity had no jurisdiction. To the same effect. *Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400. In *Cresswell v. Smith*, 2 Tenn. Ch. 416, it was held that chancery has no power to reach stocks or things in action, even in the hands of third persons unaffected with fraud or trust, without the aid of a statute. *Keightley v. Walls*, 27 Ind. 384; *Williams v. Reynolds*, 7 Ind. 622. In the case last cited it is said equity will not subject choses in action to the payment of a judgment creditor, because equity only aids the law, and will, therefore, not interfere, except as to such property as may be sold on execution at law. In the case of *Buford v. Buford*, supra, the same view was enforced in the absence of a statute, and in concluding its opinion the court said, 'The bare circumstance of a debt cannot be made the foundation of a bill.' The views upon the question of jurisdiction expressed in all these cases are in accord with the rule as laid down by Mr. Adams. 'Equity,' he says, 'does not create new rights which the common law denies, but it gives effective redress for the infringement of existing rights, where, by reason of the special circumstances of the case, redress at law is inadequate.' Adams, Eq. p. 6; Phelps, Jur. Eq. § 158."

This case is published in 57 Am. St. Rep. 407, and in a note Mr. Freeman again cites *Donovan v. Finn*, and several other cases, and says: "There is probably a preponderance of authority in favor of the view that equity has no power in ordinary cases to compel the appropriation of choses in action to the payment of their owner's debts."

Harper v. Clayton, 84 Md. 346, 355, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. Rep. 407.

The supreme court of Tennessee is equally pronounced in support of the doctrine of the original opinion in this case. The following is the opinion of that court in the first case which came before it involving this question: "This is a bill filed by the complainant to subject stock in the Nashville Bridge Company to the payment of his debt due from defendant. It is not pretended that there is any fraud or trust in this case to furnish a ground of equity jurisdiction; and the simple question is whether this court has power to cause stocks, credits, and rights of action held by a debtor without fraud to be sold or converted into money, or transferred to the creditor in payment of his debt. We think it has not; and without entering into any reasoning on the subject, or review of authorities, we refer, as conclusively settling the point, to the case of *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531. Our act of assembly of 1833 [c. 11], makes ample provision upon this subject; but this bill, being filed long before the passage of that act, cannot be governed by it. Affirm the decree." *Erwin v. Oldham*, 6 Yerg. 185, 27 Am. Dec. 458.

In the case of *Cresswell v. Smith*, 8 Lea. 688, which was decided nearly 50 years later, the decision in *Erwin v. Oldham* was reaffirmed by the supreme court of Tennessee, and it was further held "that the mere abolishment of imprisonment for debt would not, without more, vest the chancery court with jurisdiction it did not previously possess, however much the creditor might need additional aid." This case was heard in the first instance and decided by Chancellor Cooper, a judge of very high repute with most lawyers and jurists; and in a learned opinion reviewing all the authorities, and reaching the conclusion that equity was without jurisdiction in the premises, is found a reference to Lord Hardwicke's position on the question, which is peculiarly apposite here in view of the argument of counsel. After referring to the courts and judges ranging themselves upon either side of the question, he continues: "In this war of giants, 'Non mi tantas componere lites.' If, however, to the great names of Kent and Walworth could be added the greater name of Lord Hardwicke, it would be difficult to convince a lawyer of the present day that the weight of reason was not with them, whatever might be the weight of authority. Unfortunately for that side of the question, we have a positive decision of the master mind of English equity which seems to have been overlooked by Chancellor Kent, and is directly in accord with *Donovan v. Finn*. In both cases a judgment creditor, after exhausting his legal remedy, sought to reach a legacy due to the debtor in the hands of the executor of the decedent, and in both the decision, so far as it turned upon the inherent power of the court of chancery, was

the same." The chancellor then reviews the rulings of Lord Hardwicke in *Edgell v. Haywood*, 3 Atk. 352, and continues: "The language of this decision against the power of the chancery court to reach stock, debts, and choses in action not leviable by execution is quite as emphatic as that of Lord Thurlow in *Dundas v. Dutens*. It was only by virtue of the statute that the court could act. *Donovan v. Finn* was precisely the same case without the statute. I conclude, therefore, that this eminent judge was of the same opinion as his successors,—that such property could not be reached directly in equity, but only through some other ground of jurisdiction, such as fraud or trust." *Creswell v. Smith*, 2 Tenn. Ch. 416, 422, 423.

In the original opinion, we cited some Kentucky cases supporting the conclusion reached. We will now advert to one or two others decided by the court of last resort of that state. *Buford v. Buford*, 1 Bibb, 305, is one of them. We copy from the opinion in that case: "The point being settled that at law the obligation which James Buford held on Calloway could not have been taken in execution, nor the land in the said bond described, it remains to inquire if a court of equity can go beyond the law, and create a new right. Equity cannot construe a statute otherwise than a court of law can. Both courts are bound by the same rules of construction, insomuch it is a maxim that '*equitas sequitur legem*.' Equity will remove impediments which are in the way to legal rights, and will give redress where, according to the forms of procedure at law, the complainant might have a right without a remedy, or where that remedy would be incomplete. Equity will enforce a recognized right in a manner unattainable at law, but it cannot create a right unknown to the law. What right, then, had William Buford, upon which he could bottom his complaint in chancery? At law he could have no lien upon his debtor's property, by virtue of his judgment, until his writ of execution was delivered to the proper officer; but even after delivery he could have gained no lien thereby on the land or the bond which is the subject of the complaint. The application, therefore, is not to enforce a right recognized by law, but to create one, and give a lien unknown to the law. Equity cannot sustain the prayer of the creditor upon the suggestion that his debtor has but an individual piece of property, and that his debt must remain unpaid unless the law shall be transcended, and that property made liable. If the chancellor is not circumscribed by the rules of law which enter into and constitute the right, what is to limit his discretion? If he can seize the bare circumstance of a debt as the foundation of the bill, and create a privity or a lien where the law has given none, then, indeed, it might be said that justice was to be measured by the chancellor's foot, his power by his appetite, and his range illimitable. A bond for land gives no vested

right to the land. It is but a right to ask for the subject or damages by way of compensation for not complying with that right. It is but a chose in action, which execution cannot reach, and which equity cannot reach in behalf of a creditor, without a privity created by the parties or by the law. The insolvency of the debtor can furnish no ground for the interposition of the chancellor when, in so doing, he does not follow, but outgoes, the law. As well might the creditor ask that his debtor, who was destitute of property, should be compelled to labor, and suffer the creditor to receive the proceeds. And yet it is believed the chancellor could exercise no such power, although the law had given the creditor an execution against the body of the debtor." And in the late case of *Curd v. Letcher*, 3 J. J. Marsh. 443, the same court reaffirms the doctrine of *Buford v. Buford*, and of the other cases cited in our original opinion.

The New Jersey court, enjoying an especially high reputation in the field of equity jurisprudence, is thoroughly committed to the same doctrine. The first case was that of *Disborough v. Outcalt*, 1 N. J. Eq. 298. There was a full discussion of the question on principle and authority, and an unqualified acceptance and adoption of the doctrine of *Donovan v. Finn*. In *Whitney v. Robbins*, 17 N. J. Eq. 360, it is decided that "the jurisdiction of the court of chancery to collect the choses in action of a judgment debtor, and apply them to the payment of his debts, has never been assumed in this state until conferred by the acts of" 1845 and 1864, and this holding was reaffirmed in *Vanderveer v. Stryker*, 8 N. J. Eq. 175. The case of *Hardenburgh v. Blair*, 30 N. J. Eq. 645, was decided by the court of errors and appeals in 1879. The court, having held that the relief sought was not grantable under certain statutes of that state, proceeds thus: "But it is contended, on behalf of the judgment creditor, that, independently of the acts of 1845 and 1864, chancery had a jurisdiction which would enable it to reach the moneys in question, and apply them in payment of the judgment debt of the cestui que trust. An examination of the decisions of the English courts will show it to be there settled that an original jurisdiction of this kind did not pertain to its courts of equity. The powers of the court were simply in aid of the judgment creditor where a trust had been interposed which obstructed the operation of the process of a court of law, and extended only to such property as, save for the interposition of the legal obstacle, might have been reached by such process. Speaking on this subject, Lord Cottenham said: 'What gives a judgment creditor a right against the estate is only the act of parliament, for, independently of that, he has no such right. The act of parliament gives him, if he pleases, the option by the writ of *elegit*.' * * * The effect of the proceeding under the writ is to give the creditor a legal

title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into the court, not to obtain a greater benefit than the law [that is, the act of parliament] has given him, but to have the same benefit which he would have had at law if no legal impediment had intervened.' *Neate v. Duke of Marlborough*, 3 Mylne & Cr. 416. Mr. Lewin, after an examination of the cases, uses this language: 'As equity only follows, and does not enlarge, the law, the judgment creditor has no title to relief where the chattel of which the trust has been created is not, in itself, amenable to any legal process.' *Lewin, Trusts*, 648. In *Taylor v. Jones*, 2 Atk. 600, which, Chancellor Kent said, contained the great and leading doctrine in support of the creditor, the debtor had, in fraud of creditors, purchased stock with his own money, and vested it in trustees for the benefit of himself for life, and of his wife for her life, and afterwards for the benefit of his children. On a bill filed by his creditors to have his debts paid out of the stock, it was decreed that the trust estate be sold, and applied in payment of the creditors, although the stock was not, at that time, subject to levy and sale under execution at law. The case was one infected with fraud, and the decision of the master of rolls was put on that ground. Now, although fraud is one of the heads of equity jurisdiction, yet *Taylor v. Jones*, and several other cases of the same kind, have been denied, as contrary to correct principle, by a weight of judicial opinion that entirely destroys their value as precedents. *Lewin, Trusts*, 648. The subject has since been regulated by acts of parliament, which expressly make a judgment debtor's equitable interest in lands, and also stock, funds, and annuities held by him in his own name, or in the name of another in trust for him, available for the payment of his debts. * * * Independently of these statutes, and the statutes relating to insolvent debtors and bankrupts, it is well settled in England at the present time that the jurisdiction of chancery in aid of a judgment creditor extends no further than to property of such a nature and description as might have been seized by the process at law if some legal obstacle had not been interposed."

Recurring, now, to the New York decisions: The case of *Hadden v. Spader*, 20 Johns. 554, is chiefly relied upon as settling the doctrine in that state that a judgment creditor, even in the absence of statute, may come into chancery to have satisfaction out of choses in action belonging to his debtor. There is an opinion in that case by Woodworth, J., to this effect. It was concurred in by Spencer, C. J., and dissented from by Platt, J. The statement of facts in the report demonstrates that the case was one of fraud and trust, and therefore well within a recognized head of equity jurisdiction wholly apart from the question we are now upon; all which is made entirely

clear in the opinion delivered by Justice Platt, who concurred in the affirmance of the decree upon the ground of fraud and trust, concluding in these words: "But I am not prepared to extend this doctrine to any other cases than those wherein the trustee received goods liable in themselves to execution, under circumstances which imply fraud, in fact or in law, as against creditors. In an abstract view, it may appear proper to extend the remedy, in favor of creditors, to every chose in action of the debtor. But in my judgment such power has not yet been conferred on our courts of justice, and it will be the appropriate office of a bankrupt law, or some other legislative provision, to afford such a remedy. I feel that we are treading on new ground, and I am unwilling to commit myself beyond the case now before us." What we have thus set forth as being the case before the court leads inevitably to the conclusion that all that was declared by Woodworth, J., as to the right of a creditor to subject the choses in action of his debtor, was beside the case presented, wholly unnecessary to its decision, and, therefore, was the merest dicta of that judge. It was so declared in the subsequent case of *Donovan v. Finn*, as we have seen; it was so considered and esteemed by the lawmakers of New York, else there would have been no occasion for the statute of 1830, expressly passed to "settle" the law in accordance with Woodworth's opinion, and so expressly held by the court for the correction of errors in the case of *Durant v. Albany Co.*, 26 Wend. 66, decided in 1841. And, beyond this, the opinion is inconsistent with itself, in that it confesses in one part that the remedy proposed to be applied must be predicated upon a right existing at law, but which in the particular case the remedy at law is inadequate to effectuate, and from this sound basis, stated in the opinion itself, it proceeds to the conclusion that equity may reach and apply choses in action when confessedly there was no right at law in any case to so reach and apply them. In the case last cited,—*Durant v. Albany Co.*,—the decision was that the chancery court had no such jurisdiction as was attempted to be declared by Justice Woodworth in *Hadden v. Spader*, and the presiding judge of the court, in delivering the ruling opinion in the case, had the following, among other things, to say of *Hadden v. Spader*: "It is true that, in the case of *Hadden and Spader*, the learned member of the court of errors who delivered the leading opinion did advance a doctrine which carried the jurisdiction of chancery beyond its former recognized limits, and extended it to the discovery and application of choses in action and equitable interests which could not before be levied upon by execution at law. In these views another learned member of the court expressly concurred; and, what is very remarkable, the opinion which had been delivered is expressly referred to in the preamble to the final decree entered in the case. But

this case, I apprehend, notwithstanding the extraordinary preamble of the decree, cannot be considered as deciding anything beyond the true point involved in the case. That was clearly within the former acknowledged jurisdiction of the court of chancery. It was in no respect necessary, therefore, to its decision, and the affirmance of the decree of the chancellor, to assert the new and enlarged jurisdiction of that court which was claimed for it in the leading opinion delivered on the final decision of the case. While, therefore, that decision has been considered as sound law, the reasoning of the leading opinion in it appears not to have been received with equal favor, or to have been acquiesced in either by the courts or the bar." Here follow quotations from the opinion of Chancellor Sanford in *Donovan v. Flinn*, showing the unsoundness of Woodworth's views in *Hadden v. Spader*, which we do not repeat here, as they are set out in the original opinion; and the opinion in *Durant's Case* proceeds: "I have been the more liberal in my quotations from the opinion of Chancellor Sanford in the case of *Donovan and Flinn*, not only because that case appears to have been fully argued, and well and ably considered, but because they present the views of a chancellor who was as faithful and enlightened in the exercise of the powers which he believed himself to possess, as he was careful to abstain from the assumption of those not within his proper jurisdiction; and who, while he was prompt to apply all the legitimate and beneficent prerogatives of equity to the great purposes of justice, viewed with anxiety, and not without painful alarm, the tendency of his own court to an undue accumulation and exercise of powers. Few officers of the court of chancery have lived whose governing principle appears to contrast more strikingly with that embraced in the old saying,—so fully exemplified in the life and character of Cardinal Wolsey, the chancellor of Henry VIII. of England,—that 'great men in judicial places will never want authority.' Views of the case of *Hadden and Spader* similar to those of Chancellor Sanford seem to have been entertained by Justice Marcy and others in the subsequent case of *Pettit v. Candler* in this court in 1829. See 3 Wend. 618. Justice Marcy there says: 'The relief asked for and granted in the case of *Hadden v. Spader* lay within the uncontested powers of the court; but the doctrine advanced by some of the judges when that case was reviewed in this court went greatly beyond the principle necessarily involved in it, and is supposed by Chancellor Sanford not to have the sanction of the court.' 'Nothing can be certainly said to be established as law by this court in a particular decision but what is necessarily involved in the case decided.' Chief Justice Savage concurred in the views presented by Justice Marcy, with the remark that 'his impressions were that, under the existing law, a defendant is not bound to answer as to

property which never was within the reach of an execution.' Justice Sutherland concurred, reserving himself upon this latter point. I think, therefore, that it must be conceded that the law of the decision in the case of *Hadden and Spader* did not extend the jurisdiction of chancery beyond its former acknowledged limits; and that, previous to the statute of 1830, that court, in the absence of fraud, trust, or other head of equity, had no power to compel the discovery of money, stocks, choses in action, or equitable interests of a debtor not tangible by execution at law, and to apply them, when discovered, to the payment of the debt of a creditor, even although such creditor had obtained a judgment at law, issued an execution thereon, and had it returned unsatisfied. If the court had such jurisdiction already, then the passage of the statute of 1830 expressly giving it that jurisdiction was unnecessary, and is without effect. But I take the passage of that statute to be evidence that in the opinion of the revisers who proposed it, and the revising legislature who passed it, the court of chancery, independent of the statute, had not the jurisdiction in question. Indeed, the revisers, in presenting the draft of the proposed statute, expressly say that 'deeming it important to settle the law, and preserve the rule as laid down in *Hadden and Spader*, they have prepared the above sections'; thereby clearly implying that, without them, the law was not so settled." It was insisted in *Durant's Case*, as it is insisted here, that the statute of New York above referred to was merely declaratory of, "and only reasserted, jurisdiction which the court of chancery already possessed, but which had been drawn into question and doubt"; and there, as here, certain declarations of Chancellor Walworth were relied upon to support the position. Of these deliverances, the opinion in *Durant's Case* treats as follows: "I am aware that in *Tarbell v. Griggs*, 3 Paige, 207, 23 Am. Dec. 790, the present chancellor—Walworth—said: 'It has been repeatedly decided that this section of the Revised Statutes is not introductory of a new principle, but is only in affirmance of what was considered by the court of dernier resort the legitimate jurisdiction of the court of chancery previous to the adoption of the Revised Statutes.' The learned chancellor has not been pleased to refer us to the cases in which it has been so repeatedly decided. The statute went into effect in 1830; the chancellor spoke in 1832; and I am not aware of any decision of any court during that period, or even down to the present time, giving to the statute in question the character and effect ascribed to it by the chancellor. If there be any such decision, I have been unable to find it. It is true that in *Child v. Brace*, 4 Paige, 309, the chancellor again says: 'It must be recollected, however, that this statute is only declaratory of a principle which had before been adopted in this court.' Again the chancellor does not refer us to the cases

in which the principle of the statute had been adopted in our court of chancery, and I know of no case in which that principle forms a part of the decree and law of the case." After referring to all the cases at all bearing on the matter, and demonstrating that none of them supports Chancellor Walworth's assertion, the opinion, with reference to him, proceeds: "Down to 1827, it would appear that, in the opinion of the present chancellor himself, notwithstanding the decision in the case of *Hadden v. Spader*, neither the doctrine of the leading opinion in that case, nor the principle of the statute of 1830, was the acknowledged law of the court of chancery of this state; for in the case of *Weed v. Pierce*, 9 Cow. 722, which in that year came before him as vice chancellor of the fourth judicial circuit, he said: 'I think, with the late chancellor, that in an ordinary case, free from all fraud and injustice, this court ought not, on the application of an execution creditor, to deprive the debtor of the power of collecting his debts. There must undoubtedly be an unconscientious exercise of that power on the part of the debtor, or some fraud, collusion, injustice, or willful neglect on his part to collect and apply his debts and choses to satisfy his creditors, or some other ground of equitable jurisdiction in relation to such debts or choses in action, to enable execution creditors, by aid of a court of equity, to reach and apply the same in satisfaction of their judgments and executions. It must be admitted that the reasoning of Judge Woodworth [in *Hadden and Spader*] would extend the jurisdiction of courts of equity much beyond what the late chancellor supposed was allowable.' Such were the views of Vice Chancellor Walworth in 1827. They seem to me to be entirely sound, and to present truly the law of the court of chancery down to 1830." This very able and exhaustive opinion, in another part, undertakes to summarize the law of New York on the question under consideration, prior to the statute of 1830: "The ordinary cases in which a court of chancery, in the exercise of its appropriate powers, and within its own proper and legitimate jurisdiction, might, previous to 1830, interfere in aid of a judgment creditor, may be comprised under the two general classes following: (1) To compel the discovery of property improperly concealed or withdrawn from the creditor, and which, when discovered, may be taken in execution at law; and (2) to remove impediments, either created by equity or interposed by fraud, to the due course of proceedings at law. It is believed that, previous to the Revised Statutes of 1830, the cases in which our own court of chancery interfered to relieve judgment creditors were all embraced in these two general classes, and were, of course, all cases of acknowledged equity jurisdiction. They all came under some general head of equity. The case of *Bayard v. Hoffman*, 4 Johns. Ch. 450, was a case of fraud, trust, and a conveyance without consideration; that of *Brinkerhoff v.*

Brown, Id. 671, was a case of fraud; that of *McDermutt v. Strong*, Id. 687, was a case of trust; that of *Spader v. Davis*, 5 Johns. Ch. 280, and *Hadden v. Spader*, 20 Johns. 554, was a case of trust and fraud; and the case of *Pettit v. Candler*, 3 Wend. 618, was also one of trust and fraud. These are the leading cases in our own courts previous to 1830; and it will be seen on examination that they all embrace some general head of equity, and are thus within the legitimate jurisdiction of chancery. In neither of them was there an attempt on the part of the court, without facts or incidents of equitable jurisdiction, to discover, and apply to the payment of the debt of a judgment creditor, stocks, credits, choses in action, or equitable interests not tangible by execution at law."

We will not pursue this discussion and citation of authority further. Quite enough has been said and shown upon adjudged cases, and texts incidentally quoted, to demonstrate that "*Donovan v. Finn* was" not "opposed to the precedents extant from the most distinguished judges," but was strictly declaratory of the law of England and of the state of New York in the then absence of statutes. Enough has appeared, also, to demonstrate that "*Donovan v. Finn* was" not "immediately denounced, disregarded, and overruled," and that it has been "followed in the state of New York, where it originated." And, apart from these statements, quite sufficient of reason and authority has been presented to demonstrate the soundness of the proposition of *Donovan v. Finn* as a living principle to-day. On the other hand, the case of *Hadden v. Spader*, or rather the view of Justice Woodworth there expressed, is a conclusion, drawn from a stated promise, which palpably, and according to all well-considered cases, does not support it; was at most a dictum wholly unnecessary to the determination of the case; and has been denounced, disregarded, and overruled, not only in New York, where it originated, but also by courts, whose learning and ability have not before now been drawn in question, almost from one end of this country to the other.

But it is insisted that this court in its early reports—in cases arising before we had any statutes bearing on the matter—ruled in line with the views of Justice Woodworth expressed in *Hadden v. Spader*, and against the doctrine declared in *Donovan v. Finn*; and counsel, for the first time on the application for rehearing, cite some Alabama cases. Among them is *Brown v. Bates*, 10 Ala. 432. This was a case under the statute of 1814 (to be considered further on), but in the course of his opinion in the case Chief Justice Collier remarked: "It was held in this state, long previous to 1814, that a judgment creditor who had exhausted his legal remedies might go into equity for the purpose of subjecting the equitable estate of his debtor, or other interests that could

not be made available at law." But the learned chief justice does not cite any case in support of this dictum of his, and none have been cited by counsel or found by us. The only cases prior to *Brown v. Bates* to which we have been referred are those of *Vandegraaff v. Medlock*, 3 Port. 289, 29 Am. Dec. 256; *Morgan v. Crabb*, Id. 470; *Roper v. McCook*, 7 Ala. 318, and *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444. The last-named case was simply a bill filed by a creditor, by subrogation, to subject, to the payment of his debt, land which had been purchased and paid for by the debtor, but the title to which, in fraud of complainant and other creditors, had been taken in the name of the debtor's son. There could have been nothing decided in such a case bearing upon the matter of consideration, and nothing was attempted to be decided, nor was anything said having any such bearing. The 7 Alabama case was a bill filed by the assignee of a purchase-money note to enforce a vendor's lien. After deciding that the bill had equity to enforce the lien, Collier, C. J., said that, if complainant had not had a lien, he should have had to recover judgment, and have execution returned nulla bona, before he could have come into equity to subject the equitable estate of his debtor; meaning, by "equitable estate," property belonging to the debtor, but standing in the name of another person, there having been no conveyance executed to the debtor in the case. In the case of *Vandegraaff v. Medlock*, 3 Port. 389, 29 Am. Dec. 256, the case and the decision are embodied in this headnote: "Chancery has no power to decree to mortgagees the proceeds of a policy of insurance, effected by the mortgagor, on the mortgaged property, where the same has been destroyed by fire, no covenant existing in the deed as to the insurance." Clearly, here was nothing bearing on our point. But Judge Hopkins said, wholly outside of the case and the decision: "If he [the mortgagor] be insolvent, his other creditors have as just a claim to the proceeds of the policy as the mortgagee. But no creditor could make them liable by the aid of a court of equity, to satisfy his demand, who had not, before he filed his bill for the purpose, obtained a judgment at law, sued out execution, and pursued the latter to every available extent at law;" and he cites, in support of this obvious dictum, *Brinkerhoff v. Brown*, 4 Johns. Ch. 671, which does not support it in point of decision, and which, so far as its dicta may tend that way, has been wholly repudiated. But, leaving *Brinkerhoff v. Brown* out of the question, the casual and incidental remark of Judge Hopkins amounts to nothing, and, even as dictum, it does not support the dictum of Judge Collier in *Brown v. Bates*, quoted above. It is only necessary to say of the case of *Morgan v. Crabb*, 3 Port. 470, that the dictum of Judge Hopkins, just referred to, is there repeated by him, and is confessedly as alien to the

case, and the decision in the one case, as in the other. It is most manifest that these dicta do not support Judge Collier's dictum in *Brown v. Bates*,—"It was held in this state long previous to 1844," etc.,—and that they did not by any means establish any doctrine in this state opposed to *Donovan v. Finn*, prior to the act of the year just named. We may interject here that, as the territorial legislature had, in 1818, passed a garnishment statute, it might well have been decided by this court, prior to the act of 1844, that chancery would entertain a bill to reach the choses in action of a judgment debtor which, because of some legal impediment, could not be reached and subjected by process of garnishment; but this, as we shall see, would have been on the ground that the statute referred to had given the judgment creditor the legal right to subject choses in action, and the legal remedy was inadequate under the particular circumstances. Therefore, we include Alabama in repeating and reaffirming the doctrine of the original opinion, that, apart from statutes, courts of equity have not, and never had, any power or jurisdiction to subject the choses in action of a debtor to the satisfaction of a judgment against him.

There is a statute in Alabama which, it is insisted, confers this power and jurisdiction in cases of the kind we have in hand. This was enacted in 1844; that part of it now relied on by appellees was embodied in a changed form as section 2987 of the Code of 1852, was section 3540 of the Code of 1886, when this case arose, and is section 814 of the Code of 1896. We are of opinion that this statute has no bearing on the case in hand, for the reason that it authorizes bills for discovery only, and the subjection of property discovered in proceedings under bills for discovery, and nothing else, and the bill in this case is in no sense a bill for discovery, or within the statute at all. The statute in its original form was as follows:

"An act authorizing the filing of bills in chancery in certain cases.

"Section 1. Be it enacted, * * * that whenever an execution against the property of a defendant shall have been issued on a judgment at law and shall have been returned unsatisfied, and there shall remain due on said judgment, the party suing out such execution may file a bill in chancery against such defendant, and any other person or persons, to compel the discovery of any property, money, or thing in action, belonging to the defendant, and if [of] any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has been created by, or the fund so held in trust, has proceeded from some other person than the defendant himself.

"Sec. 2. And be it further enacted, that the-

said court shall have power to compel such discovery, and to prevent such transfer, and to decree satisfaction of the sum remaining due on such judgment, out of any property, money or thing in action belonging to the defendant, or held in trust for him, with the exception above noted, which shall be discovered by the proceedings in chancery, whether the same were originally liable to execution at law or not.

"Sec. 3. And be it further enacted, that a bill of discovery may be filed, and the defendant shall be compelled to answer such bill, when the defendant is charged with having confessed, or suffered any judgment purporting to be for a sum or debt due, when in fact nothing, or, only a part of the sum stated in said judgment is due, with intent to defraud the just creditors of said defendant, or to place the property of the defendant out of the reach of his creditors, or to hold the same on some secret trust or confidence, or for the benefit of such defendant."

Acts 1844, pp. 107, 108.

It is manifest that we need refer in this discussion only to the first and second sections of this act; the third, being entirely alien to the present case, is not involved. So much of sections 1 and 2 of this act as was the law when this bill was filed was embodied in section 2987 of the Code of 1852, taken in connection with section 2 of that Code, and so it has been embodied in each subsequent Code without amendment, and constitutes section 814 of the Code of 1896, with certain provisions of section 2 of that Code read into it. As codified in 1852, the statute reads as follows: "Sec. 2987. When an execution for money from any court has been issued against a defendant, and it is not satisfied, the plaintiff or the person for whose benefit such execution is sued out, may file a bill in chancery against such defendant, to compel the discovery of any property belonging to him, or held in trust for him; and to prevent the transfer, payment, or delivery thereof to such defendant, except when the trust has been created by or proceeded from some other person than the defendant himself; and the court may bring any other party before it, and decree such property, or the interest of the defendant therein, to the satisfaction of the sum due plaintiff." The words, "or money, or thing in action," employed several times following the word "property" in the original statute, are not set down in this section, but they are supplied by the definition of the word "property" as used in the Code, contained in section 2 of this and all succeeding Codes, so that in this respect the codified statute is precisely the same as the original. Another difference between the original act and its codification consists of the omission from the latter of the provision of the former for the bill to be filed against "any other person or persons," as well as against the defendant

in execution. Whatever else may be said of this omission, it is certainly not supplied by any provision in any of the Codes, unless the provision in these words, "and the court may bring any other party before it," etc., which were not in the statute originally, but are new to the Code of 1852, be taken to supply, in a sense, the omission last referred to. Doubtless, the new provision does in a sense supply the old, or the occasion, rather, for the old; but it cannot be said that they are the same or mean the same thing. To the contrary, the original statute proceeds upon the theory that persons having property of, or owing money to, the defendant may be known to the complainant at the time he files a bill to discover them, and, being known, it undertook to authorize the bill to be filed, the suit initiated, against them as well as against the defendant in the first instance. On the other hand, the codifiers, taking the statute to authorize what, only, it purports to authorize, namely, the filing of a bill of discovery, and the subsection of property discovered under it to complainant's judgment at law; and recognizing, what the legislature had apparently overlooked, the sheer anomaly, not to say absurdity, of prosecuting a bill to discover property of the defendant which the complainant already knew to be in the hands of, or due, the defendant from a known person; and recognizing, also, the existence in Alabama, since before its admission into the Union, of a garnishment statute which they themselves had incorporated in previous sections of the Code of 1852, by which all the effects of the defendant in the hands of, or owing by, third persons known to the judgment creditor could be reached and subjected at law; and hence that there was no possible occasion for a bill in equity in that behalf,—they, the codifiers, in making this change, proceeded upon the only true theory of a bill of discovery, that is to say, the theory that the complainant could not know, before filing his bill and having it answered, who held defendant's concealed property, or might not know who owed defendant money; and provided, instead of allowing the bill to be filed against other persons, that, when such other persons should be discovered by the answer to the bill, the court should then bring them before it, and sequester the effects of defendant in their hands, or owing by them. The change thus wrought by the codifiers is a pregnant one. It is quite true that the original statute in terms authorized the filing of a bill of discovery, and expressly limited the remedy given to property "which shall be discovered by the proceedings in chancery"; yet, so long as the provision authorizing the bill to be filed against third persons remained, there was such inconsistency in the act as gave rise to plausible contention that a bill not of discovery could be maintained under it; and to this may be ascribed whatever of dicta this court may have at

any time indulged to that effect. The important change in question has not been at all times sufficiently taken into account. With it properly in view, there is, and since the Code of 1852 there has been, no room whatever, nor the least justification, for saying that under the statute any other than a bill of discovery can be filed.

To the query, why give this remedy against unknown or concealed property, and not against known property of the defendant? the answer is short, complete, and perfectly manifest. It is, as we have already indicated, that in 1844, when this act was passed, and in 1852, when it was codified, the judgment creditor already had, and for years had had, a plain and adequate remedy at law, by garnishment, to reach and subject to his judgment all known property, money, and choses in action belonging to the defendant, held in trust or otherwise by, or owing from, third persons, under the territorial act of 1818, which was embodied in the Code of 1852 as section 2471, and which has continued to be the law of this state. Aiken Dig. St. p. 213. It is the converse question, so to speak,—Why should the legislature have given a remedy by bill in chancery to subject known effects of the judgment debtor when there was already a plain, adequate, and complete remedy, in that regard, at law?—which cannot be answered at all; and upon which the only thing that can be said is that no remedy by bill in equity to reach such known effects has ever been given, or attempted to be given. And it was to remove any semblance of haziness, even, upon this point, that the codifiers of 1852 made the change in the act of 1844 to which we have adverted. John J. Ormond, the chief codifier of 1852, was on this bench along with Collier, C. J., and Goldthwaite, J., when *Brown v. Bates*, 10 Ala. 432, was decided. He was also on this bench with the same associates when the case of *Allen v. Railroad Co.*, 11 Ala. 437, was decided; and in this latter case it was held that a bill seeking to subject choses in action which could be reached by garnishment was without equity; and it was this doctrine which he and his co-commissioners sought to relieve from all question by more clearly and distinctly confining the remedy given by the act of 1844 to property which could not be reached by garnishment because it was concealed, and in respect of which, therefore, a discovery was necessary.

But it is insisted that the statute of 1844 was taken from, and is substantially the same as, the New York statute of 1830; that that statute has been construed by the courts of New York to authorize the judgment creditor to file a bill in chancery to reach and subject the choses in action of the debtor in any case, whether discovery is necessary or not; and that, of consequence, our statute should receive the same interpretation. The statute of New York is a substantial prototype of the

act of 1844 except that it contains no provision for making others than the judgment debtor defendants to the bill it authorizes; and it differs from the codification of the act of 1844 in that it does not provide for the court's bringing in persons who are discovered by the answer to owe money to, or have effects of, the debtor defendant. It was, however, expressly enacted with reference, and settled the law according, to the opinion of Woodworth in *Hadden v. Spader*, in which the bill made another than, and along with, the debtor, a party defendant; and this circumstance probably justifies the construction there put on the statute in this regard. It is probably, a circumstance, too, tending to give plausibility to the notion that, because the statute of 1844 authorized others than the defendant in judgment to be made respondents to the bill, such bill need not be strictly one for discovery; but it is a circumstance of no importance in the construction of the codification of the act of 1844, which strikes out the provision for making third persons parties, and provides for the bill being filed against the judgment debtor, and the bringing in, by order of the court, third persons whom the answer discovers to be in possession of the respondent's property, or to owe him money. This pregnant change in the statute of 1844 in itself supplies good ground for not applying to it, as codified, the construction which in this regard was applied to the New York statute. But there are other cogent grounds for repudiating the New York construction as the sound one, as well for the act of 1844 as for its codification. As we have said, the statute of that state was enacted expressly to establish as law the view of Justice Woodworth in *Hadden v. Spader*. That view was, in effect, that, whenever execution on a judgment at law should be returned *nulla bona*, the judgment creditor had a right to come into equity to reach and subject to the satisfaction of his judgment choses in action belonging to the judgment debtor. The expressed purpose on the part of the lawmakers to settle this declaration of Justice Woodworth as the law of the state, naturally, and, it may be conceded, properly, overbore and emasculated expressions in the body of the act confining the remedy to cases in which discovery was necessary, and to bills for discovery. There was no expression on the part of the legislature of Alabama in the passage of the act of 1844 of any purpose beyond that set forth in the body of the act itself; and, looking to the act itself, there can be no question, we think, that the thing authorized was the filing of bills of discovery only, and not the filing of bills generally to reach choses in action of the judgment debtor. In other words, the consideration which constrained the New York courts to disregard the terms of the act itself, which went to confine it to bills of discovery, never had any existence in respect of the courts of Alabama; and, leaving it out of view, the conclusion that

our statute has reference solely to such bills cannot be reasonably escaped. But there is yet another view which, to our minds, in itself strips the contention for the application of the New York construction to the Alabama statute of all semblance of merit. The deliverance of Justice Woodworth is expressly rested on the theory that the choses in action of a debtor should be applied to the satisfaction of the judgment against him; that there was no way to so subject them at law; and that, *ex necessitate*, equity must supply the remedy to that end. It was not pretended that equity would give such remedy if there was a remedy at law; but his position was that chancery would eke out the deficiencies of the law because it was absolutely necessary to the ends of justice that it should do so. He merely proposed to apply a remedy to meet a necessity; and the doctrine he enunciated went, nor was intended to go, no whit beyond the necessity. This doctrine of necessity was what the legislature of New York expressly proposed to settle as the law of the state. At that time, there was no remedy at law in that state to reach and subject any of the judgment debtor's choses in action, known or concealed. There was no statute of garnishment, nor other mode of levy at law, upon choses in action. To carry into effect the remedy of Woodworth, J., as he had formulated it, which formulation the legislature expressly undertook to make the law of the state, it was necessary for the statute to be construed to give a remedy in equity against all choses in action, because at law there was no remedy against any. If there had been a garnishment law in New York under which all known choses in action of the debtor could have been subjected at law, the proposition of Justice Woodworth would not have involved an equity remedy to subject them, and the statute to settle his proposition as law could not have been construed to extend the equity remedy to them. The whole purpose of Woodworth, J., which was expressly declared to be the purpose of the legislature, being to give a remedy against choses in action which could not be reached, and because they could not be reached, at law, the statute could never have been construed to give a remedy in equity against choses in action which could be reached at law, more especially when such a construction would have done palpable violence to the language of the body of the act dissociated from the otherwise expressed purpose of its enactment. Now in Alabama, in the year 1844, the only choses in action of a judgment debtor which could not be reached and applied to the satisfaction of the judgment by legal process were those which were concealed from the judgment creditor; there was no lack of legal remedy to apply these once found, but only a want of power in the courts of law, and in the creditor, to find them. The doctrine of necessity applied to them only to the extent of supplying a remedy to discover them,—to discover in whose hands they

were, or who owed money to the defendant in judgment. To this end, the statute is express. It authorizes the filing of a bill of discovery, and not any other sort of bill; it deals with property discovered in the proceedings consequent upon the bill for discovery, and it deals with no other property; and by the same judges who decided *Brown v. Bates*, 10 Ala. 432, it was decided in *Allen v. Railroad Co.*, 11 Ala. 437, and this after the statute of 1844, and immediately after it had been treated and discussed by them, that the chancery court had no jurisdiction to subject a chose in action which was leviable by process of garnishment in a court of law. The statute of New York was intended to meet a necessity, and it was construed to be commensurate with that necessity. The Alabama statute was intended to meet a necessity, and it was in effect construed in the case last cited to be commensurate with that necessity. In New York the necessity covered all choses in action, and, in violence to the language of the body of the enactment, it was held to give a remedy to subject all choses in action. In Alabama the necessity was only as to those choses in action which were concealed or unknown; the terms of the enactment do not embrace any others; every consideration pertinent to the interpretation and construction of the statute drives unerringly and inevitably to the conclusion that it does not, and never did, authorize anything whatever but bills of discovery and proceedings, under bills of discovery, to subject the property discovered; and *Allen's Case*, *supra*, is to all intents and purposes a decision to that effect. So much for the insistence that the construction placed by the courts of that state on the New York statute should be adopted by our courts with reference to our statute.

But it is further insisted that the New York construction has been applied by this court to this statute. Two cases are mainly relied on in this connection. They are *Brown v. Bates*, 10 Ala. 432, and *Martin v. Carter*, 90 Ala. 98, 7 South. 510. *Brown v. Bates* was decided before the change was made in the statute by the codifiers, but that change is not of importance to that case. That bill was strictly one within the provisions of the statute as we have construed it, and purely for the discovery of concealed property and its subjection when discovered to the satisfaction of the complainants' judgment. It was filed against the judgment debtor, and against nobody else. It alleged, among other things, that defendant had choses in action and other property which were so secreted and concealed that process of law could not reach them. It did not aver, but to the contrary showed ignorance in respect of, the names of third persons having property of, or owing money to, the defendant, and sought to discover these persons. It was held to be well filed, and its averments to be sufficient under the act of

1844. It was simply an impossibility for the court in that case to have construed the statute to authorize any other bill in equity to subject choses in action than a bill to discover choses in action and to subject the choses discovered in the proceedings to the judgment; and we by no means understand that any effort was made in that direction. Had it been made in the opinion, it would have been the mere saying of Judge Collier, not the adjudication of the court, and of no efficacy for any purpose. That nothing of the sort was intended is shown by the ruling of the same judges, at the succeeding term of the court, that no bill in equity would lie to reach choses in action leviable by garnishment at law. *Allen's Case*, supra. In *Martin v. Carter*, 90 Ala. 96, 7 South. 510, Judge Clopton said: "Under the statute [the reference being to the statute we have been considering, then constituting section 3540 of the Code of 1886], a bill may be filed to subject property which cannot be sold under execution, or reached by legal process, or for discovery in aid of the execution at law." He cites no authority for this broad proposition except *Brown v. Bates*, which, as we have seen, does not so decide. The bill sought to subject to the claim of the complainant the interest of Martin, one of the respondents, in two notes executed by Wells & Moore to Martin and six other persons jointly, and to foreclose a mortgage given by the makers of the notes to the payees to secure the payment thereof. While assuming that the bill is filed under the statute, the decision is rested on the grounds that the interest of Martin in the mortgaged property could not be levied on, and that his interest in the notes could not be reached and subjected by process of garnishment, because that would be a splitting up of the cause of action against the makers of the notes. Now this was a correct decision, and the only proper grounds to put it upon wholly apart from the statute. As held and illustrated in many of the cases which we have collated, this case presented a state of facts upon which, on all the authorities, relief in equity could be had without reference to the act of 1844. It was simply a case of a right given at law, which, because of a legal impediment, could not be effectuated by legal process. As we have seen, long before the act of 1844 a statute of this state gave to a judgment creditor the right to subject the choses in action of the debtor to the satisfaction of the judgment. There was before that time, also, a statute authorizing attachments to be levied upon choses in action of the defendant in attachment by process of garnishment. Both these statutes have been of force ever since their enactment in 1818. But for the legal impediment referred to, the interest of Martin in the notes given to him and others by Wells & Moore was leviable by process of garnishment at law. The interest belonged to a

class of property against which the judgment creditor was given a right to proceed by legal process. But in this particular instance he could not so proceed because the makers of the notes could not be forced at law to pay one of the joint payees, leaving themselves subject to other suits by the other payees, and the judgment creditor of one of the payees, having no claim against the others, could not coerce the payment of the full amount of the notes. Here there was a right given at law, a legal impediment to its enforcement at law, and an appeal to chancery to effectuate the right because, though given by the law, the law courts could not effectuate it. And chancery jurisdiction is always properly invoked in such cases on the principle elaborated by Chancellor Sanford and other courts and judges from whom we have quoted in the course of this opinion, and thus tersely stated by Lord Lindley: "Courts of equity [before the statute] gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law." *Holmes v. Millage*, 10 Eng. Ruling Cas. 608. So that all that was said by Judge Clopton in *Martin v. Carter* as to the statute was but the merest dicta, outside of the case, and unsound as dicta; and the decision was properly rested on considerations which gave the bill equity, and authorized the relief prayed, without any reference to the statute. What Judge Clopton thus mistakenly and unnecessarily said is of no more importance or effect as a construction of the statute than had it been said in a casual conversation.

The case of *Nix v. Winter*, 35 Ala. 309, is also cited in support of the application for rehearing. Nothing was involved or decided, or even said, in that case bearing upon the construction of the statute in the respect under consideration. *Brown v. Bates* is there cited to the point that it was not indispensable for a bill under the statute to aver that the execution was issued to the county of the debtor's residence, and returned "Nulla bona"; and from this it may be inferred that the court assumed that that bill was filed under the statute. If so, the assumption was entirely gratuitous and erroneous. The bill was filed to subject an equitable interest in land, and thus invoked the exercise of jurisdiction which courts of chancery have independent of statute; the well-established doctrine being that equity power may be appealed to to subject the debtor's equitable interest in property "which could have been reached at law if he had had the legal interest in it instead of an equitable interest only." *Holmes v. Millage*, supra.

It is said that Chief Justice Brickell in *Ex parte Hardy*, 68 Ala. 303, 323, et seq., expressed views at war with the conclusion we reach as to the original jurisdiction of equity and the construction of the statute of 1844. But the opinion of Judge Brickell

in that case was the dissenting, not the ruling, opinion, and it was therefore impotent to put a construction on the statute, or to settle what the law was before its enactment. What he did say was merely argumentative and incidental, in support of his position in the case, and would have been dicta even had his been the governing opinion. Among other things, however, he did say: "The whole scope of the statute, as is evident from its most casual reading, is to authorize creditors who have exhausted remedies at law to resort to a court of equity for the discovery of property subject to the payment of their debts, and, when discovered, its subjection for that purpose by the decree and process of the court. * * * When the principle is established that every species of property, legal or equitable, tangible or intangible, in which a debtor has a beneficial right or interest not exempt by law, is bound for, and may be reached and applied to, the satisfaction of his debts, if legal remedies fail, as they are indisputably shown to have failed when there is a judgment at law followed by a fruitless return of the process for its execution, the power of a court of equity must be perfectly adequate to carry the principle into effect, unless with humiliation we confess that there are legal and equitable wrongs for which there is no remedy." After setting this down as the predicate for what was to follow, what he further said at war with our conclusion was equally at war and inconsistent with the propositions thus made the bases of his argument. In the ruling opinion in *Ex parte Hardy*, which was delivered by Judge Somerville, no views in opposition to our position are expressed, but, on the contrary, in a general way we are supported.

We have examined every other Alabama case, it is believed, at all bearing upon either of the questions we have been discussing, and every case in which *Brown v. Bates* is cited; and we find in none of them anything to stand in the way of either of the conclusions we have reached,—namely, first, that, in the absence of statutes, the chancery court has no jurisdiction to reach and subject choses in action of a judgment debtor to the satisfaction of the judgment; second, that the statute of 1844 confers that jurisdiction only in respect of concealed choses in action, to be exercised only by bill of discovery and proceedings thereunder; and, third, that a judgment creditor having, under the garnishment statute, the legal right to levy upon choses in action of his debtor, may come into equity to effectuate that legal right when, because of some impediment, it cannot be enforced by garnishment.

This bill is obviously not under the statute as we construe the statute, and as the statute plainly reads. There is no impediment to the enforcement of the complainants'

judgment, by garnishment, at law, and the case it presents is not otherwise cognizable in equity apart from statutes.

The importance of this case in principle, and, to the parties, in amounts involved, and the ability, learning, and industry displayed by counsel upon either hand in its presentation, go somewhat in justification of the length of this opinion.

Let the application for rehearing be overruled.

STAPYLTON v. NEELEY.

(Supreme Court of Florida. May 20, 1902.)

TRUSTEE—DISPOSITION OF TRUST FUNDS—EQUITABLE DIRECTION—MODE OF APPLICATION—RIGHT TO APPLY FOR GUIDANCE.

1. An application by a trustee to a court of equity for direction and guidance as to the disposition of the trust funds, when not made in a suit then pending, should be by bill, and not by petition; and the applicant must be in possession of trust funds of which disposition is necessary to be made presently, and must show that there are conflicting claims, or the probability thereof, and the existence of no other means of determining rights or demands, so as to protect the trustee from the risks of future liability or controversy.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; William A. Hocker, Judge.

Petition by Jesse M. Neeley, as assignee of John A. Rowell, for instruction as to the disposition of trust funds, to which Granville C. Stapylton, as receiver of the Merchants' National Bank of Ocala, files an answer as a claimant of the funds. From a decree disallowing the receiver's claim, he appeals. Reversed.

Robert McNamee and R. A. Burford, for appellant. Anderson & Hocker and O. T. Green, for appellee.

PER CURIAM. This cause, being reached for final adjudication, was referred by the court to two of its commissioners, Messrs. Maxwell and Glen, for investigation, who report the same, suggesting reversal.

The appellee, Jesse M. Neeley, as assignee of John A. Rowell, filed his petition in chancery in the circuit court of Marion county on the 26th of October, 1897, as follows:

"In the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County, in Chancery.

"In the Matter of the Assignment of John A. Rowell.

"To the Honorable W. A. Hocker, Judge of said Court: Jesse M. Neeley respectfully represents unto your honor that he is the assignee of John A. Rowell, under deed of assignment executed by said Rowell to your petitioner January 15, 1907, and that he is now, and has been since said date, in possession of all the assets conveyed to him by the said assignor. Your petitioner says that

G. C. Stapylton, as receiver of the Merchants' National Bank of Ocala, Florida, has filed a claim in the sum of fifty-one hundred dollars against the assets in the hands of your petitioner, based upon an alleged assessment made by the comptroller of the currency upon certain stock of the Merchants' National Bank of Ocala standing on the books of the said bank in the name of John A. Rowell, your petitioner's assignor, at the time said bank became insolvent, and was placed by the comptroller of the currency in the hands of the said receiver.

"Your petitioner says in this behalf that the alleged assessment made by the comptroller of the currency was not made and did not become a debt, if at all, against the said J. A. Rowell, until long subsequent to the execution of the said deed of assignment, and long after the expiration of the time limited by statute for presenting claims against your petitioner's trust by domestic creditors; that the said claim was presented to your petitioner by the said receiver long after the expiration of said time.

"Your petitioner further shows that no notice of such assessment has ever been given to the said J. A. Rowell, and that the only notice thereof was given directly to your petitioner, as assignee of the said Rowell.

"Wherefore your petitioner says that the said claim for fifty-one hundred dollars upon said assessment of bank stock ought not to be allowed as a valid claim against the said trust, and should not be admitted to participate in forms thereof equally with other claims or debts arising and presented to your petitioner, as assignee, within the time limited by law.

"Your petitioner has served upon said G. C. Stapylton, as receiver, a copy of this petition, and notice of presentation of same, and prays the court to make an order such as may be legal and proper in the premises, and direct your petitioner, as such assignee, as to his duty in the premises, and decree whether or not the said G. C. Stapylton, receiver, is entitled to participate as a creditor in respect to said claim of fifty-one hundred dollars in the distribution of the funds in his hands as such assignee.

"Jesse M. Neeley,

"Solicitor for J. M. Neeley, Assignee of John A. Rowell."

The sole defendant, G. C. Stapylton, receiver, answered this petition, combating the contention made therein that the claim of the receiver founded on the liability of Rowell, the assignor, as a stockholder in the suspended national bank, assessed by the comptroller of the currency of the United States, was not entitled to share with other creditors who had filed their claims within the time prescribed by the statute in the distribution of the assets of Rowell in the hands of the petitioner, as assignee, for the benefit of Rowell's creditors generally. The cause

was heard in the court below upon the petition and answer, and the following decree rendered therein on November 8, 1897: "The above matter came on to be heard before me pursuant to notice, and was argued by counsel for the respective parties, and upon consideration thereof the court is of opinion: First, that, at the time of assessment, claim for fifty-one hundred dollars on account of stock assessment presented by the receiver was not a provable claim, and that under said claim he is not entitled to share equally with the other creditors of the estate of the assets in the hands of the assignee; second, that, the claim not having been filed within the time fixed by the statute, the same, though not barred, is made subject or junior to the claims of the creditors filed within said time, and is not entitled to distribution until after said claims which were filed in time have been paid. It is therefore considered, ordered, adjudged, and decreed by the court that the said claim of said receiver be disallowed, and the assignee is directed not to pay the same, or any part thereof, until after the claims which have been filed within the statutory time have been paid. At chambers, Ocala, Fla., 8th November, 1897. W. A. Hocker, Judge." From this decree the appeal is taken.

This decree is erroneous, because the petition upon which it is founded does not present a set of facts or circumstances that justified a court of equity in either entertaining the case as presented, or in granting the relief prayed and adjudged. Had the petitioner, as assignee, filed a bill in proper form, making all persons parties who claimed debts against the estate, alleging the assignment to him for the benefit of the creditors generally of the insolvent debtor, Rowell, and that he had collected the assets of said estate, and converted them into money, and was now ready to make distribution of the same among the creditors lawfully entitled to share therein, and that among the debts presented were one or more as to whose lawful right to share in such distribution he was in reasonable doubt and embarrassment, giving the facts and circumstances connected with such claims that gave rise to such doubts and embarrassment, and praying for the advice and direction of the court in the premises, and as to the proper distribution and payment of the trust funds in his hands, it would have been proper for the court, after due investigation of the matters alleged, to have made a decree directing how and what distribution of the funds should be made, including lawful and excluding unlawful claims from the distribution ordered. But the petition filed here does not show that the petitioning assignee has arrived at the point where he is ready to make distribution of any funds in his hands, or that the assets in his hands are in proper shape for distribution, or that they ever will be. Neither does it give the names of any other creditors of said estate, nor the amounts or

particulars of their respective claims. It presents the case of an assignee or trustee for the benefit of the creditors generally of an insolvent estate, pending his administration thereof, and before he is ready to make distribution of its assets among those entitled thereto, and without showing that there are any funds out of which any one will ever be entitled to distribution, coming prematurely to the court of chancery, and demanding of it an adjudication as to the legality of an individual isolated claim presented against the trust estate in his hands, and as to its right at some indefinite time in the future to share in funds that may or may not in the future come to his hands for distribution. Such a proceeding is unauthorized, and, if permitted in the case of one claimant, could be exercised piecemeal as to every disputed claim against the estate, prolonging indefinitely the final settlement of the claims justly entitled to the trust funds, and giving rise to a multiplicity of endless litigation.

An application by a trustee to a court of equity for direction and guidance as to the disposition of the trust funds, when not made in a suit then pending, should be by bill, and not by petition (*Gibbins v. Shepard*, 125 Mass. 541), and the applicant must be in possession of trust funds of which disposition is necessary to be made presently, and must show that there are conflicting claims, or the probability thereof, and the existence of no other means of determining rights or demands, so as to protect the trustee from the risks of future liability or controversy. *Bullard v. Attorney General*, 153 Mass. 249, 23 N. E. 691; *Clay v. Gurley*, 62 Ala. 14; *Dimmock v. Bixby*, 20 Pick. 368; *Rothgeb v. Manck*, 35 Ohio St. 503; *Bexroad v. Wells*, 13 W. Va. 812; *O'Cain v. O'Cain*, 51 S. C. 348, 29 S. E. 68. Even were we to overlook the fact that this proceeding is by petition, instead of by bill, and should treat it as a bill, still it fails to present a case where the relief prayed is authorized, and, such being the case, it is the duty of the appellate court to notice the defect, although it has been ignored in the pleadings, assignments of error, and arguments. *Richardson v. Gilbert*, 21 Fla. 544, and cases there cited.

The decree of the court below in said cause is hereby reversed, with directions to dismiss the petition; costs to be paid by the appellee.

LONG v. STATE.

(Supreme Court of Florida. April 1, 1902.)

LARCENY—PROSECUTING WITNESS—DECLARATIONS AS TO OWNERSHIP—ADMISSIBILITY—BILL OF SALE—OPERATION AS MORTGAGE—INSTRUCTIONS—SUPPORT IN EVIDENCE—PRESUMPTION OF INNOCENCE—ELEMENTS OF CRIME—ASPORTATION OF PROPERTY.

1. Declarations of a prosecuting witness as to his ownership of certain cattle, made at a time when he was not in possession thereof, and not made in defendant's presence, are not admissible against defendant on a trial for the larceny of such cattle.

2. In order to render a bill of sale absolute on its face a mortgage, it must have been executed with the intention or purpose of operating as a security.

3. A charge asserting that, if it was verbally agreed between the parties to the transaction, at the time of execution of an absolute bill of sale of certain cattle, that the vendor should be allowed to redeem or have the cattle back upon payment of a certain sum of money, the transaction constituted a chattel mortgage only, is properly refused, as the facts thus hypothesized are not inconsistent with an absolute sale, in the absence of an intention that the conveyance should be a security.

4. A charge asserting that a chattel mortgage does not operate as a conveyance of the legal title or right of possession is properly refused, where there is evidence tending to show that the mortgagee, by the terms of the instrument, and by a verbal understanding between the parties, was to have possession of the property.

5. The rule announced in *Dean v. State*, 26 South. 638, 41 Fla. 291, 17 Am. St. Rep. 186, that, "where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence, before a conviction is authorized," is not a rule of law to be given in charge to a jury in prosecutions for larceny, but a presumption of fact, which the jury may apply in proper cases, and which may guide the court, in cases where it is applicable, in determining the sufficiency of evidence to support a verdict of guilty.

6. To constitute larceny, there must exist both a felonious intent and a carrying away of the property, and a charge eliminating either of these features of the offense is improper.

7. Where one person, having no actual or constructive possession of the property of another, points out such property to a third person, and gives the latter a bill of sale therefor, receiving in payment a sum of money, he does not commit larceny, in the absence of some act constituting an asportation of the property.

(Syllabus by the Court.)

Error to criminal court of record, Orange county; Cecil G. Butt, Judge.

James Long was convicted of larceny, and brings error. Reversed.

Jones & Jones and L. D. Browne, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. This cause was referred by the court to two of its commissioners, Messrs. Hocker and Glen, for investigation, who have reported that the judgment ought to be reversed.

Plaintiff in error was tried and convicted in July, 1901, in the criminal court of record of Orange county, upon an information charging the larceny of two cows, the property of William Lancaster. It appears from the evidence that defendant, claiming to own the two cows alleged to have been stolen, which were then in a pasture, went out there with one Douglass, as Douglass claimed, to sell him the cattle, but, as defendant claimed, to procure a loan of \$25 upon the security of a bill of sale for the cattle. Defendant pointed them out to Douglass, and on the same day

¶ 2. See *Chattel Mortgages*, vol. 3, Cent. Dig. §§ 21, 24, 27, 32.

executed a bill of sale to Douglass, agreeing to allow the cattle to remain in the pasture for 15 days free of charge; and Douglass paid him \$25, as he claims, for the purchase of the cattle, but, as defendant claimed, on the security of the bill of sale. Some weeks afterwards Douglass drove the cattle away, and a few days afterwards Lancaster went to see Douglass about the cattle. The witness Douglass was permitted, over defendant's objections and exceptions, to testify that in the conversation then had between witness and Lancaster the latter claimed to own the cattle. The cattle were at the time in the possession of Douglass, and defendant was not present at the time of the conversation. This testimony, to the effect that Lancaster claimed to own the cattle, was hearsay, and ought to have been excluded on defendant's objection. The question as to Lancaster's ownership was a contested one on the trial, defendant claiming to own them himself, and it was not proper to allow Lancaster's declarations as to his ownership, not made in defendant's presence, and while he was not in possession of the cattle, to be given in evidence. The defendant, as a witness, was asked, concerning the bill of sale above referred to, "Did you understand that bill of sale to be a straight out bill of sale of the cattle or a mortgage?" Upon objection by the state the witness was not permitted to answer. Without undertaking to say whether this particular question was objectionable, its exclusion was immaterial, because in answer to other questions the witness was permitted to state the circumstances attending the execution of the paper, the purpose for which it was executed, and his understanding that the paper was executed as security for a loan of money, and not to evidence an absolute sale.

Defendant moved the court to strike from the evidence the bill of sale executed by him to Douglass. When this motion was made, the bill of sale had not been offered in evidence. At a subsequent stage of the trial the paper was introduced in evidence without objection, and the motion to strike was never renewed.

Exceptions were taken to the refusal to give instructions requested by defendant, as follows: "(1) If you find from the evidence that, although the bill of sale given by defendant to Elisha Douglass of the cattle which defendant is charged with stealing was so given by him, and that, although the said bill of sale purports on its face to be absolute, it was verbally agreed between defendant and Douglass that defendant was to be allowed to redeem or have the cattle back upon payment by him to Douglass of a certain sum of money, you are instructed that the said bill of sale is deemed to be a chattel mortgage only. (2) If you find from the evidence that the said bill of sale was a mortgage, you are instructed that it only conferred a specific lien on the cattle in favor of

Douglass, and did not operate as a conveyance of the legal title or right of possession of the cattle." These instructions were properly refused. The facts stated in the first charge do not necessarily, as a matter of law, make the transaction a mortgage. The facts stated may be entirely consistent with an absolute sale of the property. In order to make the transaction a mortgage, the intention or purpose must be to secure the payment of money. Section 1981, Rev. St. The fact that an absolute purchaser may agree with the seller to resell the property to him for a sum of money agreed upon, or, as expressed in the refused instruction, it may be verbally agreed between the seller and purchaser that the former was to be allowed to have the property back upon payment of a certain sum of money, does not necessarily prove the transaction in reality to be merely the security for money, so as to bring the transaction within the meaning of the statute. If the bill of sale was, under the statute, according to the evidence, in reality a mortgage, yet by some evidence, at least, Douglass, to whom the paper was executed, was, by the terms of the written instrument, and by the verbal understanding between the parties, to have possession of the cattle, which is permissible if so understood between the parties, though the conveyance giving such right of possession be merely a mortgage. Section 1983, Rev. St. The latter clause of the second requested instruction would deny that right, and that instruction was therefore properly refused. The court also refused to give instructions 5 and 6 requested by the defendant, as follows: "(5) Where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. (6) The openness of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention." To the refusal to give them exceptions were duly taken.

The fifth requested charge is one of the headnotes in the case of *Dean v. State*, 41 Fla. 201, 26 South. 638, 79 Am. St. Rep. 186. The sole question in that case was whether the evidence was sufficient to sustain the verdict, and the court reached the conclusion that it was not. It appeared from the uncontradicted evidence certified to the court in that case that the accused took the property alleged to have been stolen—an ox—openly, in the daytime, in the presence and with the assistance of several persons, under a claim of ownership, and led it along the highway to his home; that he subsequently sold it to a party living in the same neighborhood of the real owner; and there was testimony of several witnesses independent of the accused himself that he had raised the

ox from a calf, and had continuously owned it. There was no concealment in any way, but an open avowal of possession and ownership. The court did not find any conflict in the evidence as to such matters, nor were there discovered any infirmity or defects in it to rebut the presumption in favor of an innocent intent in the taking of the property. In weighing the testimony the court applied the principle that, where the taking in larceny was open, with no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent. It was not in terms said that this was a presumption of law under the facts stated, but the last clause in the headnote embodied in the request would seem to indicate that it might be so regarded. The principle stated was taken from *McMullen v. State*, 53 Ala. 531, and was used argumentatively by this court in discussing the facts before it. In cases of larceny the question of the intent with which the accused took the property is always one of fact primarily to be decided by a jury, subject to review by the court. As we understand the decisions in Alabama, this is the rule there, and the question of intent as to the taking is one of fact, in all cases for the jury. It was held in *Talbert v. State*, 121 Ala. 33, 25 South. 690, that such question should be submitted to them, although the taking was open, in the presence of the owner of the property and others, and there was no subsequent denial or concealment. See, also, *State v. Powell*, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291, 14 Am. St. Rep. 821. Where the taking is open, in the presence of others, not amounting to a robbery, and there is no concealment, or, in short, where the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and there is nothing in it from which a jury may legitimately infer a felonious purpose, then a verdict against the accused cannot be sustained, and it would be the duty of the court to set it aside. The principle, however, announced in the headnote in the *Dean Case*, upon which this court acted in determining the sufficiency of the evidence then before it, must not be regarded as stating a principle of law which an accused has a right to have charged in his favor; and, if such is its effect, it must be limited. Where there is conflict in the evidence as to the intent with which the property was taken, or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony. As stated, the principle is not one of law, but of fact, arising from the evidence, and under the facts of this case the court was correct in refusing to charge the jury as requested

by the accused. What is said disposes, also, of the sixth request.

Exceptions were taken to portions of the charge of the court. In the second paragraph the court stated, "The defendant is charged with the larceny of two cows, the property of William Lancaster." It is argued here that this language assumes that the cows belonged to Lancaster,—a matter in dispute upon the trial. We do not think the criticism is well founded. The language objected to simply states the charge upon which defendant was being tried, and does not assume Lancaster's ownership of the cows. In the next paragraph the jury were distinctly told that it is incumbent upon the state to prove the property taken to be the property of William Lancaster. Paragraphs 4, 5, and 6 read as follows: "(4) The court instructs you that if you find from the evidence that the defendant, James Long, appropriated the two cows to his own benefit; that he sold them, either by a straight bill of sale or by a conditional sale, without the knowledge or consent of the owner, and received a money consideration therefor,—he would be guilty. (5) The court instructs you that if the defendant, James Long, pointed out the cows to Douglass, and gave him a bill of sale for same, and received in payment the sum of twenty-five dollars, that would be a delivery. (6) The court instructs you that if the two cows were not the property of James Long, and the said Long, knowing the same not to be his property, delivered the same to Douglass, either upon mortgage or sale outright, he would be guilty of larceny."

The fourth and fifth paragraphs are assigned as error. Paragraph 4 is erroneous, because it omits two essential elements in larceny, viz., the carrying away of the property, and the felonious intent. Defendant might have done all the acts mentioned in this paragraph with no felonious intent, in which event he would not be guilty of larceny. *Long v. State*, 11 Fla. 295; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417. Paragraph 5 asserts that certain facts stated would constitute a delivery of the cattle by defendant to Douglass, and paragraph 6 asserts that, if the cattle were delivered to Douglass by defendant, either upon mortgage or sale outright, and the cattle were not the property of defendant, and defendant knew they were not his property, he would be guilty of larceny. While the fifth and sixth paragraphs were both excepted to, the fifth only is assigned as error. As the fifth gives the facts that the court holds would constitute the delivery of the property mentioned in the sixth, it will be not only convenient, but necessary, to consider them together. These instructions, read together, authorize a conviction for larceny where there has been no asportation of the property. Where one person, having no actual or

constructive possession of another's property, points out that property to a third person, and gives the latter a bill of sale for the property, receiving in payment a sum of money, but there is no act constituting an asportation or carrying away of the property, no larceny is committed, because in larceny the asportation is a necessary element of the offense. *Mizell v. State*, 38 Fla. 20, 20 South. 769. No doubt, an actual manual delivery of property would constitute an asportation; but a sale and conveyance by bill of sale and a pointing out of the property, where no actual delivery is made, and no further acts done which in law would constitute an asportation, would not make the offense of larceny complete, though for civil purposes the title to the property may pass by such transaction. These instructions authorize the jury to convict of larceny without proof of an asportation of the property, and are erroneous in law, and misleading upon the facts. We do not wish to be understood as intimating an opinion that the jury could not have found from the evidence that the property had been taken and carried away, but as holding that the facts stated in the instructions would not constitute an asportation.

Other assignments of error need not be considered, as they need not necessarily arise upon another trial, except the one questioning the ruling denying the motion for a new trial upon the ground that the evidence is not sufficient to support the verdict; and as to that, if properly presented, in view of the fact that another trial is to be had, it is not proper to express an opinion at this time.

The judgment of the court below is reversed, and a new trial granted.

FEGLEY v. JENNINGS.

(Supreme Court of Florida. May 14, 1902.)

PROMISSORY NOTE — GUARANTY — UNCONDITIONAL PROMISE — PRESENTATION — NOTICE OF DISHONOR — NECESSITY — SUBJECTION OF SECURITIES.

1. Where a party assigns and transfers a promissory note for value, and "guaranties its prompt payment at maturity," such guaranty is an unconditional promise on his own account to pay a sum certain at a definite time. In a suit upon such a guaranty, presentation of the note to the maker when due, request of him to pay, and notice to the guarantor of dishonor need not be alleged; nor is the guarantor at law under any legal obligation to first resort to the maker of the note guaranteed, or to any securities held for its payment; and the failure of the assignee of such note to present it when due to the maker for payment, or to give notice to the guarantor of its dishonor, or to resort to foreclosure proceedings of a mortgage given to secure such note, furnish no defense to such guarantor in a suit upon his unconditional guaranty thereof; and a demurrer to a plea setting up such defenses by the guarantor should be sustained. If the guarantor in such a case desires immediate resort to the mortgage securi-

ty held for such note, his remedy is to pay the note according to his contract of guaranty, and then himself enforce the mortgage security to which he would be subrogated.

(Syllabus by the Court.)

Error to circuit court, Hernando county; William A. Hocker, Judge.

Action by William Fegley against W. S. Jennings. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error brought suit against the defendant in error in the circuit court of Hernando county. The declaration alleged that on January 24, 1893, J. B. Fellhimer and R. S. Clark, "by their joint and several promissory note, now overdue, promised to pay to defendant or order, on or before three years after date, the sum of four hundred and fifty dollars, at the Brooksville State Bank of Brooksville, Florida, with interest at ten per cent. per annum from date until paid, * * * and the defendant, for value, received, transferred, and set over the same to the plaintiff, and guarantied its prompt payment at maturity; and the said note was duly presented for payment at the Brooksville State Bank aforesaid, and was dishonored, whereof the defendant had due notice, but did not pay the same, or any part thereof, although often requested by the said plaintiff so to do," etc.

A demurrer to the declaration was filed and overruled. Certain pleas were filed, and a demurrer thereto sustained, and afterwards defendant filed an amended plea, alleging, in substance: That on the date of the note sued on the makers thereof, to secure its payment, executed a mortgage on certain lands in Hernando county, which contained a valuable orange grove. That said note and mortgage, on or about April 14, 1893, were transferred by defendant to plaintiff; that said mortgage contains the following stipulations, viz.: "Said parties of the first part hereby agree to work and cultivate said orange grove in a good and workmanlike manner, to keep the same in good repair, and upon their failure so to do said parties of the second part shall be entitled to, and shall have peaceable and immediate possession of, said property, and said notes and mortgage shall then and there become due and payable." That said makers and mortgagors failed during the month of July, 1893, and ever afterwards failed and refused to work and cultivate said orange grove in a good and workmanlike manner, and to keep the same in good repair; and that by reason of such default and failure the said note became then and there due and payable, and defendant immediately thereafter requested plaintiff to foreclose said mortgage, at which time the same was full and ample security for the note sued on, yet plaintiff failed and neglected to foreclose said mortgage, and the said orange grove and premises since, viz., during the month of February, 1895, have, by reason of a freeze, become practically worthless, and the makers of said note insolvent, and plaintiff, by his fault in failing and

¶ 1. See Guaranty, vol. 25, Cent. Dig. §§ 55, 56, 77, 78.

neglecting to foreclose said mortgage when it became due, lost said security, and defendant all means of obtaining repayment of the sum sued for from said makers.

Another plea was filed, denominated a "plea on equitable grounds," which was substantially the same in its allegations.

Plaintiff filed a demurrer to both pleas, which was overruled as to the first and sustained as to the second, and thereupon issues was joined on the first plea, and a trial had, resulting in a verdict and judgment for defendant. An ordinary and evidentiary bill of exceptions was made up and settled, and the case is now here on writ of error.

Angus Paterson and T. S. Coogler, for plaintiff in error. G. O. Martin, for defendant in error.

PER CURIAM. This cause, being reached in its regular order for final adjudication, was referred by the court to two of its commissioners, Messrs. Maxwell and Glen, who have reported that the judgment should be reversed, for reasons stated in the following opinion.

The first error assigned is that the court erred in overruling plaintiff's demurrer to defendant's first amended plea. The declaration alleged the making of a note to defendant, and that the latter, "for value received, transferred and set over the same to the plaintiff, and guarantied its prompt payment at maturity." The cause of action, therefore, was an undertaking on the part of the defendant, accompanying the transfer of the note, whereby its prompt payment at maturity was guarantied by defendant, and this undertaking was upon a valuable consideration. Defendant promised on his own account to pay a sum certain at a definite time. 2 Daniel, Neg. Inst. §§ 1760, 1763; Brown v. Curtiss, 2 N. Y. 225; Johnson v. Gilbert, 4 Hill, 178. Nor was the undertaking a promise that the note should be paid if reasonable diligence should be exercised in pursuing the makers, or a guaranty that the note was collectible, but it was an absolute and unconditional guaranty of payment as stated. The rule of the common law is that under such a guaranty presentation of the note by the maker when due, request to pay, and notice to the guarantor of dishonor need not be alleged; nor is the guarantee at law under any legal obligation to first resort to the maker of the note guarantied, or any securities held for its payment. Walton v. Mascall, 13 Mees. & W. 452; Id. 72, and note; 2 Am. Lead. Cas. by Hare & Wallace, 116; Douglass v. Howland, 24 Wend. 35. Also the following American authorities: 2 Daniel, Neg. Inst. §§ 1761, 1769; Baylies, Sur. p. 17, § 7; Wright v. Dyer, 48 Mo. 525; D. M. Osborne & Co. v. Lawson, 26 Mo. App. 549; Roberts v. Hawkins, 70 Mich. 506, 38 N. W. 575; Brown v. Curtiss, 2 N. Y. 225; Allen v. Rightmere, 20 Johns. 365, 11 Am. Dec. 288; Newcomb v. Hale, 90 N. Y. 326,

43 Am. Rep. 173; Hoyt v. Quint, 105 Iowa, 443, 75 N. W. 342; Huff v. Slife, 26 Neb. 448, 41 N. W. 286, 13 Am. St. Rep. 497; Bank v. Hopson, 53 Conn. 453, 5 Atl. 601; Gridley v. Capen, 72 Ill. 11; Duncanson v. Kirby, 90 Ill. App. 15; Hungerford v. O'Brien, 37 Minn. 306, 34 N. W. 161; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Roberts v. Ridole, 79 Pa. 468; Hanna v. Stroud, 13 S. D. 352, 83 N. W. 365; Donley v. Camp, 22 Ala. 659, 58 Am. Dec. 274; Townsend v. Cowles, 31 Ala. 423; Cobb v. Little, 2 Greenl. 261, 11 Am. Dec. 72; Klein v. Kern, 94 Tenn. 34, 28 S. W. 295; Jenkins v. Wilkinson, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; Dickerson v. Derrickson, 39 Ill. 574; Day v. Elmore, 4 Wis. 190. See, also, Welch v. Walsh, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302; Bingham v. Mears, 4 N. D. 437, 61 N. W. 808, 27 L. R. A. 257. The plea set forth a condition of the mortgage whereby it was claimed the note, by reason of a breach of such condition, became immediately due; then averred a request on plaintiff to foreclose, which the latter failed to comply with, and a loss of the property given as security in consequence thereof; but these facts constituted no defense to an action upon the undertaking of the defendant, which was an absolute and unconditional guaranty of payment, and the demurrer to the plea should have been sustained. Newcomb v. Hale, supra; Fuller v. Tomlinson, 58 Iowa, 111, 12 N. W. 127; Harvester Co. v. Tomlinson, 58 Iowa, 129, 12 N. W. 139; Blanding v. Wilsey, 107 Iowa, 46, 77 N. W. 508; Wells v. Mann, 45 N. Y. 327, 6 Am. Rep. 93; Sample v. Martin, 46 Ind. 226; Brandt, Sur. § 242. See, also, authorities supra. If defendant desired immediate steps taken to enforce the mortgage security, his remedy was to perform the contract of guaranty by paying the holder the amount of the note, and then enforcing the security himself.

The plea demurred to was the only plea upon which trial was had, and, as it did not constitute any defense to the action, and the demurrer thereto should have been sustained, it is unnecessary to consider any of the other assignments of error.

The judgment should be reversed, and the cause remanded, with directions to sustain the plaintiff's demurrer to the defendant's amended plea, and for such further proceedings as may be conformable to law and in accordance with this opinion. So ordered.

GEIGER et al. v. HENRY.

(Supreme Court of Florida. May 14, 1902.)

ATTACHMENT—ADVERSE CLAIM—JUDGMENT—INDEFINITE CHARACTER—AMOUNT OF JUDGMENT—PROPER VERDICT—EFFECT—REVIEW.

1. Under a statutory claim proceeding interposed in an attachment suit, the statute (section 1200, Rev. St.) provides that "upon the verdict of the jury the court shall enter judg-

ment deciding the right of property, and if the verdict is for plaintiff, awarding a recovery by the plaintiff from the defendant and his sureties, of the value (as fixed by the officer, or as fixed by the jury if fixed by it) of such parts of the property as the jury may have found subject to execution, and awarding separately such damages as the jury may have awarded, and all costs attending the presentation and trial of the claim." Under this statute it is error to enter judgment against the claimant and his sureties for an indefinite sum, to be thereafter ascertained by the judgment to be entered in the principal attachment suit.

2. Where the officer levying a writ of attachment affixes a valuation upon the property levied upon, and a claim is interposed to such property, and no issue is raised as to such valuation in the trial of such claim proceeding, and no submission is made to the jury, and no finding is made by them as to the value of such property, on a general verdict in favor of the plaintiff in attachment against the claimant for all of the property a judgment is authorized by the statute against the claimant and his sureties for the amount of the value of such property as fixed by the officer levying the attachment.

3. Where an improper judgment is entered upon a proper verdict, the appellate court will reverse it, with directions for entry of a proper judgment on the verdict.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhodon M. Call, Judge.

Attachment suit by Harry A. Henry against one Hicks, in which Lorenzo D. Gelger interposed a claim to the property. Judgment in the claim proceeding for the attachment plaintiff, and Gelger and his sureties bring error. Reversed.

A. W. Cockrell & Son, for plaintiffs in error. David H. Doig and Stephen E. Foster, for defendant in error.

PER CURIAM. This cause, having been reached in its regular order for final disposition, was referred by the court to its commissioners for investigation, who have reported that there is no reversible error in the record, except as to the final judgment entered.

The litigation arose under a claim proceeding. A suit of attachment was instituted by defendant in error against one Hicks, and certain personal property was levied on as his. The plaintiff in error Gelger interposed a claim to the property by tendering the statutory affidavit, and also a bond, with his co-plaintiffs in error as sureties. A trial of the claim resulted in a verdict and judgment for defendant in error. The verdict of the jury was a simple finding in favor of the plaintiff in the attachment proceedings, and the following judgment was entered therein by the court, viz.: "Wherefore it is considered by the court that the right of property in and to the said property levied on by the sheriff herein is in the defendant, W. R. Hicks, and not in the said L. D. Gelger, and that the same was and is subject to said levy under the writ of attachment in said cause; and it is further ordered that, upon judgment being rendered in said cause against the said de-

fendant, that execution shall issue thereon against the said L. D. Gelger, claimant, and against John B. Mills, Jules Salomon, W. F. Coachman, and A. Drysdale, to the extent of \$250, if so much is recovered, or for such smaller sum as may be recovered against said defendant." The claim bond accepted by the sheriff recited that the sheriff had fixed a valuation of \$250 on the property seized under the attachment writ and claimed by Gelger. It does not appear that the claimant before the trial denied in writing the correctness of any valuation of the property seized, or that the question of its valuation was in any way submitted to the jury on the trial.

That part of the judgment entered deciding the right of property to be in the attachment debtor, Hicks, and subject to the levy of the attachment writ, was proper on the verdict rendered; but the other portion of the judgment was unauthorized, and in violation of the statute. It provides (section 1200, Rev. St.) that "upon the verdict of the jury the court shall enter judgment deciding the right of property, and if the verdict is for plaintiff, awarding a recovery by the plaintiff from the defendant and his sureties, of the value (as fixed by the officer, or as fixed by the jury if fixed by it) of such parts of the property as the jury may have found subject to execution, and awarding separately such damages as the jury may have awarded, and all costs attending the presentation and trial of the claim." The judgment purports to award execution against the claimant and his sureties for an indefinite sum, to be thereafter ascertained by a judgment to be entered in a different proceeding by attachment against Hicks, and to be based thereon, and in this respect was unauthorized by the statute. The court could have entered judgment on the verdict against the claimant and his sureties for the valuation of the property fixed by the sheriff, there being no question of valuation before the jury; but there is no authority for the portion of the judgment awarding execution in the way indicated.

After a careful examination of the assignments of error other than in reference to the judgment, no reversible error is found, and the judgment will be reversed, at the cost of defendant in error, with directions for the circuit court to enter a proper judgment on the verdict, and for such further proceedings as may be conformable to law.

CHAPIN et al. v. MITCHELL.

(Supreme Court of Florida. May 14, 1902.)

WITNESSES—TRANSACTION WITH DECEASED PERSON—BOOKS OF ACCOUNT—SUPPLEMENTARY OATH.

1. The proviso to section 1095, Rev. St., prohibiting a party to an action or proceeding, or person interested in the event, etc., from testifying as a witness in regard to any transaction or communication between such witness and a person at the time of such examination

deceased, insane, or lunatic, does not prohibit the admission in evidence in favor of either party of the shop books and books of account of either party, in which the charges and entries shall have been originally made, as provided for by the act of 1854, brought forward as section 1120 of the Revised Statutes; neither does the proviso to said section 1095, Id., prohibit the introduction in evidence of the suppletory oath of the party in connection with such books of account, to the effect that the articles charged therein were delivered, or the items of labor and services therein charged were actually performed, and that the entries thereof were made at or about the time of the transaction, and are the original entries, and that the charges have not been paid. Such books, to be admissible in such cases, must appear to be fairly kept, and free from erasures and interlineations, to be judged of by the court.

2. Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another; and in a case where such transactions or communications were had between a party to a suit, or one interested in the event thereof, and a party dead, lunatic, or insane at the time they are offered in evidence, they cannot be testified to by such party to the suit, or by any one interested in the event thereof, under the proviso to section 1095, Rev. St., as to matters not properly a part of the suppletory oath, in connection with books of account offered in evidence under the provisions of section 1120, Id.

(Syllabus by the Court.)

Error to circuit court, Orange county; John D. Broome, Judge.

Action by E. A. Mitchell against Edward Chapin and another as executors. Judgment for plaintiff, and defendants bring error. Reversed.

Massey & Baumgarten, for plaintiffs in error. Beggs & Palmer, for defendant in error.

PER CURIAM. Defendant in error sued plaintiffs in error, as executors of Horace E. Chapin, deceased, and obtained judgment, and the latter sued out writ of error. The declaration contained a count that the deceased, Horace E. Chapin, in his lifetime became indebted to the plaintiff in the sum of \$300 for services rendered by him to said Chapin at his request, and which he promised to pay, but failed to do so, and which defendants also failed to pay on request. There were also other common counts.

The bill of particulars was for services rendered to H. E. Chapin by E. A. Mitchell in attending, nursing, and caring for him at his request during his feebleness and weakness prior to and including his last illness. Defendants pleaded that the said Horace E. Chapin was never indebted as alleged. The bill of exceptions recites that plaintiff produced several witnesses, who gave evidence to prove that plaintiff had rendered the services claimed in the cause, and what would be a reasonable compensation for the same.

It appears from the ordinary bill of exceptions that presents the only matters for de-

termination on the assignments of error made that there was testimony of both parties before the jury. Plaintiff was introduced as a witness to prove that he rendered the services sued for to Horace E. Chapin, the deceased, at a hotel in Orlando, from April, 1896, to the date of his death, in April, 1897. Objection was made by defendants on the grounds: First, that plaintiff was a party to the action, and interested therein; second, that he was not rendered competent by section 1095, Rev. St. The court overruled the objections, and admitted the evidence, to which ruling exception was taken. Plaintiff was also permitted to testify, over the objection of defendants, that the services rendered Horace E. Chapin were those of a nurse and attendant of an invalid, such as giving medicine, calling a doctor, sitting up at night to give medicine, and in attending to the general duties in a sick room.

It was proposed to prove by plaintiff what other services he rendered Horace E. Chapin when he was not in the sick room, and defendants objected on grounds above stated. The court overruled the objections, and plaintiff testified that he served Horace E. Chapin by attending to his correspondence and by accompanying him on his walks from April, 1896, to April, 1897, not continuously, but only at times when he was in need of the plaintiff. Exceptions were taken to the rulings of the court admitting this testimony, and they present the only questions for our consideration.

Section 1095, Rev. St., provides that: "No person, in any court or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto: provided however that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

For defendant in error it is insisted that the rulings of the court were not in violation of the statute as construed by this court, and special reliance is placed on the case of *Deans v. King's Ex'x*, 20 Fla. 533. This case belongs to a class of decisions of this court to

which reference should be made in order that its bearing may appear. In 1852 this court held that a book account was not admissible as evidence of the sale and delivery of goods (*Higgs v. Shehee*, 4 Fla. 382), and in 1854 an act was passed providing that "in all suits and actions at law or in equity, the shop books and books of accounts of either party in which the charges and entries shall have been originally made, shall be admissible in evidence in favor of either party, provided that the credibility of such evidence shall be judged of by the jury in cases of trial at law, and by the court in cases of a hearing in equity." At the time of the passage of this act the common-law disability of interested parties to testify had not been removed or modified by statute. It has remained as a part of our statutory system since it was enacted, and is embraced in the Revised Statutes (section 1120). This statute was construed in *Hooker v. Johnson*, 6 Fla. 730, and it was there held that the book entries, to be admitted, must be originally made, and contemporaneous with the transaction; that the book must appear to be fairly kept, and free from erasures and interlineations; and that the party make affidavit that the articles were delivered, or the labor and services were actually performed; and that the entries were made at or about the time of the transaction, and are the original entries, and the charges have not been paid. Another case bearing on the admissibility of account books in evidence and the oath of the party in connection therewith is *Robinson v. Dibble's Adm'r*, 17 Fla. 457, decided after the passage of the act of 1874 (chapter 1983), substantially the same as section 1095, above quoted. It was held that the purpose of this act was to enlarge, and not to restrict, the competency of parties as witnesses, and its effect was to prohibit a party being a witness as to transactions and communications between himself and a deceased person; but such party could still make his suppletory oath as to his books of account, his cross-examination being restricted to the matter of the oath. It was also held that whether books of original entry are in such condition on account of erasures, interlineations, and like causes as to justify their submission to the jury was a question for the trial judge to determine. The result of the matter was that the statute (section 1095, *supra*) did not change the rule under the book-account statute passed in 1854, and parties in interest could still make the suppletory oath in connection with such books, the same as they could before the enlarging statute as to competency of witnesses was passed. The subsequent case of *Deans v. King's Ex'r*, *supra*, proceeded upon this theory of the law. It was there held that, after proving his book account by his suppletory oath, he could testify that the services charged in the book and sued for were actually performed by him. It was ruled that such evidence was not in contravention of the act of 1874, which only pro-

hibited testimony of transactions or communications in such cases. The cases cited in support of the ruling gave no countenance to the idea that the testimony there held to be admissible was competent independent of the statute in reference to the admission in evidence of account books. In the case cited of *Leggett v. Glover*, 71 N. O. 211, it appears that under an old book-debt statute a party could prove his account by his own oath up to \$60. A subsequent statute was passed, giving a party the right to be a witness in his own behalf generally, but with a restriction that he could not testify as to any matter between himself and a person deceased where his executor or administrator was a party. It was held that it was not the purpose of the late statute to narrow the competency of parties to be witnesses, but to widen the same, and that a party still had the right to prove his debt by his own testimony under the old statute. A similar ruling was made in the case of *Strickland v. Wynn*, 51 Ga. 600, and the other cases cited in the case of *Deans v. King's Ex'r*, *supra*, except *Belote v. O'Brian's Adm'r* (20 Fla. 126), in this court, had reference exclusively to suppletory oaths in connection with book accounts. It was probably never intended by the decision in the case of *Deans v. King's Ex'r* to go further than to authorize an interested party to add his suppletory oath to the extent formerly adjudicated by this court in *Hooker v. Johnson* in connection with a book account. The act of 1874, embodied in section 1095, Rev. St., being intended to enlarge, and not restrict, the competency of witnesses, the former act of 1854, embraced in the revision (section 1120), was not repealed, and to the extent it goes it must be held not to include testimony as to transactions or communications between the party and a deceased person within the meaning of the exception in the act of 1874, now section 1095, Rev. St. What was decided in *Lewis v. Meginniss*, 30 Fla. 419, 12 South. 19, in reference to the suppletory oath in connection with the account book, is not in conflict with the decision in *Deans v. King's Ex'r*. The case of *Belote v. O'Brian's Adm'r*, 20 Fla. 126, had no reference to the admission of account books and suppletory oaths, but dealt with the admissibility of evidence under the exceptions to the act of 1874 (chapter 1983). It was held that the exceptions in the statute did not render a witness incompetent generally, but only to testify to transactions and communications had with the deceased in his lifetime, and that any party could testify to any pertinent fact if it does not come within the exceptions. The testimony held to be admissible in that case related only to the value of certain medicines, the like of which was furnished to the deceased, as shown by other evidence, and what it was worth to make and repair garments per year; and it was held not to be within the exceptions in the statute. When books of account are offered in evidence in connection with the suppletory oath

of the party, the decisions in *Hooker v. Johnson*, *Robinson v. Dibble's Adm'r*, *Deans v. King's Ex'r*, and *Lewis v. Meginniss*, *supra*, will apply; but, where the testimony has no connection with book accounts, its admissibility must be governed by the statute found in section 1095, Rev. St.

As shown by the abstract, the court permitted the plaintiff to testify that he rendered the services sued for—that is, in attending, nursing, and caring for the deceased—at his request, and also that the services rendered deceased were those of a nurse and attendant of an invalid, such as giving medicine, sitting up at night, and attending to the general duties in a sick room. This testimony tends to prove such a transaction between plaintiff and deceased as would clearly show liability on the part of the latter. "Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another." *Heyne v. Doerfler*, 124 N. Y. 505, 26 N. E. 1044; *Hollday v. McKinne*, 22 Fla. 153. The testimony admitted is in violation of the exception in the statute that no party to the action or proceeding, nor any person interested in the event thereof, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, against the executor, etc.

The testimony in reference to correspondence and calling a doctor, brought out in the objections made, may, under some conditions, relate to matters not constituting a transaction or communication with the deceased; but the proposed offer of testimony implied in the question objected to called for improper evidence, and should not have been allowed. The offer was to show what other service the plaintiff rendered to the deceased not in the sick room.

For the errors in the rulings mentioned, the judgment is reversed, and a new trial awarded. So ordered.

AUSTIN v. HOXSIE et al.

(Supreme Court of Florida. May 6, 1902.)

JUDGMENT—CONCLUSIVENESS—GRANTEES NOT PARTIES—EQUITY—ALLOWANCE OF PLEA—RIGHT TO FILE REPLICATION.

1. No alienee, grantee, assignee, or mortgagee is bound or affected by a judgment or decree rendered in a suit commenced by or against the alienor, grantor, assignor, or mortgagor subsequent to the alienation, grant, assignment, or mortgage, to which he is not a party.

2. Where a plea in equity is allowed upon argument, the complainant is entitled to file a replication, and contest its truth.

(Syllabus by the Court.)

Appeal from circuit court, Lake county; John D. Broome, Judge.

Bill by W. H. Austin against Eunice G. Hoxsie and others. From a decree for defendants, complainant appeals. Reversed.

William Hocker, for appellant. W. S. Jennings, for appellees.

PER CURIAM. This cause, having been reached in its regular order, was referred by the court to two of its commissioners, Messrs. Maxwell and Glen, who have reported that it should be reversed for reasons hereinafter stated, and after due consideration the court is of opinion that such conclusion is correct.

Appellant Austin filed a bill in April, 1897, in the court below, against F. A. Teague, Eunice G. Hoxsie, and others, wherein he sought the foreclosure of a mortgage executed by the said Teague and wife to the Buffum Loan & Trust Company, and by it assigned, A. D. 1894, to complainant. The defendants other than Teague were alleged to have or claim some interest in the mortgaged property subordinate to the lien of complainant's mortgage. Decrees pro confesso were entered against all of the defendants except Eunice G. Hoxsie, who filed a plea of *res adjudicata*. This plea was set down for argument, allowed by the court, and the bill ordered dismissed as to her. From this order complainant appeals.

The plea of the defendant Hoxsie alleged that in July, 1895, she had filed a bill to foreclose a mortgage by said Teague to her upon the same property covered by complainant's mortgage, which mortgage of defendant was executed on the same day as complainant's mortgage, but that hers was first recorded; that the Buffum Loan & Trust Company was the record owner of the mortgage now sought to be foreclosed, and was made a party defendant to the said suit of the said Hoxsie "to have its claim adjudicated and its claim declared a junior lien and subsequent incumbrance, and to have its said claims extinguished and lien cut off"; that a decree pro confesso was obtained in said suit against the said Buffum Loan & Trust Company, and in the final decree rendered thereon it was adjudged and decreed "that Mrs. Hoxsie's mortgage be of superior dignity to the said mortgage" of complainant, "and that all of the rights and privileges under said mortgage concerning said mortgage premises be, and the same were thereby, cut off and extinguished"; that said decree further directed sale of the mortgaged premises under the Hoxsie mortgage, and that she (defendant Hoxsie) became the purchaser of said property at said sale; that said sale to her was confirmed, and deed executed in July, 1896, and she took immediate possession of the premises.

From this plea it appears that the complainant's assignor, the Buffum Loan & Trust Company, and not the complainant himself, was a party defendant to the suit wherein the Hoxsie mortgage was foreclosed. This suit was instituted in July, 1895, and the assignment of the mortgage to complainant by the

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1206, 1208.

Buffum Loan & Trust Company was alleged in the bill to have been made in 1894. "No allenee, grantee, assignee, or mortgagee is bound or affected by a judgment or decree rendered in a suit commenced by or against the allenor, grantor, assignor, or mortgagor subsequent to the alienation, grant, assignment, or mortgage to which he is not a party." *Logan v. Stieff*, 38 Fla. 473, text 479, 18 South. 762.

The plea does not allege that Mrs. Hoxsie had no actual knowledge of the assignment of the mortgage to Austin. It alleges that the Buffum Loan & Trust Company, made a party defendant to her suit, was the record owner of the mortgage claimed to be owned by Austin, which must be taken to mean that, so far as disclosed by the record of the mortgage, the Buffum Loan & Trust Company appeared to be the owner. As there is no allegation in the plea that Mrs. Hoxsie did not have actual knowledge of the assignment to Austin, the question of the effect of a want of such knowledge is not necessarily involved. It is doubtful, on the showing made by the abstract, whether a want of such knowledge would have any material bearing on the rights of the parties under their respective mortgages; but, as this question is not necessarily involved in determining the sufficiency of the plea, it is not adjudicated. Austin was not a party to the decree set up in the plea as *res judicata*, and under the rule announced in *Logan v. Stieff*, *supra*, his rights were not thereby determined. The plea of defendant, therefore, set up no adjudication binding upon complainant, and should not have been allowed.

The order allowing the plea was further objectionable in directing that the bill be dismissed as to the defendant Hoxsie. After it was adjudged good, the complainant was still entitled to file a replication, and contest its truth, and should have been permitted to do so. 1 Beach, Mod. Eq. Pr. § 327; *Wilson v. Mitchell*, 48 Fla. —, 30 South. 703.

The decree should be reversed, and the cause remanded, with directions that the plea be not allowed, and for further proceedings not inconsistent with this opinion. It is so ordered.

HEEBNER v. TOWN OF ORANGE CITY.

(Supreme Court of Florida. May 14, 1902.)

MUNICIPAL LIMITS—EXCLUSION OF LAND—STATUTORY PROCEEDING—NATURE—MODE OF REVIEW.

1. The proceeding by petition, on behalf of a party desiring to have his land excluded from the corporate limits of a town, provided for by section 720 of the Revised Statutes, as amended by chapter 4601, Laws 1897, is one at law, a judgment in which can be reviewed in the appellate court only by writ of error, and not by an appeal.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Petition by William D. Heebner to have his land excluded from the limits of the town of Orange City. From an adverse decision, Heebner appeals. Dismissed.

Isaac A. Stewart (Egford Bly, on the brief), for appellant. F. C. Austin, for appellee.

PER CURIAM. This cause, being reached in its regular order on the docket for final adjudication, was referred by the court to its commissioners for investigation, who report the same recommending dismissal of the appeal. Upon consideration of the cause upon the abstracts of the record, the court finds that the proceeding was a statutory petition under chapter 4601, Laws 1897, and from the judgment in which an appeal has been taken to this court instead of a writ of error. Such a proceeding is one at law, and not in equity. *City of Tampa v. Mugge*, 40 Fla. 326, 24 South. 489; *Same v. Kaunitz*, 39 Fla. 683, 23 South. 416, 63 Am. St. Rep. 202. Since the adoption of the Revised Statutes there is no such thing as an appeal from a judgment at law, but such judgments can be reviewed only by writ of error, unless especially otherwise provided. The said appeal taken in said cause is, therefore, hereby dismissed, at the cost of the appellant.

JOHNSON v. ATKINS.

(Supreme Court of Florida. May 6, 1902.)

INTOXICATING LIQUORS—LICENSE TAX—VOLUNTARY PAYMENT—RECOVERY—FAILURE TO ISSUE LICENSE—EFFECT.

1. Taxes voluntarily paid to an officer authorized to receive them cannot be recovered from such officer by the party paying same.

2. The tax collectors had power, under chapter 4115, Act 1893, to accept a sum of money in part payment of a license tax due the state by a dealer in spirituous, vinous, or malt liquors, and money voluntarily paid to such officer by such a dealer on account of the license tax so due could not be recovered from the officer, even though no license was ever in fact issued, and the dealer ceased to engage in the sale of such liquors before the expiration of the license year.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhodon M. Call, Judge.

Action by William Atkins, as surviving partner of the firm of Atkins & Burroughs, against James E. Johnson. Judgment for plaintiff, and defendant brings error. Reversed.

John L. Doggett, for plaintiff in error. George U. Walker and Porcher L'Engle, for defendant in error.

PER CURIAM. Defendant in error, plaintiff in the trial court, sued plaintiff in error in the circuit court of Duval county, the dec-

¶ 2. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 102.

laration, filed February 1, 1897, containing two counts,—the first claiming \$800 for money had and received; the second alleging that defendant converted to his own use, or wrongfully deprived plaintiff of the use and possession of, plaintiff's property, to wit, the sum of \$400. Defendant pleaded to the first count "never indebted as alleged," and to the second count: First, that he denies conversion, and denies wrongfully depriving plaintiff of the use and possession of his money as alleged; and, second, that the money alleged to have been converted is not the money of plaintiff. Issue was joined on these pleas, and a trial had, with verdict and judgment for plaintiff May 10, 1897. Defendant moved for a new trial, upon the grounds, among others, that the verdict was contrary to the law and the evidence, which motion was overruled, and an exception noted. From the judgment entered this writ of error is taken, and one of the errors assigned questions the propriety of the ruling upon the motion for new trial.

The entire evidence in the case, as exhibited by the abstracts, is as follows: Plaintiff, William Atkins, testified: "I am the plaintiff in this cause, and I am the surviving partner of the firm of Atkins & Burroughs. On, to wit, the 18th day of February, 1895, I made a demand upon James E. Johnson for certain moneys in the sum of four hundred dollars that had been paid to him by my partner on account of a liquor license, and Johnson refused to deliver the said money. I was in partnership and doing business as a retail dealer in liquors in the city of Jacksonville, Duval county, Florida, from the 1st day of October, 1894, to the 23d day of January, 1895, under the firm name and style of Atkins & Burroughs. We did business all during that time without a license, having paid, however, James E. Johnson, the defendant in this cause, who was then the tax collector of Duval county, the sum of four hundred dollars on the 2d day of January, 1895, on account of said license. On, to wit, the 23d day of January, 1895, my partner died, and I went out of business, and then it was I made demand upon Mr. Johnson, the tax collector, to refund the money to me, and he refused so to do, because he claimed that the balance of the amount due for such license had not been paid."

James E. Johnson, as a witness for plaintiff, testified as follows: "My name is James E. Johnson. Yes, I identify this receipt as having been given by me to Mr. Burroughs when he paid me \$400 as the tax collector of Duval county on account of a liquor license that he wanted issued. I did not issue the license because all of the money had not been paid. They did business without the written evidence of a license. I do not remember whether Mr. Atkins ever made demand of me for the money or not. I think very probable that he did." The re-

ceipt referred to by this witness was introduced in evidence, and is as follows:

"Jax. Jan'y. 2, 1895.

"Received from Atkins & Burroughs four hundred dollars. Dep. on a/c license.

"J. E. Johnson."

The same witness, testifying in his own behalf, said: "My name is James E. Johnson. I am the defendant in this cause. At the time testified about by the plaintiff, I was tax collector of Duval county, Florida. Mr. Burroughs, the partner of the plaintiff, called at my office, and paid me the sum of four hundred dollars on account of a liquor license. The understanding between he and I was that he was to come back after that, and pay the balance of the money. I kept the money under this understanding, and allowed him to do business during that time, but did not issue the license, because I could not issue it until the whole amount had been paid, and the whole amount never was paid."

By the third subdivision of section 9, c. 4115, approved June 2, 1893, dealers in spirituous, vinous, or malt liquors were required to pay a state license tax of \$500 in each county for each place of business, whether such license was taken out for the whole year or fractional part of a year. Under that section licenses were required to be taken out before such dealers should engage in business, and by section 10 tax collectors were authorized to enforce the payment of all license taxes by the seizure and sale of the property. While the power given by this latter section did not apply to license taxes for certain occupations (Johnson v. Armour, 31 Fla. 413, 12 South. 842), it did apply to license taxes due by dealers in spirituous, vinous, or malt liquors, and under that power the defendant could, and it was his duty, to have enforced the payment of the license tax due by plaintiff's firm, or so much thereof as could have been enforced by seizure and sale of the property. The testimony shows clearly that when the \$400 were paid to Johnson he was the tax collector of Duval county, and that plaintiff's firm at that time was justly due the state the license tax required of dealers in spirituous, vinous, and malt liquors, as it had been engaged in that business, without having paid such license tax, from October 1, 1894. Such license tax being due the state, it was the duty of plaintiff's firm to pay it to defendant as collector, and the duty of such collector to collect it; and, if necessary for that purpose, the collector was authorized to resort to the power of seizure and sale given by the tenth section of the act referred to. While we do not mean to say that the dealer could compel the collector to receive from him a part only of an entire license tax due by him, it was within the power of the collector to do so, if he chose, and, if he did do so, the money would become the property of the state; and,

if voluntarily paid by the dealer, he could not recover it, even while it remained in the hands of the collector, for the principle is well settled that taxes voluntarily paid cannot be recovered. Cooley, Tax'n, p. 809. Both Atkins and Johnson testify that the money was paid by Burroughs on account of the license tax then due by Atkins & Burroughs as dealers in spirituous, vinous, and malt liquors. Neither party pretends that the money was deposited with Johnson to be held by him until the balance of the tax was paid, and that it was to be returned to the plaintiff's firm in case the balance of the tax was not paid, or upon any condition whatever. It is true the receipt given indicates the purpose for which the money was paid, stating, as it does, that the money was received as a "dep. on a/c license." If we construe the abbreviation "dep." as meaning "deposit," the result will not be different, even though the terms of the receipt be held to control the testimony of the parties, for its language does not show or imply that the money so deposited was to be held conditionally, or returned to the plaintiff's firm in any event, but, on the contrary, that it was deposited unconditionally on account of the license. Therefore it was the duty of the defendant to apply the money to that account, and this he undertook to do by accepting the money and issuing the receipt. Under these circumstances the money became the property of the state, and the defendant liable therefor to the state as its officer, and, having been voluntarily paid to defendant by the plaintiff's firm on account of the license tax due the state, it cannot be recovered from him by this plaintiff. It is true the defendant does not claim that he has ever paid the money to the state, but that fact cannot change the character of the real transaction shown in evidence. The state has her remedies for compelling the defendant to account for this money. The fact that she has failed to enforce them, if such be the case, does not render the defendant liable to the plaintiff for the money voluntarily paid to him on account of the license tax due the state. The court is of opinion that there is no sufficient evidence to support the verdict, and that the trial judge erred in refusing the motion for a new trial.

The judgment is reversed, and a new trial granted.

**FIRST NAT. BANK OF ST. AUGUSTINE
et al. v. KIRKBY et al.**

(Supreme Court of Florida. Nov. 16, 1901.)

MASTER AND SERVANT—LIEN FOR WAGES—CORPORATION—SUIT IN EQUITY—MULTIFARIOUSNESS—MISJOINDER OF PARTIES—GENERAL DEMURRER—REVIEW—LABORERS ENTITLED TO LIEN—CREDITORS AFFECTED—PARTIES SUBJECT TO LIEN—AUTHORITY OF CORPORATE AGENT—RECEIVERSHIP.

1. On an appeal from an order overruling a general demurrer to a bill for want of equity, neither the question of multifariousness nor

misjoinder of parties in the bill can be raised in the appellate court for the first time, where such questions were not presented below either by an express ground of the demurrer or *ore tenus*, as could have properly been done at the argument of said demurrer.

2. Under section 1732, Rev. St., a bookkeeper of a corporation conducting a sawmill business, and another employé, whose duty it was to keep a record of the time of the other employés, and to attend to a commissary run in connection with such mill, and another employé, who was under contract to haul logs to the mill at the wages of \$5 per day, using his own team in so doing, are all entitled to a lien for their wages on the lumber produced by such mill.

3. Under section 1742, Rev. St., parties who are given liens on personal property, whether in possession or not, are entitled to enforce such liens as against purchasers and creditors with notice of such liens. Creditors without notice, within the meaning of said section, can only consist of creditors who have, without notice of such liens, acquired liens by judgment or otherwise, and cannot apply to general creditors without liens.

4. Where a corporation conducting a sawmill business has eight miles of railroad track laid with iron rails, that is used exclusively in connection with such mill business as an appurtenant to such mill, and that is not permanently located, but subject to removal from one locality to another as the timber hauled thereon becomes exhausted, the employés of such corporation have a lien for their wages, under section 1732, Rev. St., upon such iron rails.

5. General powers conferred upon an agent by a power of attorney must be construed with reference to the special powers in connection with which the general authority is given; and where there is a special power given therein as to a particular feature of the business authorized to be conducted, and an express limitation is therein put upon the authority of the agent, such limitation will control.

6. A general power as managing agent of a corporation in the conduct of its business does not clothe such agent with authority to mortgage the property of his principal.

7. A mortgage, executed by an agent of a corporation, of its property, may be ratified by such corporation either expressly or impliedly by its acts, but no such ratification can be implied in the absence of knowledge of the mortgage by the corporation.

8. A bill in equity, brought to enforce laborers' liens aggregating less than \$1,000, that does not show the existence of any other liens upon the property, except those held by other parties made defendants to the bill, whose liens are alleged to be subordinate to those of complainants, and that does not allege inadequacy of security for the liens of complainants, and that does not allege insolvency of the debtor, and that fails to allege any misconduct whatever on the part of the debtor with regard to its property, does not authorize the appointment of a receiver to take charge of the property of such debtor, consisting of a sawmill and its business, stock on hand, eight miles of railroad track and its equipments, and 60,000 acres of land.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county: Rhydon M. Call, Judge.

Bill to enforce liens for laborers' wages by Walter J. Kirkby and others against the First National Bank of St. Augustine and others. From a decree for complainants, certain defendants appeal. Affirmed in part and reversed in part.

¶ 6. See Corporations, vol. 12, Cent. Dig. § 1009.

Walter J. Kirkby, George H. P. Sedding, and John E. Burnsed, complainants below, on September 17, 1894, filed their amended bill of complaint against the East Florida Land & Produce Company, Limited, the National Bank of Jacksonville, the First National Bank of St. Augustine, William O. Middleton, and Robert J. Oliver, copartners as Middleton & Oliver, George D. T. Dow, James T. Russell, and F. J. Moncrief and J. H. Finley, trustees, alleging that the East Florida Land & Produce Company was the owner and in possession of a certain saw and planing mill and machinery, 8 miles of railroad, 2 locomotives, and 10 log carts and 12 railroad cars, 350,000 feet of lumber sawed by said mill, and certain lands described in an exhibit not in the record sent to this court, but presumably the same lands placed in the hands of the receiver; that the complainants were in the employ of the East Florida Land & Produce Company, and worked for said company in and about the said mill under continuing contracts; that said company was indebted to the said Kirkby in the sum of \$412 for labor as bookkeeper, to the said Sedding in the sum of \$137 for labor as timekeeper, and to the said Burnsed in the sum of \$444.15 for labor as teamster, the said labor having continued to August 31, 1894; that complainants, on September 1, 1894, had severally filed in the clerk's office notices of their respective liens, in which notices the said Kirkby and Sedding claimed liens upon the mill, its machinery, and the logs, lumber, and building material in the mill, lumber yard, and premises of the East Florida Land & Produce Company at Neoga, Fla., and the said Burnsed upon this property, and also all mules, horses, harness, and carts on said premises. The bill further alleged that their liens upon said property were prior in dignity to all others; that the two banks and Middleton & Oliver claimed liens or interests in said property, but same were subordinate to liens of complainants; that Dow and Russell had levied attachments on same, but such liens were subordinate to those of complainants, and that Moncrief and Finley, trustees, claimed a mortgage on said property, but the lien thereof was subordinate to complainants' lien; that complainants were in destitute circumstances, and unable to give bond. The relief prayed was that a receiver be appointed for all of said property; that the said Dow and Russell be severally enjoined from prosecuting their attachment suits; that an account be taken of what was due complainants severally and other holders of labor liens who should come in, prove their claims, and share costs of suit; that the property be sold, and, after paying costs and attorney's fees, the balance of the proceeds be applied pro rata to the payment of such labor liens. Then followed a prayer for general relief and subpoena.

On the same day application was made for appointment of receiver in accordance with the prayer of the bill, and on the hearing of

such application Middleton & Oliver filed an affidavit of Middleton that on August 31, 1894, he, for Middleton & Oliver, had purchased the lumber described in the bill, and at the time of said purchase had no notice or knowledge of any indebtedness of the East Florida Land & Produce Company to its employees; and an affidavit of their attorney, W. A. MacWilliams, that on said August 31st he had prepared the bill of sale for such purchase, and had searched the records, and found no lien against said lumber; and a certificate from the clerk that no lien of laborers, mechanics, or materialmen was filed against said East Florida Land & Produce Company prior to September 1st, on which day Middleton & Oliver had filed said bill of sale for record. On said hearing the First National Bank of St. Augustine filed an affidavit of John T. Dismukes, its president, that said bank had made loans to the East Florida Land & Produce Company, and held mortgages on the rolling stock and eight miles of railroad iron described in the bill; that at the time of the making of such loans and of the receipt and recording of such mortgages it had no notice of the existence of any labor liens thereon, and had reason to believe and had believed that a portion of such loans had been used by said company to pay its laborers, and that same had, when the mortgages were executed, been paid in full.

On said September 17th the court appointed the receiver as prayed, directing him to take possession of all of the property described in the bill of complaint, including some 50,000 or 60,000 acres of land belonging to the East Florida Land & Produce Company, to operate the mill in so far as was necessary to saw up the logs on hand and to dress such lumber as it was profitable to dress, and requiring him to file a \$10,000 bond before entering upon his duties as receiver. The order further enjoined the further prosecution of the said attachment suits, and directed the sheriff to deliver the attached property to the receiver.

On the 5th day of November, 1894, the First National Bank of St. Augustine filed its answer, alleging: That it held four mortgages upon the said railroad iron, locomotives, cars, and carts, as follows: One dated September 27, 1890, recorded September 29, 1890; one October 8, 1890, recorded October 9, 1890; one December 21, 1893, recorded December 27, 1893; and one July 5, 1894, recorded July 6, 1894, for loans made prior to their execution to the East Florida Land & Produce Company that said loans were induced by representation of said company to said bank that said property was free from all liens. That said bank had the records searched for liens, found none, and had no knowledge of any on said property in taking said mortgages. That the said loans were made to keep the said company going, part was for purchase money of the rails in question, and part to pay the wages of complainants and other operatives.

That only \$1,500 of said mortgages have been paid, and that on August 30, 1894, the East Florida Land & Produce Company turned over to the bank 29 mules, 2 locomotives, and 10 log carts, and 12 railroad cars, to be sold, and proceeds applied to mortgages; and that all of said property except the mules was then in said receiver's hands. The answer further denies that complainants have any lien on said property, and says that, if they have, it is subordinate to the lien of respondents' said mortgages.

On the same day defendants Middleton & Oliver filed a demurrer to the bill for want of equity, which was overruled on June 12, 1895, and on the 1st day of July following they filed an answer alleging that on the 31st day of August, 1894, they purchased from the East Florida Land & Produce Company the 350,000 feet of lumber in the bill described, the consideration for said sale being an indebtedness of said company to them of \$1,620 for supplies furnished it; that said sale was bona fide, and without knowledge on their part of complainant's liens or claims for wages, and that the lumber had been delivered to them and in their possession from the day of sale; that the claims of complainants, if due at all, were for "back pay," which had been allowed to accumulate in the hands of the East Florida Land & Produce Company, and not for services in August, 1894, or any next preceding current month.

On December 20, 1894, the First National Bank of St. Augustine filed a cross-bill against the East Florida Land & Produce Company, the National Bank of Jacksonville, and the complainants for the foreclosure of the four mortgages above mentioned,—the first for \$11,133, the second for \$4,173 (both covering the said locomotives, cars, and carts); the third for \$300, and the fourth for \$1,200 (both mortgages being upon the railroad iron); the bill alleging that \$15,957.85 was still due on the mortgage debts; that the liens of the original complainants, if any existed, upon said property, were subject to said mortgage liens, the said bank having made the loans and taken the mortgages without notice of any liens, actual or prospective, upon said property; that no cautionary notices of lien were ever filed by complainants, and the notices filed by them September 1, 1894, did not embrace the mortgaged property; and alleges that none of said complainants or their fellow employees had at any time any possession of said property; that the Jacksonville Bank had a mortgage on a portion of the railroad iron subordinate to the mortgages of cross-complainants. Then followed the usual prayers for relief. Attached to the cross-bill were copies of the mortgages in question, each purporting to be executed by the East Florida Land & Produce Company by an attorney in fact.

On the rule day in April, 1895, decree pro

confesso was entered against the East Florida Land & Produce Company upon such cross-bill, and on July 12, 1895, the original complainants filed an answer to the cross-bill, calling for strict proof of the indebtedness alleged therein, denying the execution of the alleged mortgages, admitting the filing of their original bill, and averring that their liens upon said property were of superior dignity to any liens or claims of said cross-complainants.

On August 10, 1895, decrees pro confesso in the original suit were entered against the East Florida Land & Produce Company, Dow, and Russell, and on the same day the court denied an application made by the East Florida Land & Produce Company, which specially appeared for that purpose, to quash the service upon it in said cause.

Testimony in the case was taken, and on October 19, 1895, a decree was entered by the court that the cross-bill be dismissed; that complainants and all others holding liens of equal dignity had a lien prior to all others on the mill, machinery, iron rails, locomotives, cars, log carts, and other machinery and implements used in operating said mill; that they had a lien upon the lands mentioned in said bill, subject to the mortgage of Moncrief and Finley, trustees; that a master be appointed to state the account of what was due complainants and all other creditors of the East Florida Land & Produce Company who should come in and prove their claims; that the master should report the amounts due the several creditors, the order of priority of payment, with the evidence upon which he acted; that in doing this he should be governed by the decree giving priority to complainants and all other persons having labor liens of equal dignity upon the property; and that creditors so coming in might contest each other's claims and priorities, except those of the complainants. From this decree the First National Bank of St. Augustine and Middleton & Oliver entered their separate appeals to this court.

W. A. MacWilliams and M. C. Jordan, for appellants Middleton & Oliver. J. C. Cooper and W. W. Dewhurst, for appellant First Nat. Bank of St. Augustine. Wm. B. Young and A. G. Hartridge, for appellees.

PER CURIAM. The final decree rendered in this cause is far-reaching in extent. It decreed, among other things, the relief prayed by complainants Kirkby, Sedding, and Burnsed in their bill, and that they and all others holding liens equal in dignity with theirs have liens prior in dignity to all others on the mill, machinery, iron rails, locomotives, cars, log carts, and other machinery and implements used in operating the mill mentioned in the bill of complaint, and it was ordered that a special master named

take an account of what was due complainants and all other creditors of the defendant the East Florida Land & Produce Company, Limited, who should come in and prove their claims within a time specified, and that said master report to the court the amounts due the several creditors, and the order in which they were entitled to priority of payment from the proceeds of the sales of property mentioned in the bill of complaint, giving priority to complainants and others having labor liens equal in dignity with theirs under the laws of this state. Among the property mentioned in the bill is 350,000 feet of sawed lumber. It was also decreed that the cross-bill of complainant the First National Bank of St. Augustine be dismissed, and that the moneys expended by the receiver in paying taxes on the lands should constitute a first lien thereon. By interlocutory order previously made in the cause the court directed the receiver to pay out of the moneys in his hands the sum of \$581.27 for taxes on real estate, and the sum of \$124.25 taxes on personal property, due from the East Florida Land & Produce Company to the state of Florida for taxes in the year 1894. The decree further adjudged that the complainants have a lien upon the lands mentioned in the bill, subject to the lien of the mortgage made to the defendants Moncrief and Finley, trustees. The First National Bank of St. Augustine and Middleton & Oliver are the only parties who have appealed, and only in their behalf is there any contention that the decree is erroneous.

From an examination of the pleadings in this cause and the evidence submitted, it appears that the interest of Middleton & Oliver is entirely separate from that of the First National Bank. They claim to have purchased the lumber on the mill yard of the East Florida Land & Produce Company, and assert no claim to any other property involved in the suit. The bank's claim extends to other property, and hence appellants have no unity of interest as to the subject-matter of the litigation.

Proceeding with the separate interests of appellants and the several assignments of error which they may urge for our consideration, we find an objection of Middleton & Oliver to the action of the court in overruling their demurrer to the bill of complaint. Under this assignment they contend that there is an improper joinder of parties complainant in the bill filed to enforce the separate liens of the three complainants. The demurrer of said respondents was for want of equity. Neither multifariousness nor misjoinder of parties appears to have been assigned as a ground of the demurrer, nor to have been urged in the court below. Had such objection been so assigned, even *ostenus*, under the general demurrer filed it would have been properly submitted to the court, but, without this having been done, it

cannot be considered here. *Darcey v. Lake*, 46 Miss. 109; *Fay v. Jones*, 1 Head, 442; *Labadie v. Hewitt*, 85 Ill. 341; *Cholmondeley v. Clinton*, Turn. & R. 107, text, 116; *Wake v. Parker*, 2 Keen, 59; *King of Spain v. Machado*, 4 Russ. 225; *Page v. Townsend*, 5 Sim. 395; *Delondre v. Shaw*, 2 Sim. 237. The nature of the misjoinder is not such as to invoke the action of this court for its correction *sua sponte*, as was the case of *Bauknight v. Sloan*, 17 Fla. 284.

The decree rendered in the cause against Middleton & Oliver is assigned by them as error, and under this assignment it is contended: First, that complainants have no liens under the laws of this state for their respective demands. We are satisfied that complainants are given liens on the lumber of the East Florida Land & Produce Company under section 1732, Rev. St., which provides as follows: "1732. For labor as book-keeper, clerk, etc.—In favor of book-keepers, clerks, agents, porters and other employes of merchants and transportation companies and other corporations: upon the stock, fixtures and other property of such merchants, companies or corporations." *Kirkby* was employed as bookkeeper at the mill, and *Sedding* was employed in keeping the time of other employes at the mill and attending to the commissary of the company kept in connection therewith, and are entitled to liens on the lumber by the very terms of the statute. *Burnsed* was employed, it appears, to haul logs for the mill at \$5 per day, and used his own team in doing so. There was no hiring of the team by the mill company, nor an agreement to pay *Burnsed* any amount for the use of the team separate from his services, but the agreement was to pay him so much per day for the hauling with his team, and under such a contract he is entitled, in our opinion, to a lien for the amount due him. It is further contended under this assignment that Middleton & Oliver were purchasers of the lumber in question without notice of the liens of complainants. Under section 1742, Rev. St., persons given liens on personal property, whether in possession or not, are entitled to enforce them against purchasers and creditors with notice, and we are of opinion that the court was authorized to hold, on the showing made, that said respondents were such purchasers, though it was shown that they are also general creditors. They rely upon the defense that they were purchasers, and not creditors. Creditors without notice, within the meaning of said section of the statute, means those who have acquired liens by judgment or otherwise, and not general creditors. *Rogers v. Munnerlyn*, 36 Fla. 591, 18 South. 609.

The action of the court in directing the receiver to pay taxes due the state on personal and real estate of the East Florida Land & Produce Company out of funds in his hands derived from the sale of lumber

and other personal property is also assigned for error by Middleton & Oliver. The taxes in question were due for the year 1894, and by the fifteenth section of chapter 4115, Acts Fla., approved June 2, 1893, it is provided that personal property shall be responsible for the taxes on real estate, and real estate shall be responsible for the taxes on personal property. The state was, therefore, entitled to her taxes out of any money in the hands of the receiver, whether derived from real or personal property of the East Florida Land & Produce Company. In the order made for the payment of the taxes the court directed that those due on real estate should constitute a charge thereon, and in the final disposition of the case no doubt such order will be carried out, and the personal property relieved of any taxes due on the lands. We see no error in the order made in reference to the payment of the taxes.

These appellants also assign as error the order appointing the receiver, but, as this is also assigned as error by the National Bank of St. Augustine, we will consider it in connection with the errors assigned by the latter.

One of the errors assigned by the National Bank of St. Augustine is that the court erred in decreeing that complainants have a lien prior in dignity to all others upon the mill, machinery, iron rails, locomotives, cars, log carts, and other machinery and implements used in operating the mill mentioned in the complainants' bill. In its answer to the bill the bank claimed to be a mortgage creditor without notice of complainants' liens, so far as the following property, and no other, was concerned, viz., the 2 locomotives, 12 railroad cars, 10 log carts, and 8 miles of railroad iron. The proof shows that this property all belonged to the East Florida Land & Produce Company, a corporation, and that it was all used in connection with the operation of the mill. The railroad iron was laid upon certain lands, presumably of the company; but the proof shows that it was not regarded as being permanently fixed to the land, but only for temporary purposes in procuring logs for the mill, and that such iron is frequently moved and relaid on other lands whenever the timber suitable for saw logs becomes exhausted in the particular locality. We are satisfied that all of this property claimed by the bank is of the character contemplated by section 1732, Rev. St., before referred to, and that complainants have, under that section, a lien upon it, prior in dignity to all others, except as against purchasers and creditors without notice. We therefore proceed to ascertain whether the bank was such a purchaser or creditor with respect to the property mentioned. The mortgages relied upon by it and offered in evidence purport to have been executed in the name of the company, in each instance by an attorney in fact; and in connection with the mortgages the bank offered certified

copies from the records of St. Johns county of the powers of attorney under which the attorneys purported to act. These copies and the mortgages were, upon complainants' objections, excluded from evidence, and this ruling is assigned as error. As the whole evidence is exhibited to us in the record, that excluded as well as that admitted, we shall not stop to decide the propriety of that ruling, but consider the case as if the excluded evidence had been admitted. It is contended on behalf of the lien claimants that the powers of attorney so offered in evidence gave no authority to the attorneys to execute the mortgages, and we concur with that view. In paragraphs 1 and 11 of the powers of attorney is given in broad terms the right to conduct the business of the company in this country, and to execute any contracts, deeds, writings, etc., necessary thereto. Paragraphs 2 to 10 give special powers in connection with the business; those bearing upon the right of the attorney to execute the mortgages in question being paragraphs 8, 9, and 10. The first of these gives the right to open and continue in the name of the company a current account with such bank or banks in the United States as the attorney may think fit, and to draw checks on same, but forbids him to overdraw such accounts without authority from the directors. The ninth paragraph authorizes him to indorse checks, bills of exchange, promissory notes, and bills of lading, and to draw bills from time to time upon the company or persons or companies having business with it, in any of the connections aforesaid. The tenth paragraph authorizes the attorney to draw bills from time to time upon the company for the purpose of providing money for current expenses, and to place the proceeds of any such drafts to the credit of the banking account aforesaid, or to remit the same to the company, or otherwise deal with the same as the directors may from time to time appoint. The language used in paragraphs 1 and 11 is broad, but this must be construed with reference to the special powers in connection with which the general authority is given (1 Am. & Eng. Enc. Law, 1000, and authorities cited); and where there is a special power given as to a particular feature of the business authorized to be conducted, and express limitations upon the authority of the attorney therein, these will control. The power sought to be exercised was that of mortgaging the railroad iron, log carts, locomotives, and railroad cars of the company in order to effect or secure loans of money for its use. The powers of attorney had expressly prescribed the manner in which the attorneys could pledge the credit of the company in order to raise funds for the business by authorizing them to draw on the company for that purpose, and had placed a restriction upon their right to incur even an unsecured indebtedness to the bank by overdraft, without express authority. This excludes the

idea that the attorneys were, by this instrument, authorized not only to incur the alleged indebtedness to the bank without express authority, but in doing so to mortgage so substantial a part of the company's property as above described. Nor was the right to mortgage such property within the powers of the attorney as its managing agent. 4 *Thomp. Corp.* § 4849, citing *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Whitwell v. Warner*, 20 Vt. 425. If, therefore, the mortgages are valid, it is because the course of business between the parties or their conduct was such as to show ratification of the act of the agent in executing them, or some grant of authority to the agent other than that claimed in the powers of attorney. No other grant of authority was attempted to be shown, and after a careful consideration of the testimony the court finds no sufficient evidence to show ratification of any of the mortgages except the one dated September 27, 1890. As to the property embraced in that mortgage, upon which the proof shows there is now due the sum of \$1,000 and interest, the bank is a creditor without notice to the extent of the amount due on that mortgage, and its rights as such mortgagee are superior to the liens of the complainants; but as to the other property embraced in the other mortgages the complainants' rights are superior to those of the bank, although we hold in a subsequent part of this opinion that these mortgages are subject to foreclosure under the cross-bill against the East Florida Land & Produce Company, Limited. The East Florida Land & Produce Company, Limited, was an English corporation, having its principal office in London, but conducting a sawmill business in St. Johns county, in this state. The management of this business was committed to its managing agent at St. Augustine, who was also a director of the company, but whose powers as such agent were conferred by the powers of attorney we have already considered. The attorneys are shown to have frequently contracted debts with the bank in the business of the company beyond the scope of the written authority, and most, if not all, of these debts became known to and were ratified by the company. But it is not shown that the company had any knowledge of the execution of any of the mortgages except the first one (dated September 27, 1890), and without such knowledge no ratification can be implied (*Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349, 24 South. 490), and no express ratification was attempted to be shown. As to the mortgage of September 27, 1890, it is shown that the company in London made payments upon the debts secured by it, and never repudiated it, though it had knowledge of its execution; and such conduct is sufficient, in our judgment, to ratify this mortgage.

On the 30th of August, 1894, the managing agent for the company executed a written in-

strument authorizing the bank to take possession of and sell certain property embraced in its mortgages, and apply the proceeds to the payment of said mortgage debts. This agent had no authority to do this under his written power of attorney, and there is no evidence that the company ever ratified his act in this respect.

It is further contended by the bank that the court erred in decreeing a first lien upon the property of the East Florida Land & Produce Company in favor of all persons holding liens of equal dignity with complainants, and in decreeing that the master should take an account of what was due all creditors of the company who should come in and prove their claims. The bill does not allege that there are any other lien creditors of equal dignity with complainants. It does not allege that the East Florida Land & Produce Company was insolvent, or show any reason for a general marshaling of its assets, or for bringing in any of its lien or general creditors. Under the statutes in force at the time this suit was brought, persons holding several liens of the nature held by these complainants could not properly join in a suit to enforce them under the circumstances disclosed by this bill if a timely objection was interposed. The features of the decree now being considered were, therefore, erroneous.

Another assignment of error on the part of the bank complains of the dismissal of its cross-bill. This cross-bill sought the foreclosure of the four mortgages already referred to, and to have the foreclosure decree declare the lien of the mortgages superior to the liens of complainants upon the property embraced therein.

A decree pro confesso had been entered against the East Florida Land & Produce Company, the alleged mortgagor, which entitled the bank to proceed to a decree against it foreclosing its mortgages, so far as that company was concerned. As we have seen, however, none of these mortgages except the one dated September 27, 1890, were, as against the complainants, entitled to priority over their liens. The court should, therefore, have retained the cross-bill, and in the decree of foreclosure of the mortgages adjudged the priorities between the bank and complainants as we have stated them to exist. The dismissal of the cross-bill was, therefore, erroneous.

The bank further assigns as error the part of the decree adjudging a lien in favor of complainants Kirkby, Sedding, and Burnsed on the land of the East Florida Land & Produce Company, Limited. The bank is not shown to have any lien on the lands of said company by virtue of any of its mortgages, and its cross-suit is not in the nature of a creditor's proceeding, nor is the bill of complainants Kirkby, Sedding, and Burnsed, as we have already seen, a creditors' suit, and we do not see that the bank is entitled to assign error on the feature of the decree adjudging

a lien on the land. The rights of the bank as a general creditor are not concluded by the proceeding in any way in this suit.

It is further insisted on the part of the bank that the decree pro confesso against the East Florida Land & Produce Company under the bill filed by Kirkby, Sedding, and Burnsed, is erroneous because of defective service on said company. As stated, the produce company is not complaining in this court of anything that was done in the lower court, though it did appear there specially to quash the service against it. The entire record in reference to the service on the East Florida Land & Produce Company does not appear to have been brought up on this appeal, but, without reference to this, it does appear from recitals in the order appointing the receiver that all parties, complainants and defendants, then appeared before the court. It cannot, therefore, be held that the East Florida Land & Produce Company was not properly before the circuit court.

The action of the court below in appointing a receiver for the property of the East Florida Land & Produce Company is assigned as error by each of the appellants. The bill upon which this action was based alleged that the East Florida Land & Produce Company owned certain mill and railroad property, lumber, and lands; that complainants held laborers' liens upon the property for stated sums, aggregating less than \$1,000, and that certain other parties, made defendants to the bill, held liens or claims upon the property; but that the liens of complainants were superior to all others except such other labor liens as might be in force against the property. The bill alleged that it was filed for the benefit of such other of these lienholders as should come into the suit; but this, as we have seen, was improper, and cannot furnish support for the appointment of a receiver. There was no allegation in the bill of inadequacy of security for the liens of complainants, no allegation of insolvency of the East Florida Land & Produce Company, and no allegation of any misconduct whatever on the part of said company with regard to its property. Under such a bill as this the appointment of a receiver to take charge of a sawmill, its business and stock on hand, eight miles of railroad and its equipment, and 60,000 acres of land, as an incident to the enforcement of liens aggregating less than \$1,000, was obviously improper, and such decree, as against the bank and Middleton & Oliver, was erroneous.

Those portions of the decrees which have been pronounced erroneous in this opinion are, as against the appellants, reversed, and in other respects the decrees are affirmed, and the cause is remanded, with directions for the court below to enter a decree in accordance with this opinion, to dispose of the matter of receivership according to law, and for such further proceedings as may be proper.

TAYLOR et al. v. GLENS FALLS INS. CO.
(Supreme Court of Florida. April 30, 1902.)

INSURANCE POLICY—REFORMATION—NECESSITY—LACHES—ACTION ON POLICY—LIMITATION—AVOIDANCE—CANCELLATION OF POLICY—VOID CHARACTER—PARTIES—PROOFS OF LOSS—WAIVER.

1. Where a policy of fire insurance is made payable to the party in whose name the legal title stood to the property insured, such party being dead at the time of the execution of such policy, no recovery at law can be had upon such policy by the heirs at law of such deceased party without a reformation thereof in equity.

2. Where husband and wife, with their children, reside in a house, the legal title to which stands in the name of the wife, and an agent of a fire insurance company for years during the lifetime of the wife deals exclusively with the husband in effecting insurance of such house, the policies being always made payable to the wife, and the wife dies, and the husband, with their children, continue thereafter to occupy and reside in the said house, and the said agent of the said insurance company, after having knowledge of the death of said wife, in response to a request from the said husband to renew the insurance of said property, subsequently to the death of said wife issues a policy on the said house, making it payable as before to her, and receives from the husband and retains the regular premium for such insurance, and it appears that such policy was so made payable by such agent through his mistake, inadvertence, and momentary forgetfulness of the fact that the wife to whom it was made payable was at the time dead, and that the husband relied entirely upon the said agent for the issuance of a valid policy, and the property is destroyed by fire during the life of such policy, and the husband and other heirs at law of such deceased wife have had no knowledge as to whom such policy was made payable, none of them ever having seen the same or had access thereto since its execution, such policy, under these circumstances, will be reformed in equity so as to make the same payable to the heirs at law of such deceased wife, and recovery can be had thereon in equity, as part of the suit for reformation, in favor of such heirs at law.

3. The failure of the insured to read a policy of insurance, even where he has opportunity for so doing, does not amount to such laches on his part as will deprive him from having such policy reformed for mistake therein.

4. Where a policy of fire insurance provides that no recovery can be had thereon unless suit thereon was brought within a year from the destruction of the property, and a suit at law is brought thereon within such year, and such suit results properly in a nonsuit by reason of a mistake in the name of the party to whom such policy was made payable, which mistake was discovered at the trial of such suit at law by the plaintiffs for the first time, the agent of the insurance company having prior to the fire wrongfully obtained possession of the policy, and having willfully withheld it and all information as to its terms and conditions from the parties bringing such suit at law thereon, and the said party or parties immediately after such nonsuit, but after the lapse of a year from the destruction of the property, file their bill in equity for reformation of such policy and for recovery thereon as reformed,—under these circumstances, held, that the limitation provided for by the policy was effectually avoided, and that such suit in equity could be maintained notwithstanding such limitation.

5. Where a policy of fire insurance is made payable in part conditionally to a mortgage of

the property insured, who has been given possession of such policy, and the agent of the company issuing it, without giving the five-days notice provided for in such policy of his intention to cancel same, and without the knowledge or consent of the real beneficiaries of such policy, obtains the possession thereof from the daughter of such mortgagee during the latter's absence, returning to her the then unearned pro rata part of the premium received therefor, such mortgagee nor her daughter being authorized by the real beneficiaries of the policy to receive such returned unearned premium or to consent to a cancellation thereof, and such agent attempts under these circumstances to cancel said policy without the knowledge or consent of the real beneficiaries of such policy, and the property insured is destroyed by fire within three days after such attempted cancellation.—*held*, that such attempted cancellation of such policy is a nullity, and that the insurance company was not thereby released from obligation to pay the subsequent loss.

6. Where a policy of fire insurance is made conditionally payable to a mortgagee of the property insured, whose mortgage debt is for much less than the amount of the policy, such mortgagee, or, if dead, his personal representatives, are not only proper, but necessary, parties, conjointly with the other beneficiaries of such policy, to a bill in equity for reformation of a mistake in such policy, and for recovery thereon as reformed; and the decree in such suit may properly adjust between the complainants their respective interests in the recovery thereon.

7. A fire insurance company, by unconditionally denying any liability whatsoever on its policy upon the destruction of the property covered thereby, waives proofs of loss provided for in such policy.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Bill to reform an insurance policy by J. D. Taylor and others against the Glens Falls Insurance Company. From a decree for defendant, complainants appeal. Reversed.

The appellants filed their bill in equity on March 25, 1897, in the circuit court of Orange county against the appellee, alleging as follows: That Eudora O. Taylor, wife of said J. D. Taylor, was prior to this suit the owner of a certain two-story frame building at Winter Park, in said county, known as the "Lemay Building," then and since used as a residence for said Eudora and J. D. Taylor and their family, of the value of about \$4,500, and which building was in the full care, custody, and control of said J. D. Taylor during the lifetime of his said wife and since. That pursuant to such control said J. D. Taylor had from and since 1891, and until 1894, procured insurance on said building against loss by fire. Prior to 1894 the amount of insurance was \$2,500, one-half of which was placed in the defendant company, the Glens Falls Insurance Company, through one W. F. Barnes, then and now the agent of said company. That in 1891 said Barnes visited and inspected the premises, acting for a Mrs. Eliza Kimbrough, and placed a loan of \$400 on the property for her; said J. D. Taylor and wife, Eudora, joining in a note and mortgage on said property to secure said loan of \$400. Said Barnes insured said premises for that

year in the name of Eudora O. Taylor as owner, \$1,250 of said insurance being placed in defendant company, and payable to said mortgagee as her interest should appear. That said Eudora died November 19, 1892, intestate, leaving as heirs at law her husband and the children mentioned as complainants, and all continued to occupy said residence, and said J. D. Taylor continued in control thereof, and was duly appointed administrator of decedent's estate. Public notice of the death of said Eudora and of the appointment of said J. D. Taylor were made according to law in said county. At the expiration of the policy of insurance of \$1,250 in defendant company on November 13, 1893, said J. D. Taylor requested said Barnes to renew same. That at the time said Taylor believed and had good reason to believe that said Barnes knew of the death of said Eudora, and that, relying upon this knowledge, and depending upon the skill and knowledge of said Barnes as said agent of defendant company to properly write said policy of insurance, of which he, the said J. D. Taylor, was wholly ignorant, he gave said Barnes no instructions whatever as to what name as owner should be inserted therein. That afterwards it appeared that said Barnes either had no knowledge of the death of said Eudora, or had forgotten this fact, and thus, by the inadvertence, accident, and mistake of said J. D. Taylor and said Barnes, and by the error of said Barnes, said insurance on said building in said defendant company was renewed in the name of Eudora Taylor as owner, she being then dead, and not in the name of her estate, or of the heirs of the estate of said Eudora, or of her said husband as administrator or trustee or agent, or in such manner and form as was proper, and as said J. D. Taylor then and since supposed said policy to have been written until just before the bringing of this suit, he not having read said policy by accident and inadvertence. And that on November 13, 1894, said J. D. Taylor again requested said Barnes, as agent of said defendant company, to renew said insurance in said company, and, not having discovered the error in the expiring policy, and still believing said Barnes knew of the death of said Eudora, and being ignorant of the proper manner and form of writing said policy, he, the said J. D. Taylor, gave no other instructions to said agent but a request for such renewal, wholly relying on and trusting him to properly write said policy, but expecting and intending that said policy should be written, not in the name of said Eudora O. Taylor, deceased, but of said J. D. Taylor, as agent or trustee or administrator of her estate, or in the names of the heirs of her estate, or as should be fit and proper to write the same. The premium for said insurance, amounting to \$48.75, was advanced for and loaned to said J. D. Taylor by said Eliza Kimbrough, mortgagee, and paid to said agent, and said insurance, in case of loss, was payable conditionally to her as mortgagee; and said policy was issued by said

agent for one year from November 13, 1894, and delivered to said mortgagee, or held by him as agent for said Mrs. Kimbrough (he then having other policies in his possession of said mortgagee as her agent); so that said J. D. Taylor did not see said policy (a substantial copy of which policy was attached to the bill, complainants alleging that the defendant company had previously procured possession of the original, and refused to deliver it to the complainants, or a copy thereof, or to disclose its contents). That on the 16th of May, 1895, said agent called on Miss Alice Kimbrough, a daughter of said Eliza, and informed her that the defendant company had directed him to cancel said contract of insurance, and to return the pro rata of unearned premium, and handed her \$24.35, representing same to be the said amount of unearned premium; and said agent did thereupon return said policy to said defendant company (the same then being in his possession as agent for said mortgagee). That said Alice, through ignorance, accepted said money, and reported same to her mother, but did not inform J. D. Taylor nor any of said complainants. That neither said Alice nor her mother, the said Eliza, had any knowledge that the terms of said policy provided that on canceling same by the company five days' notice should be given the insured, nor did either intend by receiving said money to waive such provision, and neither was in any regard the agent of said J. D. Taylor or any of said complainants respecting said insurance, nor had either any authority to assent to such cancellation or to receive said unearned premium for complainants, nor did either so intend. That on the 19th of May, 1895, about 1 o'clock at night, and less than three days after the pretended cancellation, said building was totally consumed by fire, said fire having originated in an adjoining building, and the cause thereof was unknown to complainants. That immediately after the said burning of said building, to wit, on said 19th of May, said J. D. Taylor called on said Eliza and Alice Kimbrough for the said policy of insurance (having some time previously been informed by said agent that it was in their custody), and learned for the first time of the pretended cancellation of said policy. Said Taylor then called upon said agent, and stated the loss of said building by said fire, whereupon said agent then and there informed him that the policy had been canceled, and that the defendant company refused to pay the same, and denied all liability thereunder. That all efforts of said Taylor to procure a return of said policy from defendant company, or to secure from them a copy thereof, or information of its contents, wholly failed, though every legal effort was made so to do. That suit was brought against defendant company in the circuit court of said Orange county on said contract of insurance, and in the trial thereof it appeared by the sworn testimony of said agent, Barnes, that said policy had been by him, through inad-

vertence and mistake, written in the name of Eudora Taylor, she being at the time deceased; whereupon the judge held that said policy could not be sued upon in said action, and plaintiff was then and there forced to take a nonsuit. That this suit in equity was therefore brought to reform and enforce said contract, there being no other adequate remedy. That said Eliza Kimbrough had died, and said Alice duly appointed her administratrix, and was joined as a complainant because of the said interest as mortgagee. That said Alice had prior to this suit tendered to said agent of said defendant company a return of the amount of the unearned premium paid her by said agent, with legal interest to date of such tender, but which offer was refused, and she was still ready to pay same. That said policy of insurance contained a provision that in case of loss by fire suit should be commenced within 12 months from such fire. That suit had so been commenced as already stated, but ended in a nonsuit as alleged. That the enforcement of such provision would in this case be inequitable as against these complainants. That the error in said policy had only been recently discovered, and since the expiration of said limitation. That said error was the fault of the defendant company. That the defendant company had, by its refusal to give to complainants said policy, or a copy thereof, or information of its contents, prevented them from sooner ascertaining said error; and that said provision was not of the essence of said contract, and that complainants were in no wise in default herein, other than by reason of the error and mistake of defendant company. The prayer was to reform the contract so it should read in the name of heirs of the estate of said Eudora O. Taylor, and same as reformed be enforced against defendant; also a prayer for general relief. The policy of insurance is stated to be for \$1,250, issued by defendant company in name of Eudora O. Taylor for one year from November 14, 1894, to November 14, 1895, insuring against loss by fire the building already referred to as the "Lemay Building" in Winter Park, Fla.; loss, if any, conditionally payable to Eliza Kimbrough, mortgagee; providing, among other things, that the policy should be void if the insured concealed or misrepresented any material fact or circumstance connected with such insurance, or if the interest of the insured in the property be not truly stated therein; that the company might cancel said policy by giving five days' notice of such cancellation and retaining only the pro rata premium; that immediate notice of loss should be given to the company in writing; that no suit or action on the policy should be sustained in any court of law or equity until after full compliance with all the requirements of the policy, nor unless commenced within 12 months next after the fire.

To the bill the defendant demurred on the following grounds: (1) That the case stated entitled complainants to no relief. (2) That

the person insured was not sole owner of the insured property, and had no interest therein whatever. (3) That said contract of insurance was wholly null and void. (4) That the bill did not show that defendant would have entered into a contract of insurance of the said property with any other person than said Eudora. (5) That a contract of insurance is a purely personal one; that to reform the contract as prayed, so as to indemnify others than the person contemplated, was not to reform, but to make a new contract. (6) That if, as alleged, the defendant's agent, when the contract was made, did not know or had forgotten that the person insured was then dead, and said Taylor was aware of such fact, then there was no uniting of minds as to the person insured or sought to be insured, and therefore no valid contract capable of reformation. (7) That if it was true "that said J. D. Taylor believed said Barnes then and there knew of the death of said Eudora, and relied upon such knowledge of her death and upon said agent's superior knowledge and ability as to the proper form of writing insurance policies, of which said Taylor was wholly ignorant, he, the said Taylor, in requesting the renewal of said insurance, did give to said Barnes no special instructions for the making out of said policy, and therefore by accident, inadvertence, and mistake of said Taylor and said Barnes, who it since appeared had no knowledge, or had forgotten said death of said Eudora, the said policy of insurance for the year 1893 on the described building was renewed in the name of the said Eudora Taylor, she being then dead, and not in the name of her estate or heirs, or of said J. D. Taylor as agent or trustee, as said Taylor intended it should be and supposed it had been until just before the bringing of this suit, he not having read said policy by accident and inadvertence,"—then said complainants show a mistake of facts arising from the negligence of said complainant Taylor when the means of knowledge were readily accessible, and the party complaining did not exercise the degree of diligence which may be fairly expected from a reasonable person, and that said contract is incapable of reformation. (8) That it does not appear that the writing sought to be reformed deviates from the understanding and intention of both parties to its execution. (9) If said contract was valid, and capable of reformation so as to speak of the time when made, then by its provisions no suit or action on it for any loss shall be sustained until after full compliance by the insured of all foregoing requirements, nor unless commenced within 12 months after the fire; and it appears from the allegations of the bill that more than 12 months elapsed after the fire before the commencement of the suit. (10) That there is a misjoinder of parties complainant.

Upon the filing of this demurrer the complainants amended their bill, which amendment charged that said Barnes, as agent of

said defendant, had actual knowledge of the death of said Eudora Taylor at the time of writing the said insurance policies of 1893 and 1894, but that at such time he (said Barnes) had forgotten such fact of her death, and for this reason made such policies in the name of Eudora Taylor, instead of in the name of the heirs of her estate, or of said J. D. Taylor as agent, trustee, or attorney, as such agent would have written the same but for such inadvertence and forgetfulness of said Barnes. Whereupon the defendant amended the seventh ground of its demurrer to conform to the amended allegations of the bill, making the same point therein of negligence on the part of J. D. Taylor as the cause of the error of said Barnes, and that said amended allegations showed negligence on the part of the complainants, and, as amended, applied the demurrer to the entire bill as amended. On the hearing this demurrer was sustained, and the complainants' bill dismissed, and from this decree the complainants have appealed to this court.

W. H. Jewell, for appellants. A. W. Cockrell & Son, for appellee.

TAYLOR, C. J. (after stating the facts). The circuit judge erred in sustaining the defendant's demurrer and in dismissing the bill. The allegations of the bill, if sustained by proof, make a case entitling the complainants to a recovery as prayed. That there could not properly be a recovery at law upon the contract of insurance in its present form as made to Eudora O. Taylor, deceased, she being dead at the time of its execution, without a reformation thereof in equity, is sustained by the authorities. *Sun Ins. Co. v. Greenville Building & Loan Ass'n*, 58 N. J. Law, 367, 33 Atl. 962; *Oliver v. Insurance Co.*, 2 Curt. 277, Fed. Cas. No. 10,498; *Insurance Co. v. Hoffheimer*, 46 Miss. 645; *Insurance Co. v. Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64; *Balen v. Insurance Co.*, 67 Mich. 179, 34 N. W. 654; *Insurance Co. v. Boyle*, 21 Ohio St. 119. The case, as made by the bill, entitles the complainants to a reformation of the policy. No specific instructions were given by J. D. Taylor, acting as the agent of the owners in procuring the insurance, as to whom the policy should be made; his sole instruction on that subject being that he desired the insurance renewed, and he relied upon the agent of the defendant company, who had been for years insuring the property, to prepare and execute a valid policy that would effectually bind the company and insure the property. The agent had knowledge of the fact that Eudora O. Taylor, the former owner of the property, was dead at the time of the issuance of the policy, yet from momentary forgetfulness of the fact at the time inadvertently made it out directly in her name, as previous policies on the same property issued by him had been so made. Indeed, the next preceding policy on the property issued by the same defendant company through this

same agent, that ran its full time and had expired, and for which the defendant received and retained the full premium, was likewise through inadvertence made directly to the said Eudora O. Taylor, she being dead at the time of its issuance. J. D. Taylor, the husband, acted all along as the agent for his wife, Eudora, during her life, in procuring the insurance of the property. He lived upon it with her and their children up to the time of her death, and afterwards continued to reside there with his children from the time of her death until its destruction by fire; there being no change in the occupancy, control, and possession thereof. The same agent of the same defendant had always prior to Eudora's death dealt personally with him in effecting insurance upon the property, so that there can be no just claim of objection on the part of the defendant company in making the contract of insurance as to the personnel of the owner or owners of the property. At the time of the issuance of the policy in question and of previous policies thereon the property was in the possession, control, and occupancy of the husband and father, J. D. Taylor, and of his children, and continued to remain so until its destruction by fire. The defendant's agent, with knowledge of these facts and of the death of Eudora, its former owner, and of the descent by law of the title and ownership of the property to her husband and children on her death, consented to renew the insurance thereof, and received and retained the money consideration for such insurance. Under these circumstances no other just or equitable construction can be placed upon the intention of the defendant company in making this contract of insurance than that its intention was to effectually and legally bind and obligate itself to pay to the legal owners of the property, whomsoever they might be, the sum of money contracted for in case of destruction by fire of the specified property. This intention it could, not legally or effectually carry out by making a void contract with a party deceased at the time of its execution, and it does not justly or equitably lie in its mouth, after the destruction of the property insured, and after its receipt and retention of the consideration paid to it for a valid and binding contract of insurance, to say that, "It is true I got your money, but I issued to you a void contract for it, by which I am not bound or obligated in any way." *Oliver v. Insurance Co.*, 2 Curt. 277, Fed. Cas. No. 10,408; *Cook v. Insurance Co.*, 60 Neb. 127, 82 N. W. 315; *Insurance Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Fitchner v. Association*, 108 Iowa, 276, 72 N. W. 530. And failure of the insured to read a policy, even where he had opportunity for so doing, does not amount to such laches on his part as will debar him from having such policy reformed for mistake therein. See last authority *supra*. The policy provided that no recovery should be had thereon unless suit thereon was brought within a year from the

destruction of the property, and the bill was filed subsequently to the expiration of this year, but the bill effectually avoids this bar by showing that the complainants, in ignorance of the mistake in the name of the insured in the policy, brought their suit at law within the year upon the policy, and at the trial of that suit for the first time discovered such mistake through the pleadings therein of the defendant company, by which they were forced to take a nonsuit in such action at law; and that they at once, upon such discovery, filed their bill for the double purpose of reformation of the policy and recovery thereon as reformed; that the defendant's agent, without their knowledge or consent, a few days before the destruction of the property by fire, obtained possession of the policy from a mortgagee of the property in whose possession it was, and unauthorizedly cancelled it without the knowledge or consent of the true beneficiaries of such policy, returning the then unearned pro rata of the premium to such mortgagee, who had no authority to receive it, and without giving the five-days notice of the intended cancellation of such policy as stipulated for in such policy, and that the defendant company withheld the possession of such policy thus obtained, and refused to deliver it, or a copy thereof, to complainants until after the suit at law thereon was begun, and withheld from complainants all information relative to the terms and conditions of such policy. Under these circumstances, if true, there was no bar by the limitation expressed in the policy. *Insurance Co. v. Phillips*, 41 O. C. A. 263, 102 Fed. 19; *Dougherty v. Insurance Co.*, 3 App. Div. 313, 38 N. Y. Supp. 258. The defendant company, by unconditionally denying any liability upon the policy waived the proofs of loss provided for in the policy. *Insurance Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835.

The attempted cancellation of the policy under the circumstances charged in the bill, if true, was a nullity, and did not release the defendant company from obligation to pay the subsequent loss.

There is no merit in the ground of the demurrer asserting a misjoinder of parties complainant. The bill shows that the policy of insurance in question was made payable to Eudora O. Taylor; loss, if any, conditionally payable to Eliza Kimbrough, a mortgagee. The bill shows also that the policy was for \$1,250, and the mortgage for only \$400. Under these circumstances the personal representative of the mortgagee, she being dead, was not only a proper, but a necessary, party complainant conjointly with the heirs at law of Eudora O. Taylor, deceased, and the decree in the case may adjust and provide for their respective interests in the recovery on the policy. *Williamson v. Insurance Co.*, 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906; *Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Proctor v. Insurance Co.*, 124 N. C. 265, 32 S. E. 716; *Insurance Co. v. Wolff*, 23 Ind.

App. 549, 54 N. E. 772; *Ennis v. Insurance Co.*, 3 Bosw. 516; *Lasher v. Insurance Co.*, 18 Hun, 98; *Insurance Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180.

The decree of the court below is reversed, with directions to overrule the defendant's demurrer to the bill, and for such further proceedings in the cause as may be conformable to equity practice.

SPRINGFIELD CO. v. ELY.

(Supreme Court of Florida. May 27, 1902.)

HUSBAND AND WIFE — WIFE'S SEPARATE PROPERTY — LIABILITY FOR HUSBAND'S DEBTS—AUTHORITY TO PLEDGE—WRITTEN CONSENT OF WIFE — ENFORCEMENT OF PLEDGE—PARTIES—EQUITY—AMENDMENT OF BILL—ANSWER UNDER OATH—WAIVER—DEMURRER.

1. Under section 1, art. 11, Const. 1885, the consent of a married woman, to be effective to render her separate statutory property liable for her husband's debts, must be in writing, and must be executed according to the law respecting conveyances by married women appropriate for the conveyance of the class of property to which the consent relates.

2. A married woman gave her husband written authority to deposit as collateral security for a certain specified debt to be contracted by her husband for his benefit certain certificates of stock which were her separate statutory property, and the husband, in pursuance of such authority, delivered such certificates and pledged same to the creditor as collateral security for the payment of such debt by an instrument in writing executed by him. Subsequently the husband and wife were divorced, and thereafter the wife and the creditor by mutual consent substituted in lieu of the certificates so deposited and pledged other certificates of stock belonging to her. *Held*, that the wife had given her consent to render liable for her husband's debt the stock originally pledged in accordance with the constitution, and that the creditor was entitled to subject the substituted certificates of stock to payment of his debt.

3. The fact that a party authorized to pledge another's certificates of stock for payment of a specific debt due by him also pledges same for other debts due by him to the creditor does not affect the validity of the pledge for the authorized debt.

4. A creditor seeking in equity to subject to a debt due by him by one party property of another pledged for its payment is not required to make the debtor a party defendant, where the latter is beyond the jurisdiction of the court, not amenable to its process, and where no relief is prayed against him.

5. Where a sworn answer has been filed in response to a demand made therefor in an original bill, such bill cannot subsequently be amended, at least as to the same matters set up in the original bill, so as to waive a sworn answer.

6. The fact that an amended bill undertakes to waive an answer under oath, while the original bill required a sworn answer, is not proper ground for demurrer. The proper remedy is by motion to strike the attempted waiver if the amended bill has been filed, or the court may require such waiver to be stricken before permitting the amended bill to be filed.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; Rhydon M. Call, Judge.

Bill by the Springfield Company against Mary C. Ely. From a decree for defendant, complainant appeals. Reversed.

On June 19, 1897, the appellant filed its original bill of complaint against the appellee in the circuit court of Duval county, to which appellee filed her answer, incorporating therein certain specific grounds of demurrer. There was a separate preliminary hearing of the cause upon the bill and grounds of demurrer incorporated in the answer, whereupon the court made an order adjudging that the demurrer be sustained, and at the same time an order was made giving the complainant leave to file an amended bill, as it might be advised. The original bill required answer under oath, but the amended bill tendered expressly waived a sworn answer. Defendant objected to so much of the amended bill as waived answer under oath on the ground that the original bill required a sworn answer, and such an answer had been filed; but the court overruled the objection and permitted the amended bill to be filed as tendered.

The amended bill alleged, in substance, that on the 19th day of November, 1892, the defendant, Mary C. Ely, was then and there the lawful wife of one Henry S. Ely, and was living with her said husband in Jacksonville, Fla.; that on or about said date the said Henry S. Ely proposed to the Southern Savings & Trust Company, a corporation engaged in banking business in Jacksonville, to give his note to said corporation for \$5,865.94 in consideration of the transfer to him of certain notes and drafts then held by it, and its retaining him in employment as its secretary and assistant treasurer, and further proposed to secure said note by pledging to said corporation certificates Nos. 31 and 32, for 15 shares each, and Nos. 38, 39, and 66, for 10 shares each, of the capital stock of the said Southern Savings & Trust Company; that the said proposition was then and there accepted, and thereupon Henry S. Ely made, executed, and delivered to said corporation an instrument in writing in and by which he promised to pay on demand to said corporation, or order, said sum of \$5,865.94; and in and by said instrument of writing he mortgaged and pledged to said corporation, to secure the said indebtedness, the certificates of stock before mentioned. Said instrument was made a part of the bill, and is as follows:

"\$5,865.94. B. D. 662. Due 11/19/92

"Jacksonville, Florida, Nov. 19th, 1892.

"On demand, after date, for value received, I promise to pay the Southern Savings & Trust Company, or order, at said bank, fifty-eight hundred and sixty-five $\frac{94}{100}$ dollars, having deposited with said bank, as collateral security for payment of this or any other liability or liabilities of — to said bank, due or to become due, or which may be hereafter contracted, the following property, viz., certificates No. 31 & 32, for 15 shares each, and certificates No. 38, 39, and 66, for ten shares each, of the capital stock of the So. Savings & Trust Co., with full power and authority to said bank to sell, assign, transfer,

and deliver the whole or any part thereof, or any substitutes therefor, or any additions thereto, at any brokers' board, or at public or private sale, at the option of said bank, or its president or treasurer, or its or their or either of their assigns, on the nonperformance of this promise, or the nonpayment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice, which are hereby expressly waived; and upon such sale the holder hereof may purchase the whole or any part of such securities discharged from any right of exemption.

"It is also agreed that the present value of securities herewith referred to is \$7,000.00, and that, if there should be any change or depreciation in market or other value of the same prior to maturity of this note, the undersigned shall furnish, upon demand made personally or by mail or telegraph to the address of the undersigned, given below, such additional security as will be satisfactory to said bank, or its president or treasurer; and, in case of failure so to do, forthwith then in that case the said obligation shall be due and payable, and the whole or any part or parts of said securities may be sold as hereinbefore provided, and, after deducting all legal or other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either, or all of said liabilities to said bank, or its assigns, as its president or treasurer, or its or their or either of their assigns, shall deem proper, returning the overplus to the undersigned.

"And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.
Henry S. Ely.

"Address: —."

Indorsed: "Pay to the Springfield Co., or order.

"Southern Savings & Trust Co.

"By S. B. Hubbard, Its President."

It was further alleged that the stock so mortgaged and pledged stood in the name of Henry S. Ely, trustee, but the defendant, Mary C. Ely, was the beneficial owner thereof, it being, as complainant was informed, then the separate property of the said Mary C. Ely, under the constitution and laws of Florida; that upon said 19th day of November, 1892, she executed an instrument in writing in and by which she consented that said Henry S. Ely might use said certificates of stock as collateral security for his note for \$5,865.94, and said instrument in writing was delivered to said Southern Savings & Trust Company with the writing above mentioned, and as a part of the transaction. Said instrument was made a part of the bill, and is as follows:

"Jacksonville, Fla., Nov. 19th, 1892.

"I hereby authorize Henry S. Ely to deposit as collateral security for a note of \$5,865.94, payable on demand, certificates Nos. 81 for fifteen shares, No. 82 for fifteen shares, No.

85 for ten shares, No. 38 for ten shares, No. 89 for ten shares, and No. 66 for ten shares, respectively, of the capital stock of the Southern Savings & Trust Company. Said shares standing in the name of Henry S. Ely, trustee, but I being the beneficiary thereof.

"Mary C. Ely."

It was further alleged that upon the delivery of said instruments, denominated, respectively, Exhibits "A" and "B," to said Southern Savings & Trust Company, it did transfer and deliver to said Henry S. Ely said notes and drafts, and did retain said Ely in its employ as secretary and assistant treasurer; that afterwards, to wit, on the 28th of December, 1894, for a valuable consideration, said Exhibit A was assigned to complainant (the Springfield Company), and said Exhibits A and B delivered to it, and that it was the sole owner thereof.

The bill further alleged that on February 26, 1894, the bonds of matrimony previously existing between Henry S. and Mary C. Ely were dissolved by the decree of the circuit court of Duval county; that afterwards, to wit, on March 27, 1895, under and in pursuance of an agreement entered into between complainant, defendant, and the Southern Savings & Trust Company, the certificates of stock mentioned in Exhibits A and B were surrendered up and canceled on the books of the corporation, and in lieu thereof there was issued to and in the name of the said Mary C. Ely by the said Southern Savings & Trust Company certificate No. 84 for 23 shares of its capital stock, and the said Springfield Company issued to and in the name of said Mary C. Ely certificate No. 117 for 47 shares of its capital stock, and thereupon the said Mary C. Ely executed assignments in blank indorsed on the back of each of said certificates, and delivered the same to the proper officers of your orator, to be held in lieu of the certificates of stock mentioned in Exhibit A and in Exhibit B as surety for the indebtedness therein mentioned, in place of the surrendered certificates of stock. Copies of the certificates, with their indorsements, were made a part of the bill.

It was then alleged that nothing had ever been paid on the indebtedness mentioned in and evidenced by Exhibit A; that there had been a demand for payment on May 26, 1897, at the place where Exhibit A was payable; and that Henry S. Ely was beyond the limits of the state of Florida, and out of the jurisdiction of the court, and could not be reached by its process.

The bill prayed that the stock might be sold to satisfy the amount of indebtedness found to be due upon an accounting.

Defendant demurred to the amended bill, assigning substantially the following grounds of demurrer: (1) That complainant had not made or stated a case entitling it to the relief prayed, or any relief; (2) that Henry S. Ely was a necessary party; (3) that the original

pledge was not evidenced by an instrument in writing executed according to the law respecting conveyances by married women; (4) that Henry S. Ely, in pledging the stock, exceeded the authority given him by the terms of the instrument executed by said Mary C. Ely; (5) that the lien sought to be enforced against the substituted certificate was the lien sought to be created on the original certificates, which was without force or effect; (6) that the original certificates, or copies thereof, were not filed with the bill; (7) that there was no consideration for the pledge of March 27, 1895; (8) that complainant had no valid lien or equity to be enforced; (9) that the amended bill sought to waive answer under oath, after an answer under oath had been put in to the original bill. Upon hearing of the demurrer it was sustained, and the bill dismissed, and from that decree the appeal is prosecuted.

Wm. B. Young, for appellant. A. W. Cockrell & Son, for appellee.

PER CURIAM. This cause was referred by the court to its commissioners for investigation, who recommend that the judgment of the circuit court be reversed.

I. The first, third, fifth, seventh, and eighth grounds of demurrer may be considered together, and they raise the question whether, under the facts stated in the bill, the complainant is entitled to subject to the payment of the debt due it by Henry S. Ely the certificates of stock issued to defendant March 27, 1895. If the complainant possessed the right in equity to subject to the payment of that debt the stock in the Southern Savings & Trust Company which had been attempted to be pledged to secure such debt on November 19, 1892, it is not, and we think cannot be successfully, denied that under the allegations of the bill the complainant is entitled to subject to the payment of that debt the certificates of stock issued March 27, 1895, in substitution for the certificates originally held, which were assigned in blank, and delivered by Mary C. Ely, then an unmarried woman, to complainant, to be held in lieu of such original certificates and in their stead. The principal contention made here under these grounds of the demurrer is that on November 19, 1892, Mary C. Ely was the wife of the debtor, Henry S. Ely; that the certificates of stock then attempted to be pledged were her separate statutory property, and that under section 1, art. 11, Const. 1885, the wife's property could not be made liable for her husband's debt except in pursuance of her consent given by some instrument in writing executed and acknowledged according to the law respecting conveyances of real property by married women; and that the instrument in writing executed by Mary C. Ely on that date, not being under seal, or attended by witnesses, or acknowledged, or executed by her husband, was insufficient, under that section of

the constitution, to bind her separate statutory property, the certificates of stock, for payment of her husband's debt. That section reads as follows: "All property, real and personal, of a wife owned by her before marriage or lawfully acquired afterward by gift, devise, bequest, descent or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent, given by some instrument in writing executed according to the law respecting conveyances by married women." This section does not in terms require the instrument in writing to be a deed or mortgage, nor does it require the husband to join in its execution, or give his consent to its execution by the wife, nor does it in terms require the instrument to be sealed, witnessed, or acknowledged. It simply requires the wife's consent to be given by some instrument in writing executed according to the law respecting conveyances by married women. At the time of the adoption of the constitution married women could convey their separate statutory real property by deed under seal attested and acknowledged as required by the statute, provided the husband joined in such conveyance. The only provision of law specially applicable to the conveyance of married women's separate statutory personal property was that the husband and wife should join in all sales, transfers, and conveyances of the property of the wife. No separate acknowledgment of the wife was required; nor was the conveyance required to be witnessed or sealed, or even to be in writing, unless, perhaps, in cases where such formalities might be required by law for conveyances of that species of personal property by persons generally. In *Tunno v. Robert*, 16 Fla. 733, it was held that, where the wife conveyed her separate statutory personal property by a written instrument, the statute did not require the husband to join in the execution of that written instrument, but that his assent in writing to the transfer by the wife was sufficient. The statute there construed is still in force. The section of the constitution under consideration is framed with reference to the laws respecting conveyances by married women of personal as well as real property, for both classes of property are expressly mentioned. The word "conveyance" is used in a broad sense, including conveyances of both real and personal property. The convention in adopting and the people in ratifying that instrument, it must be assumed, had in mind the fact that certain formalities were required for the conveyance of married women's real property that were not required for the conveyance of their personal property, and that the legislature possessed the power to change or alter the forms of and requisites for the conveyance of either or both at pleasure. The section under consideration, though dealing with both classes of property, and with the liability of both classes of property for the husband's debts, simply requires the consent

of the wife to be given by some instrument in writing; the instrument to be executed according to the law respecting conveyances by married women, whatever that law should be at the time the consent is given. The proper interpretation of the constitution requires us to hold that the consent of the wife, to be effective to render liable her separate statutory property to her husband's debts, must be in writing, and must be executed according to the law respecting conveyances by married women appropriate to the conveyance of the class of property to which the consent relates; and that as to the certificates of stock owned by Mary C. Ely on November 19, 1892, her written consent was not required by the constitution, or by any law then in force, to be sealed, attested, or acknowledged to render it effective. It is insisted, however, that her husband did not execute the written consent given by Mary C. Ely, and that this was required by the statute relating to conveyances of personal property by married women. Whether the constitution contemplates that the husband shall join in the execution of the written consent of the wife in order that such consent may be "executed" according to the law respecting conveyances by married women, even where the statute requires the husband to join in the execution of his wife's conveyances, is a question which we shall not now determine; but, if it does, it certainly contemplates that such joinder shall be in such form or manner only as will satisfy the statute, and, as the parties in the present case have submitted it upon the theory that the husband's joinder is necessary, we shall consider it from that standpoint. As already pointed out, this court, in *Tunno v. Robert*, supra, has held that the husband, in order to "join in the sale, transfer, or conveyance" of his wife's property, within the meaning of the statute, need not execute the written transfer or conveyance with her when it relates to personal property, but may evidence his assent to her conveyance by a separate written instrument. This was done in the present case by his written pledge of the stock under the authority given by the written consent of the wife. We are therefore of opinion that the written instruments executed by defendant and her husband were sufficient, under the constitution, to render liable for Henry S. Ely's debt the original stock pledged to secure it, and that the substituted stock is likewise liable for that debt. It is claimed, however, that Henry S. Ely exceeded his authority in pledging the original stock, in that he pledged it not only for the \$5,865.94 debt mentioned in the written consent of his wife, but also for the payment of any other liability of Henry S. Ely to the bank due or to become due, or thereafter contracted. If complainant was attempting to enforce liability for any

debt other than the one specifically mentioned in the written consent of defendant, the question suggested would become very material; but such is not the case. The fact that Henry S. Ely exceeded his authority by pledging the stock for other debts in addition to the one he was specifically authorized to pledge it for does not in any manner affect the right to charge the stock for the payment of the debt he was authorized to and did pledge it for.

II. Another ground of the demurrer insists that Henry S. Ely is a necessary party defendant. The property sought to be charged now stands in the name of the defendant, and not in the name of Henry S. Ely, trustee, and before this property was substituted for that originally pledged Henry S. Ely had ceased to be the husband of the defendant. He is alleged to be beyond the jurisdiction of the court, and not amenable to its process, and no relief is prayed against him. While he might be a proper party defendant, he is not an indispensable one. It is not essential that a judgment be first recovered against him on the debt he owes, in order to subject to payment of that debt the stock pledged, because his failure to pay the debt gave complainant a right to subject it immediately. Under these circumstances, Henry S. Ely being beyond the reach of the process of the court, complainant was not required to make him a party in order to obtain relief by subjecting defendant's certificates of stock to payment of the debt for which it is liable. Story, Eq. Pl. § 78 et seq.

III. It is not insisted in argument by appellee that the failure to file with the bill the original certificates of stock or copies thereof, made the basis of one ground of the demurrer, renders the bill demurrable, and the court thinks it does not.

IV. The fact that the amended bill waived an answer under oath, while the original bill required a sworn answer, is not a proper ground of demurrer. Where, however, a sworn answer has been filed in response to the demand made therefor in an original bill, such bill cannot properly be amended, at least as to the same matters set up in the original bill, so as to waive a sworn answer; and upon motion made to strike the attempted waiver from such an amended bill the court should grant it, or it may require such waiver in a proposed amended bill of that character to be stricken before permitting it to be filed. *Burra v. Looker*, 4 Paige, 227; *Throckmorton v. Throckmorton*, 86 Va. 708, 11 S. E. 280; *Walker v. Campbell*, 5 Lea, 354; *Wylder v. Crane*, 53 Ill. 490; *Bingham v. Yeomans*, 10 Cush. 58.

The decree of the circuit court is reversed, with directions to overrule the demurrer, and for such further proceedings as may be consistent with equity and this opinion.

LANE v. STATE.

(Supreme Court of Florida. April 30, 1902.)

JUSTIFIABLE HOMICIDE—SELF-DEFENSE—APPARENT DANGER—CIRCUMSTANCES JUSTIFYING BELIEF—INSTRUCTION—REASONABLE DOUBT—THREATS BY DECEASED—PROPRIETY OF INSTRUCTION.

1. A homicide is justifiable, under the laws of Florida, when committed in the lawful defense of a person, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished. The danger need not be actual, but may be apparent, and the slayer is to judge from the circumstances by which he is surrounded and as they appear to him. If he acts upon appearances, he does so at his peril, and can justify the killing only where the circumstances are such as to induce a reasonably cautious man to believe that the killing was necessary to save his own life or protect him from great personal injury; but, unless a reasonably cautious man would entertain the same belief from the same appearances, of which the jury are the ultimate judges, it will be no defense, even though the belief of danger was honest.

2. The belief of the accused as to the apparent necessity to kill in order to save his own life or protect him from great personal injury must be based upon facts and circumstances justifying such belief, and, where the evidence authorizes the submission of this question to the jury, the belief of the accused is material, and it is error to refuse to permit him who is permitted by statute to become a witness in his own behalf to testify to his belief based on such facts and circumstances. Carter, J., dissenting.

3. The court instructed the jury that: "Before a person can avail himself of the defense that he used a deadly weapon in defense of his life, and be justified, he must satisfy the jury that the defense was necessary at the time, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger." Held to be erroneous. (a) It imposed upon the accused the duty of satisfying the jury that the defense was necessary; whereas, if the evidence raises a reasonable doubt it will be sufficient. (b) Though an actual necessity to kill did not exist, yet if the circumstances were such as to induce a reasonably cautious man to believe his life to be in imminent danger, or that he was in imminent danger of receiving great personal injury, it will be sufficient.

4. In determining the correctness of charges the court should consider them as a whole, but, where a special charge in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed.

5. The charge set out in the third headnote being erroneous, and embodying the specific view that, if a deadly weapon was used, the accused must satisfy the jury that the killing was necessary to protect life, is not cured by other charges given in the case. Carter, J., dissenting.

6. Where the evidence on the part of the state affords no basis for the introduction of threats on the part of the deceased, but that produced for the defense shows such action or demonstration on his part, at the time of the killing, as to authorize their introduction, and they are admitted, it is not accurate for the

court to instruct the jury that if they find there was no evidence tending to show that the deceased had, at the time of the killing, in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration of attack towards the accomplishment of his threats, then they could not take into consideration any threats made prior to the killing, and especially when they were not communicated to the accused. The threats having been admitted on the basis of the overt acts shown by the defense, the jury should not be told to disregard them if they find there is no evidence of such overt acts, but the rejection of the threats should be made to depend upon whether the jury believed such evidence on the part of the defense.

(Syllabus by the Court.)

Error to circuit court, Sumter county; William S. Bullock, Judge.

William J. Lane was convicted of murder, and brings error. Reversed.

R. W. Davis, R. A. Burford, and W. F. Himes, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted at the fall term, A. D. 1901, of the circuit court for Sumter county, for the murder of George S. Offerman, and his trial resulted in a conviction of murder in the second degree. A writ of error was sued out to review the judgment and proceedings of the trial court, and numerous assignments of error are made. After a careful consideration of the entire record, the court is of the opinion that the judgment must be reversed for the reasons hereinafter stated, and the conclusions on these points make it unnecessary to specifically consider assignments as to which we find no error, and some relating to irregularities in the ordering, drawing, and summoning of petit jurors that need not necessarily arise again.

The trial of the accused occurred the second week of the court, and in the morning of a day of the first week the court ordered a venire to issue for 12 men drawn from the regular jury box to serve as petit jurors for the second week of the court, and also a special venire of 88 men, from which to complete a jury in the case against the accused. The 88 men were also drawn from the jury box. An irregularity occurred in the drawing of the jury, and in the afternoon of the same day, and in the absence of the accused from the courtroom, the court amended the order for the drawing made in the forenoon, and also ordered an additional special venire for jurors to serve in the case. The irregularity in the drawing of the jury need not occur in another trial, and no further reference to the assignments on this point will be made, except to state, without deciding whether the irregularity was sufficient to cause a reversal, or whether the presence of the accused in cases of felony is indispensable at the ordering and drawing of a special venire in his case, that it is always the safest course to have the accused personally present when the

1. See Homicide, vol. 26, Cent. Dig. §§ 155, 156, 158, 159, 161.

ordering or drawing of a special venire is made.

The accused was bookkeeper and in charge of a store run in connection with a sawmill at the place where the homicide occurred. In detailing as a witness in his own behalf the circumstances of the homicide, the accused testified that: "Mr. Offerman came in, and called for his check, and, when giving it, gave out others to other parties. And in a short time he came to the place where I gave them out, and said his check was wrong. I took his check, and looked at it, referred it to my office book, and saw it was correct there. Then went to the time book, which was turned in by Mr. Steadman, and compared them. Found them all to be the same. In the meantime he came around in the office where I was, and said the check was not right, and I explained it to him, showing where it was, according to the time that had been turned in to me. He said, 'All right, if the check is all right.' He said it seemed that I wanted to kick up some disturbance about it. I told him 'No,' that the check was right according to the time I had received from Mr. Steadman, and I could not make it out otherwise. Then I told him I did not care to have any further talk and trouble about the matter, and to get out of the office. He hesitated a few minutes. I slightly pushed him with my left hand, and told him to get out of the office, and go on and hush; that I did not want any disturbance at all. He said he would get out of the office, and did so very slowly after I pushed him. In the meantime he was saying it was me that wanted to kick up a row. I told him, after replying to that, that I did not want to kick up any row; to go on and hush; that I had asked him as a gentleman to get out. There was some words—oaths—passed by each of us. After the talk, I had ordered him out. I had asked him to hush; to get out. He then said he would get out if I would. There were some other oaths used by each one of us, and he was walking up and down the counter outside of the office. It hushed for a few minutes, a short time. I do not know how many minutes; only a short time. He commenced talking again about his check; it was not he that wanted to raise the disturbance,—'wanted to raise hell,' I believe, is the way he expressed himself. Then I stepped up, and said: 'No, I don't want to raise no hell. I had asked you to get out of the office as a gentleman. Go on out, Mr. Offerman. I don't want to have any disturbance.' He said he would get out, but did not leave. He walked then backward and forward up the counter. Then I cursed, and told him to go out. He turned, and cursed, and started towards me. I was standing at the desk in my office, where I had been at work after giving out the checks. Seeing him make a start towards me, and both of us using such words as we did,—we did not curse each other, but they were curse words by both of us, which, of course, were very

hard feelings between us,—seeing him start towards me, and knowing that a hatchet and 'deer foot' were lying on the counter, which I knew he had been looking at, as his face was turned towards them quite a while, I turned to my drawer, where a pistol was, took it out, and fired, thinking that he was coming on me either to kill or may be beat me, I did not know which, but knowing that, if he got these weapons, that he would kill me, and I fired." He further stated that at the time he fired the deceased was "reaching over the counter, making his way towards the office," and he was "reaching over to where the hatchet and deer foot were lying," and that he was "coming towards the weapons and me at the same time." He further stated that the deceased appeared angry and excited, and advanced rapidly towards the office and the hatchet and deer foot lying on the counter. The deer foot is a piece of iron about an inch in diameter and about 12 or 16 inches long, with a little split in the end, used for pulling nails and prising open boxes. Either the deer foot or the hatchet is capable of producing death. The accused was in what is called the "office," which was formed by a small railing gate at the end of the counter and the extension of boxes used for a post office. The gate extended from the counter to the boxes, and the part behind the counter used as an office was next to the post office, and near the gate. The building in which this office was located was used as a storehouse, with counters on each side as you enter the end of the building. In answer to a question of which way he had of getting out of the office, the accused stated there were "two windows there, but both of the sash were down. I kept them down in order to keep people from coming out from other parts of the store. Heavy sash, both of them. The blinds were open, but the sash were down, and there was no way for me to get out only where Mr. Offerman was,—behind the counter or out of the gate." When the deceased was shot he was on the outside of the counter, near the gate that opened into the office.

The following question was propounded to the accused, viz.: "You say, Mr. Lane, that at the time you fired you believed, from Mr. Offerman's advancing with his hand extended, that he was going to seize one of these weapons, and you at that time fired because you believed he was going to take your life or beat you? I believe you said that?" The state attorney objected to the witness answering the question, upon the ground that it was incompetent for him to testify what his belief was at the time he fired; that he could only state what the deceased was doing. The court sustained the objection, and stated, in the presence of the jury, that the defendant could not testify as to his belief, to which said decision and ruling the counsel for defendant then excepted. He was then, by his counsel, asked to state what he did say on that line, and his reply was: "I said, seeing him ap-

proach this office and approaching these things on the counter,—hatchet and deer foot,—that I believed he was coming to either murder me or beat me, and I had no way of getting out or protecting myself, only the way in which I did it." He was further asked: "Mr. Lane, I am going to get you to state whether or not your belief on that point, or apprehension of danger, was a real, honest belief on your part." Again an objection was made on behalf of the state, on the ground that it was incompetent for the defendant to state in evidence his belief, or whether the same was genuine and real, at the time he fired; that such evidence would be only an opinion, and therefore inadmissible; that from the surrounding facts and circumstances the jury were to infer the defendant's belief, and whether the same was reasonable. The court sustained the objection, and an exception to the ruling was taken. The ruling of the court did not go to the form of the questions propounded, but was based upon the view that the defendant could not testify to his belief, as this was a question for the jury to ascertain from all the surrounding circumstances. If the ruling can be sustained, it must be upon the ground stated by the court, as no other objection upon which it can be sustained was interposed.

The ruling excluding from the jury the testimony of defendant that he believed, under the circumstances of the case, his life was in danger, or that he was in danger of receiving great personal injury, was erroneous. He had the right to testify as to his belief, and that it was genuine, not feigned, or a pretense. On the subject of self-defense our statute provides that a killing is justifiable when committed in the lawful defense of a person when there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished. Under this statute it has been repeatedly held by this court that the danger need not be actual, but may be apparent. The accused is to judge from the circumstances by which he is surrounded, and as they appear to him; but if he acts upon appearances, and takes life, he does it at his peril, and he cannot justify the killing unless there are circumstances which would induce a reasonably cautious man to believe that it was necessary to save his own life, or to save himself from great personal injury. *Smith v. State*, 25 Fla. 517, 6 South. 482; *Pinder v. Same*, 27 Fla. 370, 8 South. 837, 28 Am. St. Rep. 75; *Morrison v. Same*, 42 Fla. 149, 28 South. 97. The belief of the accused as to the apparent necessity to kill in order to save his own life or to protect himself from great personal injury is material, and this has been announced by this court in the cases of *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705, and *Wilson v. Same*, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654. The following is from the

Lovett Case, viz.: "The seventh charge was that, to excuse homicide, there must exist on the part of the slayer an actual necessity to kill in order to prevent the commission of a felony or great bodily harm, or a reasonable belief in his mind that such necessity exists. The objection made to it is that, if a ground for a reasonable belief existed, it was immaterial whether the defendant believed it or not, and that the attention of the jury should not have been drawn to the existence or non-existence of such ground, and not to the conviction of defendant's mind, except as to result from the presence or absence of such ground. If there is not an actual necessity to kill in order to save one's life or prevent great bodily harm, there must, to successfully invoke the plea of self-defense, be such an apparent necessity as would naturally cause a reasonably cautious or prudent man to believe that the necessity was actual, and acting under these circumstances, a defendant will be accredited by the jury with the belief that the danger was actual, and the killing will be held excusable. The law regards homicide committed under such circumstances of apparent danger as done under the impelling influence of a reasonable belief that the stated necessity exists, and therefore excuses the killing the same as if the necessity had been real, instead of merely apparent; but it does not regard the belief as immaterial. *Smith v. State*, 25 Fla. 517, 6 South. 482. If it did, the principle would be to justify homicide when the slayer does not feel that there was any necessity to kill." In the *Wilson Case* it is held that there must be both a belief and reasonable ground to believe. An abundant authority supports the view that the belief of the defendant is material, and that a defendant, when a competent witness, may testify as to its existence in good faith. *Com. v. Woodward*, 102 Mass. 155; *Wallace v. U. S.*, 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039; *Duncan v. State*, 84 Ind. 204; *Wohlford v. People*, 148 Ill. 296, 36 N. E. 107; *Taylor v. People*, 21 Colo. 426, 42 Pac. 652; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792. An accused in this state is made by statute a competent witness in his own behalf, and can, of course, testify to any material facts. The danger, however, must be imminent,—that is, immediate,—and the belief, to avail an accused, must be based upon such a state of facts as to justify a reasonably cautious person to apprehend a design to commit a felony, or do some great personal injury. In *Padgett v. State*, 40 Fla. 451, 24 South. 145, and in *Morrison v. Same*, supra, this court approved an instruction to the effect that, unless such belief of danger is reasonable,—that is, unless a reasonably cautious man would entertain the same belief from the same appearances,—it will be no defense, even though it was an honest belief of danger. The belief must, therefore, be based upon facts justifying it. The view of the Massachusetts court ex-

pressed in the case cited is as follows: "The proposition upon which this defense must rest, and which was in fact submitted to the jury, consisted of two branches,—one the reasonable cause; the other the actual apprehension or thought of defendant, and his purpose or intent. Both must exist, or neither will avail. In determining whether the evidence of an actual apprehension of bodily harm is admissible, the court cannot be governed by its own conclusions from the testimony as to the sufficiency of the proof of reasonable cause; but if there is any testimony which, if believed, would warrant the jury in finding that there was such reasonable cause, though it comes from the defendant alone, and is in conflict with all the other evidence in the case, it is sufficient to entitle the defendant to testify in support of the other branch of the proposition,—that he did in fact act under such an apprehension." The rule stated by the supreme court of the United States in the case cited is that, if the accused believed, and had reasonable ground for the belief, that he was in imminent danger of death or great bodily harm from the deceased at the moment he fired, and if that belief, founded on reasonable ground, might, in any view the jury could properly take of the circumstances surrounding the killing, have excused his act, or reduced the crime from murder to manslaughter, then it would be error to refuse to allow the accused to testify as to his belief based on the circumstances to which he testified. After a careful consideration of the circumstances attending the homicide in this case as testified to by the accused, we are of opinion that it was error for the court to rule that the accused could not testify as to his real belief based thereon. We do not express any opinion as to the credence the jury should give to his testimony in connection with the other evidence in the case, as this is a question for the jury. It appears from the statement made from defendant's testimony that he did state, without any objection being made thereto, that he believed his life was in danger, which idea was embodied in instructions given by the court to the jury; and on the cross-examination of the accused he was interrogated as to whether the facts stated by him were the only basis for such belief. If the ruling of the court in rejecting the proposed evidence constituted the only error in the case, we would hesitate about reversing the judgment on that account, in view of what the defendant did testify to on the point of belief. The ruling made, however, was error, and it should be avoided in the future.

The accused introduced evidence of good character as a peaceable citizen, and in rebuttal the court admitted some evidence as to specific acts of lawlessness by him. In view of the subsequent ruling of the court excluding such evidence from the considera-

tion of the jury, we do not deem it necessary to say anything on this point.

By a charge prepared and given by the court to the jury they were instructed that: "Before a person can avail himself of the defense that he used a deadly weapon in defense of his life, and be justified, he must satisfy the jury that the defense was necessary at the time, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger." This instruction was evidently copied from the eleventh headnote in the case of *Gladden v. State*, 12 Fla. 562. That case was decided in 1868, on common-law principles, before the statute on the subject of homicide was passed in that year. In *Dukes v. State*, 14 Fla. 499, decided in 1874, it was pointed out that the statute had made important changes as to the law of homicide, and several decisions have since been made in reference to such changes. In *Adams v. State*, 28 Fla. 511, 10 South. 106, decided in 1891, decisions rendered up to that time on changes made by the statute are referred to and attention called to them. In the case of *Hubbard v. State*, 37 Fla. 156, 20 South. 235, substantially the same charge as given in the present case was declared to be erroneous, and there can be no doubt that such an instruction, under our statute, is wrong. It is wrong for the two reasons given in the *Hubbard Case*, as well as another. It is a specific charge on the subject of self-defense, and imposes upon the defendant the duty of satisfying the jury that the defense was necessary. The jury need not be satisfied. If the evidence raises a reasonable doubt, it will be sufficient. Furthermore, if the circumstances are such as to authorize a reasonably cautious man to believe his life to be in imminent danger, or that he was in immediate danger of receiving great personal injury, it will suffice, though an actual necessity to kill does not exist. The charge also conveys the idea that, if a deadly weapon is used in defense of life, the accused must satisfy the jury that the killing was necessary to protect life, or to protect the slayer from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger. The statute justifies the killing when done under circumstances authorizing it to protect life or the slayer from great personal injury. The charge is clearly wrong; and, after mature reflection, we are of opinion that we cannot safely hold that its error was fully corrected by other instructions given, or that it was entirely harmless. The court charged on the different degrees of murder, and of what was manslaughter, and submitted to the jury what should be their verdict if they believed from the evidence certain hypothesized states of fact deducible from the evidence. In

charge No. 12 the jury was instructed as to the presumption of innocence in favor of the accused until he was proven guilty beyond a reasonable doubt, with an explanation of what was such doubt. The erroneous charge above referred to was numbered 14, and is special on the subject of self-defense, and of the use of a deadly weapon in defense of one's self. On the subject of whether the necessity must be real or apparent only, the court gave several instructions, expressing the view that, if the circumstances were such as to justify a reasonably cautious man to believe that his life was in immediate danger, or that he was about to receive great personal injury, he would be warranted in killing, though the necessity to do so did not in fact exist; but no direct reference was made in such instructions to the use of a deadly weapon, or to what extent the personal injury should go, and no reference to the sufficiency of the evidence in such a case as to a reasonable doubt. Some of the instructions in a general way directed the jury that defendant was presumed to be innocent until the evidence established his guilt beyond a reasonable doubt, but there was no specific instruction that, in case a person used a deadly weapon in defending himself, it will be sufficient if the evidence raises a reasonable doubt in favor of a lawful defense. In the case of *Hubbard v. State*, supra, the judgment was reversed for giving substantially the same charge, regardless of other general instructions in the case. *Murphy v. State*, 31 Fla. 166, 12 South. 453, is referred to in support of the ruling, and in that case the court instructed the jury that: "Where an alibi is set up, the burden of proof is on the defendant; but he is not bound to prove it beyond a reasonable doubt, and if, upon consideration of all the evidence in the case, you have a reasonable doubt that defendants, or either of them, was present when the crime was committed, they, or such of them as to whom the doubt applies, should be acquitted. The proof of an alibi must include and cover the entire time when the presence of the accused was required to commit the offense charged. The evidence to support it should be carefully considered, and must be such as to satisfy the jury that the crime could not have been committed by the person offering proof of the alibi." The court said: "In our judgment, the last sentence in the charge is erroneous, and calculated to qualify the correct rule announced above, in that the proof of an alibi is sufficient if it, considered in connection with all the testimony, raises a reasonable doubt as to the presence of the accused at the time of the commission of the crime." In the case of *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725, it was held that: "While it is true that instructions must be considered as a whole, and it is sufficient if, taken together, they state the law correctly, yet general instructions given cannot cure an error committed

in giving a specific instruction." It is the rule in this court that in determining the correctness of charges they must be considered as a whole; but where a special charge in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed. We do not see that we can safely affirm that the erroneous features of the specific charge in reference to the use of a deadly weapon in self-defense have been entirely cured and removed by other instructions given.

The court instructed the jury, at the request of the state, that: "If you believe from the evidence that there was no overt act by the deceased, and no evidence which at least tends to show that the deceased had at the time of the killing in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration of attack towards the accomplishment of his threats, some demonstration reasonably calculated to induce the belief that the execution of the threatened attack had actually commenced, then you cannot take into consideration any threats made prior to the meeting, and especially when they were not communicated to the accused." This charge is apparently extracted from the views announced by this court in the case of *Garner v. State*, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232, in stating the rule for the guidance of the trial court as to the admissibility of previous threats. In the present case the testimony on the part of the state did not apparently afford any foundation for the introduction of threats; but that introduced for the defense, shown by the stated evidence of the defendant, was the basis for the introduction of some threats made by the deceased not long before the killing. When there is no proper predicate for the introduction of threats, as explained in the *Garner Case*, they amount to nothing as evidence in the case, and should be excluded from the consideration of the jury. When they are admissible as dependent upon the commission of an overt act on the part of the deceased, there must be some evidence of the overt act; that is, there must be evidence which at least tends to show that the deceased had at the time of the killing in fact or apparently sought a conflict with the accused, or was actually or apparently making some demonstration of attack towards the accomplishment of his threat, or some demonstration reasonably calculated to induce the belief that the execution of the threatened attack had commenced. There must be at least apparently such a demonstration of an intention to execute immediately the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer great personal injury if he does not immediately take the life of his adversary. Under such circum-

stances threats are admissible, because they serve to explain the overt act or demonstration, and show the reasonableness of the defendant in believing himself to be in that danger which justifies the taking of life in self-defense. Where the theory of the prosecution and its testimony afford no basis for the introduction of threats, but the evidence for the defense does authorize their introduction, and they are admitted, it would not be error for the court to submit to the jury the view that, if they accepted the theory of the prosecution, to the exclusion of that of the defense, they should disregard the threats entirely; but where the threats are properly before the jury the court should be careful in submitting the question of their disregard as evidence. If a charge should accurately hypothesize the facts relied on by the defense as affording a basis for the use of threats as evidence, and submit the view that, if they were disbelieved, the threats might be rejected, where the counter testimony of the state was accepted, no harm could result. The charge given by the court asserts the view that, if there was no overt act by the deceased, and no evidence which at least tends to show that the deceased had at the time of the killing in fact or apparently sought a conflict, or was actually or apparently making some demonstration of attack towards the accomplishment of his threats, etc. The charge seems to submit that if there was no evidence on the point, not that if the jury disbelieved what had been introduced. The court had admitted the threats in evidence on the showing made for the defense, and the defendant had a right to have it considered in connection with such showing, without any intimation from the court that such evidence did not exist. If the court sees proper to charge for the state on the effect of the threats as evidence, what is said will enable it to adjust the charge to such state of facts as may arise in the trial. The charge given was followed by one for the accused on the same subject, and the two taken together afford, probably, no just ground for the complaint made by counsel for defendant against the one given at the instance of the state.

The judgment will be reversed, and a new trial awarded; and it is so ordered.

CARTER, J. (dissenting). Most lawyers devoting thoughtful consideration to the law of homicide in this state as embraced in our statute and decisions upon the subject will be forcibly impressed with the uncertainty of this law, and the difficulty of its administration. The law relating to this subject is of the highest importance, the penalties imposed by it the severest known to our criminal jurisprudence, and because of its importance it ought to be certain and definite, and not be clouded by the introduction of subtle and refined distinctions and theoretical impracticable qualifications, which can

neither be understood nor given practical application by juries. The statute itself is in many respects exceedingly indefinite and uncertain, so much so that a court in many cases can never feel that a particular construction given to it is the correct one. This court has sometimes felt that the statute was not designed for the purpose of remedying defects in the common-law relating to homicide, and of making definite and certain matters relating to that offense which were uncertain at common law, as many other courts have regarded similar statutes, but as creating statutory offenses, to be ascertained and prosecuted by reference to the statute alone, without invoking the aid of the common law upon the subject in its construction, and without reference to the common-law presumptions upon the subject of homicide, except as they might or might not be drawn and applied by the jury as presumptions of fact; while at other times the court has felt it proper to approve and apply to the law of homicide under the statute certain legal presumptions recognized by the common law relating to this offense. See *Adams v. State*, 28 Fla. 511, 10 South. 106, and the previous Florida cases referred to therein, as illustrating some of the rulings along this line. The statute relating to self-defense provides that homicide is justifiable "when committed in the lawful defense of such person when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished." The statute does not in terms make the defendant's belief of any fact an essential element of his right of self-defense, nor is the word "belief" used at all. But the court in several cases has held that the accused must believe, and have reasonable ground to believe, that his life was then in imminent danger, or that he was in imminent danger of great bodily injury, or he will not be justified. *Smith v. State*, 25 Fla. 517, 6 South. 482; *Wilson v. Same*, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654; *Lovett v. Same*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; *Ballard v. Same*, 31 Fla. 266, 12 South. 865. It is possible that by the common law the belief was an element in self-defense, and this element, recognized by our decisions as necessary under the statute, must, therefore, have been so found by construing the statute in connection with the common law. Perhaps the decision in this case will introduce a further qualification of the law of self-defense by requiring the defendant to show that his belief was a "real, honest" one, as one of the questions asked the defendant and excluded by the trial court was whether his belief or apprehension of danger was a "real, honest belief" on his part or not. In some jurisdictions the defendant's belief of imminent danger, when entertained without fault or carelessness on his part, is of primary importance; but under our statute a

reasonable ground for belief is the essence of the right to act in self-defense, and the belief of the accused, if necessary at all, is of secondary importance, and will be presumed to exist whenever reasonable ground is shown. This distinction should not be lost sight of in considering the decisions in other states upon the subject. It may be well to remark just here that this court has never held that defendant can testify to his belief, or intimated that testimony upon that subject is admissible, or that the belief would not be presumed in all cases where reasonable ground is shown. Our decisions up to this time seem to divide self-defense into two branches, viz., reasonable ground to believe, and belief based upon such reasonable ground. The reasonable ground can exist only where the defendant is surrounded by such circumstances that a reasonably prudent man, standing in defendant's shoes, knowing what he knew, seeing what he saw, and hearing what he heard, would be induced to believe or apprehend a design to commit a felony or to do some great personal injury, and that there was imminent danger of such design being accomplished; and, if the reasonable ground thus defined does not exist, self-defense cannot be invoked, even though the defendant had a belief, or a "real, honest" belief, that reasonable ground did exist, or that his person or life was then in imminent danger. *Wilson v. State*, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654; *Padgett v. Same*, 40 Fla. 451, text, 458, 24 South. 145; *Frank v. State*, 94 Wis. 211, 68 N. W. 657; *Perugi v. Same*, 104 Wis. 230, 80 N. W. 593, 78 Am. St. Rep. 865. I cite Wisconsin cases because the Wisconsin statute upon the subject of homicide is almost identical with our statute of 1888, which, though amended in some respects by our Revised Statutes, is still the basis of our law of homicide. It has also been held that, if the evidence upon the subject of self-defense in a case goes far enough to raise a reasonable doubt in the minds of the jury, it is sufficient for acquittal, whether the jury are satisfied upon the point or not. *Hubbard v. State*, 37 Fla. 156, 20 South. 235. Applying this rule to the two branches of the law of self-defense, it results that there need not in fact be reasonable ground to believe, as required by the statute, nor in fact a belief as required by our decisions, but that a reasonable doubt, whether or not a reasonable ground existed, coupled with a reasonable doubt whether or not defendant believed, will require acquittal; while, on the other hand, a finding that reasonable ground existed, but that defendant had no belief upon the subject,—having acted instinctively, without time for forming a belief,—must necessitate conviction; and hereafter, perhaps, in consequence of this decision, juries will be further mystified and confused by being required to determine whether there is a reasonable doubt as to the belief being "real and honest," and required

to convict persons having reasonable grounds to believe, and believing, in cases where the belief is not a "real and honest" one. It seems to me that the law upon the subject, just at this point, goes to seed, as it were, and is incapable of any further growth or higher development. It becomes too fine-spun and abstruse to be intelligently administered by courts and juries, and in my humble judgment the doctrine relating to the defendant's belief cannot be further extended along the lines pointed out in the previous decisions of this court without destroying its efficiency and vitality. I think we may safely hold, as was intimated in *Lovett's Case*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705, that, while the law does not regard the defendant's belief as immaterial, yet the law regards homicide committed under such circumstances as, under the statute, constitute reasonable ground to believe, as done under the impelling influence of a reasonable belief that the necessity exists, and therefore excuses the homicide the same as if the necessity had been real, instead of merely apparent; in other words, that, when reasonable ground is shown to exist, the law conclusively presumes the belief, and therefore evidence upon that subject is immaterial. This is evidently in keeping with the language of the statute, which does not make the belief an essential element to be proved upon the trial (*White v. Maxcy*, 64 Mo. 552; *State v. Gonce*, 87 Mo. 627); and I am not sure that a different rule obtained at common law. In this view it seems to me the court below ruled correctly in declining to permit the defendant to testify to his belief, or to state that he entertained a "real, honest" belief. I am also of opinion that the ruling was correct for another reason, viz., because there was no evidence showing reasonable ground for such a belief, and therefore the defendant's belief, under our decisions, was wholly immaterial. This question I will discuss more at length hereafter. I am also of opinion that, conceding the law to be that defendant had a right to testify to his belief, the error in rejecting the two questions propounded upon that subject was harmless, in view of the fact that defendant was during his examination permitted to state his belief, and the grounds upon which it was based, without objection, as is shown by the statement of defendant's testimony in the opinion of the court.

In respect to the fourteenth instruction given by the trial court it is, under recent decisions of this court, unquestionably erroneous, if considered alone, without reference to other instructions given; but I do not agree to the proposition that, when read in connection with the other instructions in the case, the jury could have been misled by it. The jury, we must assume, construed and applied it in connection with the other instructions, and those instructions fully secured to the defendant the right to an acquittal, if, from the evidence,

a reasonable doubt of his guilt appeared, or if he acted in lawful defense of himself when the danger was only apparent as well as when real. More than one specific instruction upon the subject of self-defense emphasized the fact that apparent danger was all that the law required, and in each of them the danger of great bodily harm, as well as danger to life, were fully recognized as elements in self-defense. By one instruction the jury were told that the law did not require the defendant to prove himself innocent, but that it required the prosecution to prove him guilty to the satisfaction of the jury beyond all reasonable doubt, and, unless this was done, defendant must be acquitted. Under my view of the matter, taking the entire charge of the court into consideration, the general language in the fourteenth instruction was fully explained and qualified by the other instructions, so that it did not and could not convey the broad meaning which, standing alone, it would naturally bear. The jury could not, under the entire charge, have supposed that the law required the defendant to satisfy them further than to produce in their minds a reasonable doubt, or that it required the danger to be real, or to be to life, as distinguished from great bodily harm, or great personal injury. I cannot procure my consent to a reversal of the judgment upon the supposed errors in this instruction, for to my mind those errors are entirely eliminated when the charge is taken as a whole. I am also of opinion that there was no testimony in this case, which, if true, would justify the defendant in his act on the ground of self-defense, and, therefore, that any error that may have been committed by the court in refusing to permit the defendant to testify as to his belief, or in giving charges upon the subject of self-defense, should not work a reversal of the judgment. Under our statute, as has been shown, there must be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and reasonable ground to apprehend imminent danger of such design being accomplished, in order to justify the accused. If this reasonable ground does not exist, his act cannot be justified, though he believed that the reasonable ground did exist, or that his life was in danger. If, therefore, the testimony in the case was such that upon no view of it could the jury lawfully find that such circumstances existed as would constitute reasonable ground,—that is, such as would induce a reasonably prudent man to believe that the deceased designed to commit a felony or to do some great personal injury, and, further, to believe that there was imminent danger of such design being accomplished,—there is no self-defense in the case, and, as no other defense was suggested by the evidence, the defendant could not lawfully have been acquitted, even though error in these respects had intervened. The proof is ample that defendant killed the deceased, and, if he did not act in self-defense, his act was

unlawful. Of course, the jury must ascertain the existence of the facts which go to make up a case of self-defense, but when the facts are ascertained the law declares whether such facts are sufficient to constitute self-defense. *Gladden v. State*, 12 Fla. 562; *Long v. State*, 52 Miss. 23. In more than one case this court has held as a matter of law that certain facts shown in evidence did not constitute self-defense, and has held that error in instructions given upon the subject of self-defense or in refusing instructions upon that subject in such cases should not work a reversal of the conviction. *Smith v. State*, 25 Fla. 517, 6 South. 432; *Ballard v. Same*, 31 Fla. 286, 12 South. 865; *Johnston v. Same*, 29 Fla. 568, 10 South. 688. There is no testimony, aside from the testimony of the defendant as a witness, tending to show any overt act on the part of the deceased. Two witnesses for the defense testified to threats,—one that about a week before the homicide deceased said he thought defendant did not like him; that, if defendant wanted a fuss, he could get it, and that deceased would shoot it out or cut it out with him; another, that a few minutes before the homicide deceased said he was going to see defendant about his check, and, if defendant did not make it right, he would go into the office and knock him out. Neither of these threats was communicated to defendant before the homicide. The defendant, as a witness, stated that the pistol he used was a self-cocking one; that the deceased never secured either the deer foot or the hatchet; that he stood at his desk when he fired, shooting over the lattice gate between him and the deceased; and that he was about 8 or 10 feet from deceased when he fired. The remainder of his testimony relating to the claim of self-defense is substantially stated in the opinion of the court. Under the circumstances detailed by this witness, in my judgment, there was no such state of affairs as would have induced a reasonably prudent man, situated as defendant was, to believe that his life was in imminent danger, or that he was in imminent danger of great personal injury. There had been no previous quarrels between the parties, and, though the deceased had made threats against the defendant, the latter did not know it. The deceased was unarmed when shot, therefore did not go prepared with a deadly weapon to execute his threats; and the defendant had no cause to suspect that deceased was armed, or designed to injure him, when the quarrel between them first began. The defendant, during the controversy about the check, gently pushed the deceased, requesting him to go out of the office. Deceased did go after some hesitation, after which the parties were cursing,—defendant in his office, deceased walking up and down the counter; but at no time did the deceased say to the defendant anything that indicated a present or future purpose to do him personal injury. Words increased, and excitement grew higher,

and finally, while deceased was walking up and down the counter, defendant cursed, and told him to go out. Deceased turned, cursed, and started toward defendant, advancing rapidly, in an angry and very excited manner, with his right hand extended over the railing of the counter, reaching over to where the deer foot and hatchet were lying; and defendant turned to the drawer of his desk, took out his pistol, and fired two shots in quick succession. Defendant turned to his drawer for the pistol when he saw deceased thus advancing, secured it, and fired before the deceased had succeeded in procuring either the deer foot or hatchet, if it can be said such was his purpose. Under the facts as I have stated them, it is not clear that deceased was really or apparently attempting to secure the deer foot or hatchet, but, admitting that he was, where is the fact or circumstance tending to show that he apparently proposed to use it instantly, or to show that he could apparently have used it effectively at the distance he was from the defendant? The law of self-defense does not ordinarily permit a deadly weapon to be used as a precautionary measure, before imminent danger arises, but only in cases where the design to do great personal injury is apparent, and where the danger of such design being accomplished is imminent. It seems to me that the utmost that can be claimed from the defendant's testimony is that there was apparently a design on the part of the deceased to procure a weapon, and apparently imminent danger of such design being accomplished; but these facts alone are insufficient to constitute self-defense. Had deceased actually procured the weapon, the defendant would not have been in imminent danger, for, with a self-cocking pistol in his hand, he could safely have waited until deceased manifested his supposed design by continuing to advance upon him in a threatening manner after securing the hatchet or deer foot, thus evidencing a purpose to assume a position where his weapon would be effective. It is not claimed that deceased manifested a purpose to secure the hatchet or deer foot and throw it at defendant, but rather the contrary, because defendant says he supposed deceased was "coming to either murder me or beat me." To my mind, the defendant, according to his own statement, acted too hastily, for with a self-cocking pistol in hand there was no necessity for him to act, or rather the danger to him was not apparently imminent until deceased had placed his hand upon the weapon he was apparently endeavoring to secure, and indicated by some word or act an intention to use it. The word "imminent" in the statute excludes the idea that defendant may act before there is really or apparently a pressing necessity therefor; and in this case no such necessity existed, according to his own statement. There being no reasonable ground for belief, the defendant's belief is entirely irrelevant, and the law

of self-defense does not apply to the facts of this case.

I have not attempted to determine the credibility of any testimony in the case, as it would not be proper to do so, but have considered as true everything in the evidence that tends to support the plea of self-defense, and my conclusion is that there is nowhere in the evidence a showing of reasonable ground for believing that defendant was in imminent danger when he fired the fatal shot.

I think this case can be disposed of without passing upon the question whether an accused must be personally present when a special venire for jurors to try his case is ordered or drawn; hence express no opinion upon that subject.

SHIPP v. NEW SOUTH BUILDING & LOAN ASS'N.

(Supreme Court of Mississippi. Oct 20, 1902.)

TRUSTEES—SUBSTITUTION—RECORD—DEED.

1. Laws 1896, p. 105, provides that sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor until the substitution appears of record in the office of the chancery clerk. A deed of trust conveying title, as trustee, to the treasurer (naming him) of the company to secure whose debt the deed of trust was given, and to his successors as trustee, recited that the title should vest in him only so long as he was such treasurer, and that any other person becoming the treasurer should thereupon ipso facto become the trustee. Another person, having been elected treasurer, conveyed the land to the company. No record was made of the substitution. Held that, even if the deed conveyed the title to the treasurer as such, whomsoever he might be, nevertheless a change in the treasurer would, under the statute, necessitate record thereof in the clerk's office in order that the new treasurer might pass title.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

"To be officially reported."

Action of ejectment, brought by the New South Building & Loan Association against Mrs. S. V. Shipp. From a verdict and judgment for plaintiff, defendant appeals. Reversed.

On the trial in the court below plaintiff introduced a deed from one Ginder to itself, and a deed of trust from one Page to Jules A. Blanc, its treasurer, as trustee, to secure a certain indebtedness to plaintiff. Plaintiff also proved that said Ginder had been duly elected treasurer of the New South Building & Loan Association to succeed Jules A. Blanc. The act of March 3, 1896 (Laws 1896, p. 105), provides that sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor until the substitution appear of record in the office of the chancery clerk.

S. A. Witherspoon, for appellant. A. S. Bozeman, for appellee.

WHITFIELD, C. J. The only question needing consideration is this: Was there any substitution of one trustee for another? It is conceded by counsel for the appellee that there was no record of the substitution of a trustee, as required by the act of March, 1896 (Laws 1896, p. 105). The language of the trust instrument in the granting part is as follows: "Said party of the first part hereby conveys and warrants unto the said Jules A. Blanc, party of the second part, as trustee, and to his successors as trustee, the following described real estate," etc. At the close of the instrument this clause occurs: "The said Jules A. Blanc, party of the second part, is the treasurer of the said New South Building and Loan Association, and he shall be and remain trustee under the provisions of this deed of trust, and the title shall be vested in him, only so long as he may be such treasurer. And whenever any other person shall become the treasurer of said association, such person shall thereupon ipso facto become the trustee herein, with the title of the said property herein described, for the purpose of the trust herein declared, fully vested in him, without any writing, deed, conveyance, formal or other appointment, with all the powers, duties, and privileges herein granted." Jules A. Blanc was treasurer when the deed was executed. Afterwards, on the 18th of January, 1898, Henry Glinder was elected treasurer by a resolution of the board of directors of the appellee corporation. The appellee did not have this resolution recorded in any way. It was merely spread upon the minutes of the corporation. Nor did the appellee in any way make any record of the substitution of the trustee. The appellee's counsel earnestly insists that the effect of the clause in the trust deed is to convey the legal title not to Blanc as an individual, but to the treasurer of the corporation, or whatever person might be treasurer at any time; and that an election as treasurer ipso facto made such newly elected treasurer trustee. Counsel for the appellant insists that the title was vested in Jules A. Blanc as trustee, and not as treasurer; in him as an individual, not as an officer. We do not think it necessary to do more than to say this: that if it were conceded that the legal title was vested in the treasurer of the corporation in so many words, each newly elected treasurer to become ipso facto also trustee, it is none the less true that each change in the treasurer is also a change or substitution in the person who is to become trustee. Manifestly, every new treasurer is a new person, and necessarily there is a change or a substitution in the trusteeship in every such change in the treasurer. One of the objects of the statute, as we have held, is to enable the intending purchaser to trace the title on the face of the record. This is a very wise object, but it would be wholly defeated, as to foreign corporations, if

a foreign corporation could, by a mere resolution spread only on its minutes, inaccessible to the outside public, substitute a new trustee. How could an intending purchaser know the name of the new trustee through whom the title is to come? Is he to be at the expense of traveling 500 or 1,000 miles to read the resolution, depending then upon the courtesy of the corporation as to whether it would be shown or not? It is the purpose of the statute, plainly, that the name of every substituted trustee shall appear upon the face of the record. It is a very wholesome regulation, and one easy to comply with; and if the corporation, through ignorance of the law, has suffered loss, that is merely one more of many instances in which the failure to know the law entails loss. We are inclined to the opinion that the effect of the language in the instrument is to vest the title in Blanc, not as an officer, but as an individual, and each succeeding treasurer as an individual; the title thus being vested not in the man as an officer, but in whatever person as an individual happens to be treasurer. We think the case of *Commissioners v. Walker*, 6 How. 185, 38 Am. Dec. 433, so holds; Judge Sharkey there saying: "The trust was not confided to the president and cashier as a part of their official duty, but it was so declared for the purpose of identifying the persons who should execute the trust; and no reason can be perceived why the state might not with equal propriety appoint one of its officers as trustee. To all these offices succession was an incident, and to the persons who should fill them for the time being the execution of the trust was confided, with a view to insure the execution, as it was not likely that anything more than a temporary vacancy would occur. It was a trust confided to persons who should fill certain offices, not as officers, but as individuals, and, as it was contemplated that the offices should be always filled, it was the more certain that the trust would be executed." Without reference, however, to this proposition, we think there can be no doubt that, even if the position of counsel for the appellee be correct, to wit, that the title was so vested in whoever was treasurer from time to time, there is, nevertheless, a change in the trustee, or a substitution of a new trustee, every time a new person is made treasurer. There is much force in the suggestion of counsel for appellant that, if a foreign corporation could be permitted to evade this statute by the election of a treasurer by mere resolution spread upon its minutes, in pursuance of a provision in the trust deed, and such election of treasurer ipso facto made the treasurer trustee, then a private person might provide in a trust deed that whenever he appointed an attorney or agent said attorney or agent should become trustee, etc., and thus there would be, in the case of a private person, no record of the substitution, and the statute would become

a dead letter. Manifestly, there is a change in the trustee—there is a substitution of a new trustee—with every change in the person who becomes treasurer, and it was the very purpose of the statute that there should be record of such substitution, as of all other substitutions of trustees. We reverse this case with the greatest reluctance on account of the manifest fraud which has been perpetrated upon the association. But the trouble at last goes back to the failure of the corporation to comply with the statute in a respect in which compliance was very easy.

Reversed and remanded.

HARVEY v. CLARK et al.

(Supreme Court of Mississippi. Oct. 20, 1902.)

TENANT HOLDING OVER—DISPOSSESSION— PROCEEDINGS—APPEAL—AFFIDAVIT OF DENIAL.

1. Code 1892, § 2557, provides that, on proceedings to dispossess a tenant holding over, the right of appeal shall exist as in cases of unlawful entry and detainer. Section 2552 provides that, on proceedings against a tenant holding over, he may, at or before the time appointed for showing cause, file an affidavit denying the facts on which the summons was issued, which matters may be tried by the magistrate. Section 81 provides that, on appeal in unlawful entry and detainer, the case shall be tried anew. Held, that where, in proceedings to dispossess a tenant for holding over, he appealed, it was error not to allow him to file in the circuit court, for the first time, the affidavit provided for in section 2552.

Appeal from circuit court, Bolivar county; F. E. Larkin, Judge.

"To be officially reported."

Action by Fred Clark and others against Simon Harvey. From a judgment affirming a judgment of a justice in favor of plaintiffs, defendant appeals. Reversed.

W. A. Percy, for appellant. Sillers & Owen, for appellees.

TERRAL, J. Fred Clark and others, as landlords, under sections 2547-2557, Code 1892, instituted a special proceeding against Harvey, as their tenant, for holding over after the expiration of his term, and without their permission. The plaintiffs below had a judgment by default, and Harvey appealed. In the circuit court, Harvey offered to make an affidavit denying the facts upon which the summons was issued, as required under section 2552, which offer the court refused, because not made on or before the return day of the summons before the justice of the peace, and gave final judgment against Harvey to remove him from the premises.

We think Harvey should have been permitted to traverse in the circuit court the grounds of the charge against him, and to have made his defense. In cases of alleged holding over, like this, the right of appeal is secured by section 2557 in such manner as it exists in cases of unlawful entry and detainer; and section 81, Code 1892, provides

that an unlawful entry and detainer case upon appeal shall be tried anew on its merits. It is a sound and approved rule of construction that, when the law gives a right to any one, it impliedly grants all the incidental rights or means by which such right is made effective. 12 Coke, 131. The grant of a new trial upon the merits of the case necessarily includes the incidental right of making up an issue for trial. In the precise case before us the statute secures to the tenant an appeal from the judgment of the justice of the peace, and expressly declares that such appeal shall be tried anew upon its merits; and yet how vain and nugatory would be the appeal, and the right of a trial thereon upon the merits of the case, if the tenant should be denied in the circuit court the privilege of traversing the landlord's complaint so as to form an issue for trial! For it is a saying of the ancient sages of jurisprudence that the law never does a vain or useless thing. When, therefore, it gives an appeal, with a new trial upon the merits, it necessarily gives by implication to the tenant the necessary and included right of making up the issue for trial. But it is said that this is a special proceeding, unknown to the common law, and should be strictly construed. Certainly so, but that does not affect the power and duty of the court to see that a proper issue is made up for trial. In all cases the circuit court has large discretion to mold the proceedings before it so as to effect justice between the parties, and this discretion in special proceedings is coextensive with the exercise of like powers and duties in other cases.

We think it was error that the circuit court denied the tenant the right of making in the circuit court for the first time a denial on oath of the landlord's complaint, and for this cause the judgment is reversed and the case remanded. Reversed and remanded.

AMERICAN FREEHOLD MORTG. CO. OF LONDON, ENGLAND, Limited, v. BROWER.

(Supreme Court of Mississippi. Oct. 20, 1902.)

CORPORATIONS—STOCKHOLDER'S STATUTORY LIABILITY—DEFENSE—EVIDENCE.

1. A stockholder of an insolvent corporation, in an action by judgment creditor of the corporation to recover the stockholder's statutory liability, pleaded that he owned, by assignment, a judgment obtained by a third party against the corporation for an amount equal to the statutory liability, and showed that he had obtained the assignment long before the commencement of this action; that he had paid therefor the amount of his liability; that at the time he took a written assignment, which was lost; and that a duplicate had been made after the bringing of this action. The assignment was acknowledged by such third party, but the certificate showed that it was taken after the commencement of the action. Held, that the court properly directed a verdict for defendant.

Appeal from circuit court, Grenada county; W. F. Stevens, Judge.

Action by the American Freehold Mortgage Company, Limited, of London, England, against Abram G. Brower. From a judgment for defendant, plaintiff appeals. Affirmed.

H. R. Boyd and Perkins & Gilhan, for appellant. R. Horton, for appellee.

CALHOON, J. We do not decide upon the propriety of any ruling of the court up to the peremptory instruction to find for the defendant, Brower. There is a case presented by the evidence wholly unaffected by any of the previous rulings, and we are to say whether the peremptory charge was warranted upon that. This lays out of view the Ambler contract, and Brower's judgment, and the statutes of limitations of Kansas, New York, and Mississippi, and the action of the court below on the pleadings. If every ruling of that tribunal was erroneous, we, none the less, have the Easton transaction in the record, and, if upon that the peremptory charge was proper, affirmance must follow. We think it was proper. The case, in this view, is that Brower was a stockholder in a corporation known as the Western Farm Mortgage Trust Company, chartered in Kansas, to the amount of \$15,000 paid in by him; that, by the laws of Kansas, upon insolvency of the corporation he was liable to its creditors to the amount of \$15,000 besides, and they might sue the individual stockholder for a sum equal to his subscription. It is not controverted that a stockholder may set off against the claim of a creditor any valid claim he might have against the corporation at the time he is sued. The appellant had a valid judgment against the Kansas corporation, and sued Brower for the \$15,000, and he set up the defense that he had an interest of \$15,000, by assignment, in a judgment obtained by one Easton against the corporation. So far as this record shows, Easton had this judgment, and it was valid in all respects, and he obtained it long before that obtained by appellant. Now, Easton and Brower, in their depositions, both distinctly testify that Brower paid to Easton, on his judgment, his liability as stockholder of \$15,000 and took Easton's written assignment of that judgment, pro tanto, two years before the suit now before us was brought, and that, this written assignment being lost, it was duplicated after suit brought, dated as of the original date. This assignment was for some reason acknowledged by Easton, the certificate of acknowledgment showing that it was taken after the suit was brought. This is cited as a badge of fraud, to show, not that Easton's valid judgment was not reduced by the \$15,000, but that it was done after this action began. This, the argument on which might be used equally to show good or bad faith, and two or three other matters of as little or less moment, are adduced from the record of the evi-

dence to support the contention that the case should have been submitted to the jury. A few suspicious circumstances, inconclusive if taken separately or together, are not sufficient to support a verdict against direct testimony.

We have examined this record and the briefs of counsel with the most industrious and painstaking care, and conclude that no court should sustain a verdict for the plaintiff, and therefore the action of the court below in giving the peremptory charge is affirmed.

LOWE v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi. Oct. 20, 1902.)

RAILROADS—INJURIES TO STOCK—NEGLECT—BURDEN OF PROOF.

1. Ann. Code, § 1808, provides that, in actions against railroad companies, proof of injury "inflicted by the running of the locomotive or cars" shall be prima facie evidence of want of reasonable skill and care by the servants of the company. A horse at the foot of an embankment on which a train was running became frightened, and ran parallel with the track until it came to a ditch running thereunder. Instead of crossing the ditch, the horse, startled by an emission of steam from the engine, wheeled and jumped into the ditch, thereby breaking its neck. *Held*, that the injury, not being "inflicted by the running of locomotives or cars," did not fall within the provisions of the Code, and the burden of proof of negligence rested on plaintiff.

2. The killing of the horse under such circumstances did not establish willfulness, wantonness, or lack of reasonable care on the part of the engineer.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

Action by Mrs. M. C. Lowe against the Alabama & Vicksburg Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A train of railway cars was passing along defendant's track upon a fill or dump 10 or 12 feet high, when plaintiff's horse became frightened, and ran along parallel with the track at the foot of the dump until it came to a ditch which passed under the track. There was a ford or path across the ditch, where the horse might have crossed with safety. The horse, when it reached a point near the ford, suddenly wheeled and fell or jumped into the ditch, and broke its neck. The locomotive or cars of defendant did not strike it, but plaintiff showed that the engineer opened the cocks on his engine and allowed steam to escape, and thereby startled the horse and caused it to jump into the ditch, to its destruction.

F. V. Brahan, for appellant. McWillie & Thompson, for appellee.

CALHOON, J. This case does not fall within the provisions of Ann. Code, § 1808, in reference to injuries "inflicted by the running of locomotives or cars." The horse was not killed by such running, but was off the track, and, from fright, left its path of safety, fell in a ditch, and broke its neck,—a curious re-

sult, which no one could have foreseen or reasonably apprehended. *Railroad Co. v. Weathersby*, 63 Miss. 581; *Railroad Co. v. Thornton*, 65 Miss. 256, 3 South. 654; *Railroad Co. v. Holt*, 62 Miss. 170.

Since Ann. Code, § 1808, cannot be invoked by the plaintiff, the burden of proof was on her to show willfulness, wantonness, or lack of such reasonable care on the part of the engineer as the position of the horse apparently demanded to prevent obvious danger. This we think she has not done. The horse was at the foot of an embankment, 10 or 12 feet below the moving engine, and in a perfectly safe pathway, with a safe egress, when the steam was emitted. It cannot be assumed, and especially in the face of evidence to the contrary, that the emission had reference to the animal. It is not even shown that the ditch was of such dimensions as to indicate danger. The cul-de-sac cases have no bearing, because here there was a plain mode of escape, and the killing was not done on the track. Surely a railroad cannot be held liable for emitting steam in the usual management of an engine, because it frightened a horse 10 feet below, from which fright it jumped in a ditch and broke its neck.

Affirmed.

ALABAMA & V. RY. CO. v. MOORE.

(Supreme Court of Mississippi. Oct. 20, 1902.)

RAILROADS—INJURY TO ANIMALS—NEGLIGENCE—QUESTION FOR JURY.

1. In an action against a railway company for killing a horse, the evidence showed that the horse was on the railroad right of way, on one side of which were piles of lumber, while on the other side was a ditch filled with water; that it became frightened from a railway bicycle, and ran down the track, outside of the rails, towards a trestle, closely followed by the bicycle; that it ran on the trestle and was killed. *Held*, that the question of the negligence of defendant's servant operating the bicycle in pursuing the frightened horse was for the jury.

Appeal from circuit court, Scott county; J. R. Enochs, Judge.

"To be officially reported."

Action by Pinkie Moore against the Alabama & Vicksburg Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McWillie & Thompson, for appellant. Kirkland & Bullard, for appellee.

TERRAL, J. The chief contention of appellant is that it should have had a peremptory instruction upon the trial in the circuit court. The horse of appellee was killed by running into a trestle on the Alabama & Vicksburg Railway track at a point just west of Fairchild's sawmill. The road in the vicinity of the mill is fenced east and west. The mill is situated on the north side of the track, and along on that side of the track from where the horse was found and

pursued to the trestle where it was killed there was much lumber piled. The record recites that the north side of the track "was filled with lumber," and on the south side of the track there was a big ditch in which there was water. The appellant's inspector of cross-ties was traveling upon his railway bicycle along the track in pursuit of his duty, and at the sawmill, and between 150 and 300 feet east of the trestle, he encountered the appellee's horse grazing upon the south side of the track; and the horse, apparently much frightened by the bicycle, ran down the track, on the outside of the rails, towards the trestle, closely pursued by the bicycle, and ran upon the trestle, and fell therefrom, and received the injuries of which it died. The leading question in the case is whether the appellant's tie inspector, under the circumstances in evidence, acted with reasonable prudence in pursuing the frightened horse to his death, and the subsidiary one, whether the question is resolvable as a matter of law, or whether it should have been left to the jury, as it was, by the learned circuit judge. With one side of the railroad track filled with lumber, and egress on the other side obstructed by a ditch in which was water, it was, we think, a question for the decision of the jury whether Moncure should have stopped his bicycle, in order that the horse might have had an opportunity to escape from his dangerous environment. The question as to the reasonable care and prudence on the part of Moncure was one for the jury, and we see no reason to doubt the propriety of its finding. *Tyler v. Railroad Co.*, 61 Miss. 445; *Newman v. Railroad Co.*, 64 Miss. 115, 8 South. 172; *Railroad Co. v. Holt*, 62 Miss. 170.

Affirmed.

WARREN COUNTY v. DABNEY.

(Supreme Court of Mississippi. Oct. 20, 1902.)

BOARD OF SUPERVISORS—SCHOOL LANDS—EMPLOYMENT OF COUNSEL—"COMPETENT PERSON"—LAWYERS.

1. Code 1892, c. 123, provides for the employment of a "competent person" by the board of supervisors to investigate the title to school lands, and conduct suits relating thereto. Section 293 provides that the board may employ counsel by the year. The board of supervisors of a certain county employed an attorney to conduct certain suits in reference to school lands. *Held*, that the fact that the board already had in its employ other counsel, under section 293, would not affect the validity of its contract made under chapter 123.

2. The term "competent person," in chapter 123, would not necessarily exclude a lawyer who was otherwise competent.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Action by J. B. Dabney against Warren county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McLaurin & Thomas, for appellant. Magruder, Bryson & Dabney, for appellee.

TERRAL, J. J. B. Dabney, by the employment of the board of supervisors of Warren county, instituted three suits in relation to school lands of said county, and conducted them to a successful issue. He thereupon called upon the board for his stipulated reward, which is agreed to be reasonable, but payment was refused by the board because at the time of his employment the board had already in its employment, under section 293, Code 1892, counsel at the annual salary of \$300. The question, therefore, is whether the board of supervisors of a county, having counsel under section 293, can employ other counsel under chapter 123, Code 1892, in reference to suits relating to school lands. We think they may. There is nothing in chapter 123 of the Code to restrict the power of the board in this regard, or to limit it to counties which have not employed an attorney under section 293. The language of chapter 123 is not ambiguous or obscure, and it seems plainly to contemplate that the boards may employ counsel to investigate the titles to school lands, and to conduct suits relating thereto, although they may have, under section 293, other counsel for matters not relating to school lands. It is apparent, we think, that the legislature was of the opinion that the condition of the titles to school lands called for special examination, which induced it to provide for special counsel. It is insisted, however, that if the legislature, by the words "competent person," in section 4147, had intended to include a lawyer, it would have used the latter word. We do not think it would have necessarily done so. If a lawyer be a competent person in other respects, his eminence as a lawyer would not render him the less competent to institute and prosecute to effect the suits authorized under chapter 123, Code 1892.

Affirmed.

PERVANGER v. UNION CASUALTY & SURETY CO.

(Supreme Court of Mississippi. Oct. 20, 1902.)

INSURANCE—AGENTS—SERVICE OF PROCESS—STATUTES.

1. Code, c. 65, § 2323, provides that a foreign insurance company shall have an agent in the state on whom process may be served. Section 2327 provides that on failure to comply with section 2323 the person who solicits insurance or transmits an application for insurance shall be held to be the agent of the company as to all the duties and liabilities imposed by law. *Held*, that service on the agent who had issued the policy sued on was sufficient, though at the time of service he was not in the company's employ.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

"To be officially reported."

Action by Mrs. M. Pervanger against the Union Casualty & Surety Company. From a

judgment for defendant, plaintiff appeals. Reversed.

Dabney & McCabe, for appellant. McLaurin, Aarmistead & Brien, for appellee.

TERRAL, J. The legislature, by chapter 65 of Annotated Code, has authorized foreign insurance companies to take risks and transact business of insurance within this state upon certain conditions prescribed in said chapter, one of which conditions is that such insurance company shall have an agent within this state upon whom service of process on behalf of said company may be had (section 2323), and, in default thereof, that the person who solicits insurance for a company or takes or transmits an application for insurance, etc., shall be held to be the agent of the company for which the act is done or the risk is taken, as to all the duties and liabilities imposed by law (section 2327). When the appellee company issued the policy here sued on, it had an agent, J. K. Moore, through whom it issued this policy in compliance with the law of the state upon the subject. When this suit was brought, Moore had been discharged by the company, and it had no agent at all in this state, and upon the trial claimed that service of process upon Moore was ineffectual for any purpose. The contention of the appellee is not to be supported. Having come into the state under conditions prescribed by law, and issued the policy sued on by its agent, Moore, it cannot withdraw the agency of Moore, and leave itself without any agent in this regard. To do so would be a fraud upon appellant, and fraud is never tolerated. The appellee's agent, Moore, issued and delivered the policy sued on, and by the express provision of section 2327 he is to be held the agent of the company for all the duties imposed by law, one of which is to be served with process in a suit relating to such policy. The appellee could not withdraw his agency so far as to receive service for the company, and its effort in that direction is a nullity. *Sadler v. Insurance Co.*, 60 Miss. 391. It results that the service of process upon J. K. Moore, the agent of appellee who issued the policy in this case, was a proper service upon the company itself; wherefore the judgment is reversed, and the case remanded.

Reversed and remanded.

STATE ex rel. KIERSKY v. KELLY.

(Supreme Court of Mississippi. Oct. 20, 1902.)

ELECTIONS—QUALIFICATIONS OF ELECTORS—STATUTES—CONSTITUTION.

1. Const. § 241, provides that every adult male who, together with certain other qualifications, has resided in the state two years, and one year in the city or town in which he offers to vote, and has been duly registered, shall be a qualified elector. The registration oath prescribed by section 242 states a residence of one year in the city or town, and two

¶ 1. See Insurance, vol. 23, Cent. Dig. § 1574.

years in the state. Section 245 provides that electors in municipal elections shall possess all the constitutional qualifications, and such additional ones as may be provided by law. *Held*, that the provision of Code 1892, § 3028, declaring that voters shall vote in the wards of their residence, is valid; such provision being an "additional qualification" not in conflict with the constitutional requirements.

2. The provision of Code 1892, § 3028, adding as a qualification to a right to vote in a municipal election a residence in the municipality of one year prior to registration, is invalid; the constitution requiring a residence of one year before the election, not before the registration.

Appeal from circuit court, Warren county; F. E. Larkin, Judge.

Quo warranto by the state, on the relation of A. Klersky, to determine the right of R. M. Kelly to the office of city assessor of Vicksburg. From a judgment for respondent, relator appeals, and respondent prosecutes a cross-appeal. Affirmed.

In December, 1900, there was an election in the city of Vicksburg, Miss., for city assessor, and appellant, Klersky, and appellee, Kelly, were the only candidates. The latter was declared elected, and received the certificate of election and took possession of the office. Klersky instituted this quo warranto proceeding against Kelly, and upon the trial there were a verdict and judgment for Klersky, from which Kelly appealed to the supreme court, and there the case was reversed and remanded for a new trial. See 30 South. 49. On the second trial there was a verdict and judgment for Kelly, and Klersky appealed, and Kelly prosecuted a cross-appeal. A motion was there made to dismiss Klersky's appeal. See *State v. Kelly*, 31 South. 901. On the trial in the court below, the court allowed a number of ballots to be counted for the appellee which were cast by electors who had been residents of the city less than one year before they were registered as voters, and disallowed several which had been cast for appellant by persons who voted in wards other than the one in which they resided.

Catching & Catching, J. B. A. Brunini, and W. J. Vollar, for appellant. Henry & Scudder, J. D. Thames, McLaurin, Armistead & Brien, and Alexander & Alexander, for appellee.

WHITFIELD, C. J. The court below properly overruled relator's motion to exclude all evidence in relation to voters voting out of the wards of their residence. It was perfectly competent for the legislature to declare, as it did, in section 3028 of the Code of 1892, that voters should vote in the wards of their residence. Section 245 of the constitution expressly authorized it. It was "an additional qualification," not in conflict with the constitution. But it was just as clearly violative of sections 241 and 242 of the constitution for the legislature, in said section 3028, to add as a qualification to the right

to vote in a municipal election residence for one year before registering. That was adding a qualification in direct conflict with sections 241 and 242 of the constitution, which relate to municipal elections as well as state and county elections. One presenting himself for registration takes the oath prescribed in section 242, and by it swears, not that he has at the time he takes the oath resided one year in the city, preceding the ensuing election, but that he will have so resided for one year, etc.; the latter clause of section 242 plainly adapting the form of the oath set out therein to so read in city registrations. Section 251 of the constitution, which applies to all elections (*Bew's Case*, 71 Miss. 1, 13 South. 863), plainly shows that if one applying to register more than four months before the election has not then resided one year in the city, but will have so resided for one year before the election, he is entitled to be registered and to vote.

On the cross-appeal, we deem it necessary only to say that we think the second, seventh, eighth, tenth, twelfth, and thirteenth instructions asked by defendant, as well as the unnumbered instruction refused to defendant, all announced correct propositions of law, and should have been given.

It follows that the judgment, both on the direct appeal and the cross-appeal, is affirmed.

BYNUM v. STINSON.

(Supreme Court of Mississippi. Oct. 20, 1902.)

ADVERSE POSSESSION—BILL TO CONFIRM TITLE—ALLEGATIONS—SUFFICIENCY.

1. Though the description of the premises in a bill to confirm title begins "About 2½ acres, lying," it is not insufficient, the boundaries of the premises being given.

2. The description of the premises in a bill to confirm title gave one of the boundaries as a certain fence, and another part of the bill alleged that the "stock law or no-fence law" was in force in the community. *Held*, that the description was not insufficient, on the theory that the allegation as to the stock law showed there were no fences; the law not prohibiting fences, and it being probable there were some.

3. Where a pleading predicates right to land by adverse possession pursuant to an exchange of parcels by parol, neither record title nor written agreement of exchange need be shown. It is only necessary to aver the exchange, and consequent adverse possession for the period of limitation.

4. A bill predicating right to land by adverse possession pursuant to an exchange by parol alleged that the adverse holding had been "for about 15 years," and that the land was "secured from defendant 15 years ago." *Held*, that adverse possession for 10 years was sufficiently averred.

5. The bill alleged that complainant had been in actual, uninterrupted, adverse possession of the land received from defendant for about 15 years, had openly and notoriously exercised the control of an owner of it from the date of the exchange; that he had cut firewood from it, raked and hauled straw and leaves from it, split his rails upon it, sold the saw timber from it, and cultivated a small part of it,—all of which the defendant well knew, knowing

that complainant was doing so as owner of the land. *Held*, that the allegation as to adverse possession was sufficient.

6. The allegation as to defendant's knowledge refuted an objection that the words of the statute, "claiming to be the owner," were not used.

7. Such allegation also refuted the objection that, no paper title being shown, the land should be averred to have been inclosed.

Appeal from chancery court, Lauderdale county; Stone Deavors, Chancellor.

Suit by John Stinson against Henry Bynum. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Appellee, Stinson, filed this bill in the chancery court of Lauderdale county against appellant, Bynum, to confirm his title to a small tract of land. The bill averred that about 15 years ago complainant and defendant exchanged, for mutual benefit, by oral agreement, two parcels of land, and that each took possession of that part granted to him by the other, and exercised the rights of real owner over it until the beginning of the "present year" (1892), when defendant undertook to take charge of the lands granted to complainant. The opinion of the court contains a statement of the allegations of the bill in reference to the description of the land, and as to the adverse possession of complainant. The bill prays for a confirmation of complainant's title to the land. To this bill defendant demurred on the grounds that the description of the land is vague, indefinite, and uncertain, and that the bill sets up no paper title, and does not sufficiently allege adverse possession. This demurrer was overruled, and defendant appeals.

Ethridge & McBeath, for appellant. H. R. Street, for appellee.

OALHOON, J. The description of the premises set out in the bill is good enough. True, it begins, "About 2½ acres, lying," etc., but this general language can be made certain by resort to the boundaries. The bill states them. It refers to the land as lying in the S. W. ¼ of a specified quarter section, and bounds it by W. H. Stinson's line on the south, the Meridian and Enterprise public road on the east, complainant's land on the west, and by defendant's fence on the north. Because the bill elsewhere, in setting forth defendant's motives, states that the "stock law or no-fence law" was in operation in the community, it does not follow that there were not fences there. No doubt, there are fences in every stock-law district. Such laws have never yet prohibited fences.

Where a pleading predicates right by prescription by adverse possession pursuant to an exchange of parcels of land by parol, neither record title nor written agreement of exchange need be shown. It is only necessary to aver the exchange and consequent adverse possession for the 10-years period of limitation. Adverse possession is sufficiently averred in this bill. It is true, it says in one

place that the complainant's adverse holding has been for "about 15 years," but, if this were insufficient, still in another place it is distinctly averred that the land exchanged was "received from defendant 15 years ago." This means more than 10 years, and we cannot hold, according to obsolete learning, that the pleader must actually say 10 years, on the idea that, while to say 15 years is an infallible argument that it is more than 10 years, nevertheless it is not a sufficient averment that it was more than 10 years. The other averments as to adverse possession are these: "Complainant has been in actual, uninterrupted adverse possession of said parcel of land received from defendant for about 15 years, and has openly and notoriously exercised the control of an owner of it from the date of the exchange until now, using it in the same manner that he would have used it had same passed to him by deed. He has cut firewood from it, raked and hauled straw and leaves from it, split his rails upon it, sold the saw timber from it, and cultivated a small part of it. *And all this the defendant well knew, knowing full well, too, that your complainant was doing so as owner of said land.*" As between parties to an exchange, this is abundant, and the part italicized by the writer of this opinion completely refutes the technical objection of the demurrer that the exact words of the statute, "Claiming to be the owner," are not used. They also emasculate the objection that, no paper title being shown, the land should be averred to have been inclosed.

The objection that the bill is not sworn to is without any merit, as we think, and the same is true of other objections not mentioned in this opinion.

Affirmed.

NATIONAL MUT. BUILDING & LOAN ASS'N et al. v. HOUSTON.

(Supreme Court of Mississippi. Oct. 27, 1902.)

MORTGAGE-SALE UNDER POWER-PURCHASE BY MORTGAGEE-REDEMPTION-ACCOUNTING-MORTGAGEE IN POSSESSION.

1. A sale under a power in a mortgage having been set aside solely because the mortgagee himself purchased without authority, he, though his entry was under his deed as purchaser, will, in the absence of fraud, be held accountable only as a mortgagee in possession, and therefore chargeable not with the rental value, but only with what he actually received, or ought by the exercise of reasonable diligence to have received.

2. Though a mortgage foreclosure sale is voidable, the mortgagee having purchased under the power without authority, yet the mortgagee should be credited with the costs of the sale; the mortgagor allowing him to go into possession, and sell part of the property, without objection till years later, when a bill to redeem was filed.

Appeal from chancery court, Lauderdale county; Stone Deavors, Chancellor.

Suit by S. M. Houston against the National Mutual Building & Loan Association and oth-

ers. Decree for plaintiff. Defendant association appeals. Reversed.

This case was before the supreme court at the last term, when the judgment of the lower court dismissing complainant's (appellee's) bill was reversed, and the cause remanded for an accounting. 31 South. 540. It will be seen from the report of the case there that appellant held a mortgage on the property in controversy, and, after default in the payment of the debt secured, foreclosed the mortgage, and became the purchaser, indirectly, at the sale. Appellee, Houston, purchased the property from the mortgagor, and afterwards filed the bill in this case to set the sale under the mortgage, and under which appellant claims, aside, and for an accounting. In the lower court, on motion of complainant (appellee), the commissioner was directed to charge the fair and reasonable rental value of the property to defendant. The commissioner did not credit defendant with the expenses of the foreclosure sale. Defendant excepted to the commissioner's report because of these facts. His exceptions were overruled, the commissioner's report approved, and a final decree rendered accordingly. Defendant appeals.

A. S. Bozeman, for appellant. S. A. Witherspoon, for appellee.

WHITFIELD, O. J. The chancellor erred in charging the appellant with rental value of the property. The defendant should have been charged only with what it actually received, or ought by the exercise of reasonable diligence to have received. The rule is thus stated in 2 Jones, Mortg. § 1123: "As a general rule, the mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise; but he will not be held accountable for anything more than the actual rents and profits received, unless there has been willful default or gross negligence on his part. It is the fault of the mortgagor that he lets the land fall into the hands of the mortgagee, and the mortgagor should be required to prove actual fraud or negligence on the part of the mortgagee, before he can be charged for more than his actual receipts of rents and profits. He will not be held to account according to the value of the property, but for what he should, with reasonable care and attention, have received." It is not a correct view, on the facts of this case, to hold the appellant as owner. It is true, it believed itself to be owner, after the sale and purchase, and possession taken, but it was not, in law, owner, and it must be dealt with in the real character the law attached to it,—that of mortgagee in possession. Mr. Jones correctly says, speaking of one who believes himself to be owner: "When one goes into possession under a deed absolute in form, and the circumstances are such that he may believe himself to be in fact the owner of the estate, subject only to an agree-

ment to sell, such a grantee is not, technically, a mortgagee in possession. The character of mortgagee is cast upon him by the application of equitable rules to an oral agreement in contradiction of the deed, and when, perhaps, the transaction might be construed as a conditional sale. In such case the mortgagee is chargeable only with what he has received, and not with what he might have received." 2 Jones, Mortg. p. 76. There was no fraud in this case. The sale was set aside exclusively upon the ground that it was made in violation of a rule fixed by public policy, not because of any actual fraud.

We think that the chancellor erred in one other respect; that is to say, in not crediting the appellant with \$43, expenses of the foreclosure sale. The principle announced in Whitcomb v. Harris, 90 Me. 206, 38 Atl. 138, and Means v. Anderson, 19 R. I. 118, 32 Atl. 82, the last of which is a case of gross, actual fraud, proceeded upon the idea that wherever anything is due under the mortgage, and the debtor fails to pay what is legally due, and allows a foreclosure sale to be had and possession taken without objection, he ought, when coming to redeem, to be required, as one of the conditions, to pay the necessary expenses of the foreclosure sale,—a proceeding which he has allowed to take place without objection. We think this principle finds peculiarly just application in the facts of this case. Here, as the accounting shows, is something legally due; yet the mortgagors did not pay anything, allowed the foreclosure sale to take place, allowed the appellant to go into possession, actually allowed the appellant to sell off part of the property, and to bargain away still another part, without any objection interposed at any stage of these proceedings, and then, after the lapse of a number of years, filed this bill to redeem. Surely it is but equity that the appellee shall pay the \$43 incurred in the foreclosure sale.

Reversed and remanded.

BURNHAM v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi. Oct. 27, 1902.)

CARRIERS — LIABILITY FOR PERISHABLE FREIGHT—DELAY FROM FLOOD—DIRECTING VERDICT.

1. Verdict in an action against a carrier for damage to a car load of perishable fruit from a delay of two days, the train being side-tracked because of unprecedented rains, which overflowed and washed out the track, is properly directed for defendant, though plaintiff expresses the opinion that defendant had not sufficient cause for the delay, and though a light work train went over the road through the water a day earlier than the freight train was moved; the train dispatcher, who was not cross-examined, testifying that no train could go between the place where the train was side-tracked and the destination of the car, before the day it was moved, and that a locomotive was sent for and brought over the train as soon as it could be done, and that this was the first train run over this section after it was repaired.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

Action by D. Burnham against the Alabama & Vicksburg Railway Company. In accordance with a peremptory instruction for defendant, it had verdict and judgment, a new trial being refused. Plaintiff appeals. Affirmed.

The opinion of the court below was as follows (L. Brame, Special Judge):

"On March 26, 1901, the plaintiff shipped from Mobile, Alabama, over the line of the Mobile & Ohio Railroad to Meridian, a car load of bananas, destined for Jackson, Mississippi, on defendant's road. The freight train of defendant to which this car was attached left Meridian on the morning of the 27th, and was brought over the defendant's road to Brandon, which is about 15 miles east of Jackson; the latter place being 95 miles from Meridian. On that day, which was Thursday, there were unprecedented rains, which caused overflows and washouts at different places on the line of defendant's road. One was at Chunkey, not far west of Meridian; one was near Bolton, west of Jackson; and the track was overflowed and washed out of line at two places east of Jackson,—that is to say, between Pearson Station and Brandon. By reason of these washouts the train of which the car of bananas was a part was put on a side track at Brandon Thursday afternoon, the 27th, and the locomotive was sent back eastward, presumably for the purpose of aiding and assisting in repairing the break at Chunkey. This train remained at Brandon from Thursday afternoon, the 27th, until Saturday, the 29th, when a locomotive was sent from Jackson, and the train was brought over, leaving Brandon at 12:40 p. m., and reached Jackson at 2 o'clock. The plaintiff's evidence shows that by reason of the delay the bananas, which were just turning ripe at the time of being shipped from Mobile, were injured, and he was damaged. The question in the case is whether the defendant company is liable for the damages occasioned by the delay of nearly two days.

"It is well established that a common carrier transporting freight is an insurer, and is only excused from liability for failing to transport by reason of the act of God or the public enemy, or the conduct of the shipper. In this case the plaintiff accompanied the car, and his testimony tends to show that the defendant was without sufficient excuse for delaying the transportation of the car; but manifestly his statements are based largely, if not entirely, on opinion. The evidence tends to show that the washouts or injury to the track between Pearson and Brandon were occasioned by the unprecedented floods, and that work was done on two different sections of the track that had been overflowed on Thursday and Friday. The evidence is not clear as to what time on Friday the track was put in condition for use, but it tends to show that the track was being worked on or repaired as late as Friday aft-

ernoon, though there are some inferences to show that it was repaired Friday morning. If the evidence stopped here, it would, I think, justify the inference that the defendant could reasonably have brought the car over from Brandon to Jackson late on Friday, or at least early on Saturday morning; and as the plaintiff's evidence shows, or tends to show, that his damages were increased by his not having gotten the car to Jackson Friday evening, or Saturday morning early, the plaintiff would be entitled to recover. At any rate, he would be entitled to have the case submitted to the jury; the burden of proof being upon the defendant to show that it exercised due care to transport the car within a reasonable time after the track was in proper condition, and the question as to what is a reasonable time being one of fact for the jury. But the undisputed testimony of Mr. Bonds, the train dispatcher who had control of the movements of all trains on the road, is to the effect that no train could go east of Jackson to Brandon before Saturday, and that on Saturday morning the locomotive was sent over, and brought the train to Jackson as soon as this could be done; this being the first train that was run over this section of the road after the track between Brandon and Jackson had been repaired. This witness was not cross-examined, and therefore his statement went to the jury unchallenged. It is contended by plaintiff's counsel that his statement in this regard gave merely an opinion, but I do not think so. It is well known that a train dispatcher directs and controls the movements of all trains. He is in close contact with every part of the road, and is supposed to know not only the condition of the track, but the location of locomotives and trains, and other facts which enable him to speak authoritatively in saying that a train was moved as soon as it could have been moved. As the witness was not cross-examined, and asked as to his means of knowledge, or as to the particular facts upon which he based his statement that the car was brought to Jackson at the first opportunity, I think it must be assumed, as there is no evidence to the contrary, that his testimony as to this substantive fact is true. It is true, there is some room for contention that the testimony of men who worked on the different sections was to the effect that the track was put in repair on Friday, and that, as these men were on the ground, they knew the track as to this. But this is hardly a contradiction of the statements of the train dispatcher. His statements had relation not only to the condition of the track, but the location of cars and locomotives, the position of the different crews, and other particulars which would enable him to state as a fact that the cars were brought to Jackson as soon as possible. By cross-examination the plaintiff's counsel might have been able to show that he was mistaken as to some of

these things, but as there was no cross-examination, and as the statement is not in itself unreasonable, and the witness is not contradicted, I think the court bound to assume that it is true. At any rate, the margin for dispute or controversy is so narrow that I do not think that the supreme court would permit a verdict for the plaintiff to stand if one should be rendered on the testimony in the case, and therefore it is my view that the peremptory instruction to find for the defendant was proper.

"From the fact that the work train went through from Brandon to Jackson, and another Friday morning, I do not think it can be deduced that the railroad was negligent in not sending the freight train through under similar circumstances. It was shown that it was a hazardous thing for the work trains to go through the water and over the track before the subsidence of the flood, and before the track had been put in repair. It might have been commendable for the employees of the railroad to take this risk with the work train, but I do not think that the defendant could be expected or required to take any such risk with a freight or passenger train, especially as the latter are shown to have been heavier than work trains. The question in this case is a narrow one. I am fully aware of the rule that ordinarily all questions of fact are for the jury, and that, if there is any evidence fairly tending to support the plaintiff's case, he is entitled to the judgment of twelve men; but, in view of the facts of this case, I do not believe that a verdict for the plaintiff could be permitted to stand. In *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 35 L. R. A. 624, and note 3 (s. c. 28 C. C. A. 564, 77 Fed. 919), it is said: 'The reasons which led to the adoption of the common-law rule that makes a carrier an insurer of the goods which it transports, except when lost by an act of God or of the public enemy, do not apply to the mere delay in transportation when the goods are actually delivered. The strictness of the rule which was adopted to preclude collusion between the carrier and the robbers has no application where the mere time of the carriage is concerned. *Railroad Co. v. Levi*, 76 Tex. 337, 18 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45. For delay in receiving and carrying goods the carrier is not liable as an insurer, and is bound only by the general rule of liability for a breach of his contract, or by his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster, which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves or robbers or an uncontrollable mob. *Railroad Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63.' I think this expresses the correct rule of law as applicable to the de-

fendant in its duty to transport the car in question after the break, and when the track had been put in repair. Having these views, I am constrained to overrule the motion for a new trial."

Watkins & Easterling, for appellant. J. E. Thompson, for appellee.

CALHOON, J. If on the trial there had been a verdict for plaintiff, it could not properly be sustained. In moving a large train of freight, a railway company must not chance the lives of its operatives and others on it, and the immense property interest it is transporting, to save some perishable fruit. If it had, and disaster had resulted, it would have been liable, of course, and perhaps criminally so. The fact that operatives went with an engine over the track to see to safety and repair damages is to their credit, but in no way affects the propriety of delaying the movement of the main train until the safety of such action was reasonably assured.

We approve and adopt the conclusions of law and fact arrived at in the very conservative and lucid written opinion of the special judge presiding below, and request the reporter to set it out at length in the report of this case.

Affirmed.

DENNIS v. NEW ORLEANS & N. E. R. CO.

(Supreme Court of Mississippi. Nov. 3, 1902.)

RAILWAYS—DEATH ON TRACK—EVIDENCE—QUESTION FOR JURY.

1. In an action for the death of plaintiff's child by being struck by defendant's railway locomotive at a public crossing, evidence examined, and held that it was error to direct a verdict for defendant, instead of submitting the evidence to the jury.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

Action by Monroe Dennis against the New Orleans & Northeastern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Appellant brought this suit against appellee to recover damages for the alleged negligent killing of his little girl, about 3½ years old. The child was injured on the 25th of October, 1900, and died from the injuries the next day. The court gave a peremptory instruction to find for the defendant. From a verdict and judgment for defendant, plaintiff appeals. The evidence was, in substance, as follows: The little child was going north on a public road that crossed the railroad tracks, and just as she was about to reach the north side of the tracks she was struck on the head by the steps of the tender, and injured. The evidence shows that the tracks of the defendant and also the tracks of the Alabama &

Vicksburg Railway Company run east and west parallel with and very near each other. They cross a highway, where the injury occurred, running north and south at right angles. The track of defendant is south of the Alabama & Vicksburg track, and the child was approaching the crossing from the south. The child was struck by a loose engine that was being run by the servants of and was owned by the defendant company. Situated south of these railroads, and facing east, was the store and residence of plaintiff. The north corner of the store is 45 feet from the track of appellee and about 60 feet from the Alabama & Vicksburg track. There was a plank fence running south from the tracks on the west side of the public road to plaintiff's store. This fence was about five feet high, with openings of several inches between the several planks. The highway was much frequented, the crossing being just outside the city limits of Meridian, and there were nine dwelling houses just north of the crossing. The tracks west of the crossing were straight for 300 or 400 yards. The engine was approaching from the west, and there was a slight upgrade from that direction, and there was nothing to obstruct the view of a person approaching the crossing from the west except the plank fence and an artificial embankment about three feet high; and nothing else to prevent one seeing persons approaching the crossing from the south in the highway, the direction in which the child was going, until the store, 60 feet away, was reached. The engine was backing east, running, according to the plaintiff's evidence, at the rate of 25 miles an hour. The defendant's witnesses say 8 or 10 miles per hour. Plaintiff's witness stated that no whistle was blown, and that the bell was not rung; but this is contradicted by witnesses for the defense. One witness for plaintiff testified that the child ran along the highway toward the crossing for about 60 feet, and did not stop until struck by the engine. Two witnesses for appellant testified that they stood at a distance of 180 and 150 yards west of the crossing, and could see a child about the size of the child killed while it was running along the highway south of the tracks for 40 or 50 feet. A witness for plaintiff testified that he had been a fireman on defendant's road for a number of years, and that an engine running at the rate of 10 miles an hour could have been stopped at from 30 to 40 feet. The engineer and fireman on the engine testified that they saw the child when the engine was 150 to 200 feet from the crossing, and immediately did all they could to stop the engine; the engineer testifying that he immediately reversed the engine, and put on more steam, and blew the whistle, and that the bell was ringing. It was also shown by plaintiff that the child was dressed in white, with red ribbons on the dress, and that the accident occurred at about 3 or 4 o'clock in the afternoon.

Neville & Wilbourn, for appellant. Woods, Fewell & Fewell, for appellee.

WHITFIELD, C. J. The case should have gone to the jury. Reversed and remanded.

BATES v. STATE.

(Supreme Court of Mississippi. Nov. 3, 1902.)

BURGLARY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.

1. The main evidence for the state in a trial for burglary was the testimony of one B. that he had talked with defendant at his (B.'s) gate, had gone away, and when he came back had found his house broken open, and a watch and razor gone. After conviction, defendant asked for a new trial, and offered the testimony of three persons that B. had told them that the person with whom he talked at the gate was a negro of an entirely different description from defendant, and that they had not mentioned what B. told them until after the trial. *Held*, that defendant was entitled to the new trial.

Appeal from circuit court, Alcorn county; B. O. Sykes, Judge.

Oliver Bates was convicted of burglary, and he appeals. Reversed.

On the trial Peter Berthal testified that in February, 1900, he saw a negro at his gate, who asked him for something to eat, and he told him he had nothing to give him; that he (Berthal) then went away, and when he came back his house had been broken into, and a watch and a razor were gone; that defendant is the man he talked to at his gate. One witness for the state testified that on the day Berthal's house was broken into a negro came to him, and tried to sell him the razor, and he thought defendant was the man. This was practically all the evidence for the state. Defendant proved by several witnesses that he was at another place on that day, and introduced several witnesses who testified that they would not believe Berthal on oath, and his reputation for truth and veracity was bad. Defendant made a motion for a new trial. One of the reasons assigned was that of newly discovered evidence, and in support of this ground he offered the testimony of three persons to show that Berthal told them that the negro whom he talked to at his gate was a tall, big, black negro, while defendant is a small, ginger-colored negro, and does not answer the description given them by Berthal of appellant at all; and that they had never told any one about what Berthal had told them until after the trial. The motion was overruled.

Lamb & Kice, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

CALHOON, J. The attorney for the state, with admirable fairness, admits that the propriety of this conviction on the facts is questionable. On the record before us we fully concur with him, but decide now only that a

new trial should have been granted on the showing made of newly discovered evidence.

Reversed and remanded.

GILLILAND et al. v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi. Oct. 27, 1902.)

CARRIERS—FREIGHT—OVERCHARGE—PENALTY.

1. After defendant railroad company had given plaintiff freight rates over its road between G. and another point, plaintiff contracted for a number of cars making a shipment therein. Plaintiff had purchased the cargoes of a mill in G., situated on another railroad line, and defendant was compelled to pay switching charges of \$3 per car in order to get the cars transferred to its own line. *Held*, that defendant was not liable to plaintiff under Code, §§ 4287, 4288, permitting a person damaged by an overcharge or discrimination to recover twice the amount of the injury.

Appeal from circuit court, Attala county; J. H. Neville, Judge.

Action by N. B. Gilliland & Co. against the Illinois Central Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Appellants, who are merchants at Kosciusko, Miss., applied to the appellee company for freight rates of cotton-seed meal and hulls, in car lots, from Greenwood to Kosciusko, and were informed by its agent that it was 80 cents per ton of 2,000 pounds. They then bought 26 cars, and had them shipped over appellee's road to Kosciusko. The railroad company charged appellees \$3 per car additional for some switching, which was paid by appellants without noticing this additional charge. They afterwards discovered that they had paid it, and brought this suit to recover the \$3 per car, and the penalty prescribed by sections 4287 and 4288 of the Code of 1892. The case was tried in the court below on an agreed statement of the facts, upon which the court gave a peremptory instruction for defendant. From a verdict and judgment in accordance therewith, plaintiffs appealed. The facts, in addition to what is given above, are, in substance, as follows: The bills of lading conformed to the rate given. When the various car loads of goods were delivered at Kosciusko, defendant's agent made out the freight bills in accordance with rate agreed upon, and, in addition, included a charge of \$3 on each car, as switching charges, which was inadvertently paid by plaintiffs, without knowing they were paying it. The defendant company paid the Southern Railroad Company \$3 per car for switching cars over its road from the cotton-seed oil mill where plaintiffs bought them, which said oil mill was situated 1¼ miles from the railroad tracks of the Illinois Central Railroad Company, and not otherwise connected with defendant's road; and this was paid before the institution of this suit, and before no-

tice of it. The freight rate on the class of goods shipped is 80 cents per ton of 2,000 pounds from any point on defendant's road within the corporate limits of Greenwood to Kosciusko, Miss.

C. H. Campbell and J. S. Smith, for appellants. Mayes & Harris, for appellee.

CALHOON, J. We cannot agree that the highly penal statutes, Code 1892, §§ 4287, 4288, apply to this case. Here there was no overcharge "for the service rendered in the transportation." If the delivery had been to the railroad company free of charge for delivery to it, the sum charged would have been within the purview of the statute. But the freight came to it with charges, which it had to pay to get it on board. Appellants were told what the transportation charges would be over their line. Unfortunately, they did not buy at Greenwood, from either of two oil mills on appellee's line, but from the only one on the line of the Southern Railroad Company, and so the goods came to appellee charged with local freight charges of the latter company in order to be shipped over its line. If appellants are damaged, it is from their own fault or misfortune.

Affirmed.

LAMB v. RUSSEL.

(Supreme Court of Mississippi. Oct. 27, 1902.)

ATTACHMENT—CLAIMS—HEARING—PROCESS—SERVICE—FOREIGN CORPORATIONS—INSOLVENCY—PREFERRED CREDITORS.

1. An ancillary writ of attachment was taken out, on which the sheriff returned that he had summoned garnishees, but that neither defendant company nor property could be found in the state. Judgment was had by default, after which the court permitted a claimant to interpose his claim. *Held* that, there being no publication or service after attachment issued, the trial of the claim was premature.

2. Where a sheriff's return on a summons was, "I have this day executed the within writ personally on the within-named defendant, the I. Company, by handing to N., agent of said company, a true copy of this writ," objection to the service should be by plea, it being valid on its face.

3. An insolvent corporation cannot prefer a creditor stockholder.

4. Where, on attachment in a suit against an insolvent foreign corporation, a creditor stockholder interposing a claim contends that he is entitled to a preference under the laws of the state of the corporation's residence, he is not entitled thereto if his preference is not statutory, but based on the view of the law by the courts of that state.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Action by A. G. Russel against the Iowa Packing & Provision Company, in which Garrett E. Lamb interposed a claim. Judgment for plaintiff, and claimant appeals. Reversed.

In September, 1901, A. G. Russel, appellee, brought suit in the circuit court of Warren

¶ 2. See Corporations, vol. 12, Cent. Dig. § 217a.

county to recover damages in the sum of \$861.76 against the Iowa Packing & Provision Company, a foreign corporation. Summons was issued, and the sheriff made the following return thereon: "I have this day executed the within writ personally upon the within-named defendant, the Iowa Packing & Provision Company, by handing to E. N. Nagle, the agent of said company, a true copy of this writ." The next day an ancillary writ of attachment was taken out. Upon this writ the sheriff returned that he had summoned certain persons named to answer as garnishees, and neither the defendant company nor any property could be found in the county. No publication for the defendant was made, nor any service of process of any kind, after the attachment writ was issued. Judgment by default was taken against the defendant for the amount sued for. The garnishees answered, admitting certain indebtednesses to the defendant. Afterwards Garrett E. Lamb, as executor of the estate of Artemus Lamb, of Iowa, interposed a claim to the several sums admitted to be due by the several garnishees, and he was admitted by the court to propound his said claim, and filed his affidavit and bond. Issue was joined on the claim thus propounded, and in June, 1902, the claimant's issue was tried, and resulted in a verdict and judgment for plaintiff. Claimant appeals. The opinion of the court contains such other facts as are necessary for an understanding of the case.

Dabney & McCabe, for appellant. McLaurin, Armistead & Brien, for appellee.

CALHOON, J. Looking over the whole record, this cause must be sent back to stand for action as a pending case in the court below. There appears no service of process in any shape on the Iowa corporation on the attachment issue, and so the trial of the claimant's issue was premature. *French v. Sale*, 60 Miss. 530. The objection to the service of process on the main suit upon the declaration should be by plea. It is valid on its face.

The presentation in the deposition of Garrett E. Lamb shows no right in him as executor. The corporation was insolvent. Its capital stock was \$50,000. Of this, Artemus Lamb, the father and testate of claimant, owned \$29,000. It owed \$70,000, all to Artemus Lamb, who was not only a stockholder to the extent of about 60 per centum of the entire capital stock, but also its president, and also its creditor. It owed him \$70,000. Its entire assets were \$2,500. Under the repeated adjudications of this court, the insolvent corporation could not prefer him, and so, of course, could not prefer his estate. The action of our court is in line with the weight of authority. 3 Clark & M. Priv. Corp. § 786b. If the Iowa courts hold differently, it is upon their own view of the law, and not in the construction of any statute of their state, and so cannot bind us.

Reversed and remanded.

ARMSTRONG v. GADDIS et al.

(Supreme Court of Mississippi. Oct. 27, 1902.)

APPEAL—MOTION FOR NEW TRIAL.

1. An appeal to review errors on rulings on evidence will not lie where there was no motion for new trial.

Appeal from circuit court, Yazoo county; Robt. Powell, Judge.

"To be officially reported."

Action by George Armstrong against Gaddis & Whitehead. Judgment for plaintiff for a portion of the amount claimed, and he appeals, and defendant files cross-appeal. Cross-appeal dismissed.

E. L. Brown and Barnette & Perrin, for plaintiff. Henry & Perrin, for defendants.

WHITFIELD, C. J. Appellant sued appellees for \$144. In the course of the trial, appellees (defendants below) reserved various exceptions to the action of the court in admitting and excluding evidence. So it was, however, that ultimately the judgment was rendered in favor of appellant (plaintiff below) for only \$59. Defendants below made no motion for a new trial, being satisfied with the result. Plaintiff below, dissatisfied with the amount of the recovery, made a motion for a new trial, which was overruled, and then brought the record to this court by appeal. Defendants below, finding plaintiff below had appealed, petitioned the circuit clerk for a cross-appeal, and have here cross-assigned errors predicated upon the action of the court below in admitting and excluding evidence in the course of the trial; the court having overruled their objections, and they having excepted at the time. Appellant (plaintiff below) moves to dismiss the cross-appeal because the defendants below made no motion for a new trial.

In *Chastine's Case*, 54 Miss. 503, following the statute prior to Code 1892, § 739, it was held that this court would not pass upon the action of the court below in overruling a motion for a new trial where that particular action of the court had not been excepted to below; but the court nevertheless looked to the bill of exceptions and the record, and for instructions improperly refused, and evidence improperly admitted, reversed the case. But, let it be marked, there was a motion for a new trial in that case, and the court below acted on that motion, overruling it. In *Spengler's Case*, 74 Miss. 129, 20 South. 879, 21 South. 4, the court pointed out the fact that section 739 of the Code of 1892 changed the rule that this court would not pass on the action of the court below in overruling a motion for a new trial where such action in overruling the motion had not been excepted to. But, let it be marked again, there was in *Spengler's Case* a motion for a new trial, and a judgment of the court below overruling the motion. The important thing to note in *Chastine's Case* and *Spen-*

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1654.

gler's Case is that in both the party appealing had specifically called the attention of the court below to the errors complained of, not simply by excepting in the course of the trial, but by repeating the exceptions in motions for new trials on which the court acted. It would be very unfair to the court below for this court to pass upon errors assigned here for the first time, which had never been called to his attention in a motion for a new trial below. The object of the motion for a new trial, and the reason requiring it to be made and acted on in order that this court may review the action of the court below, is clearly set out in 14 Enc. PL. & Prac. p. 846: "(a) Generally. The office of a motion for a new trial is twofold: First, to present the errors complained of to the trial court for review and correction, or to secure a new trial; second, to preserve the same errors in the record, so that the ruling of the trial court in granting or refusing a new trial may be reviewed by the appellate court. It is a general rule that all errors correctable by motion for a new trial, and not so assigned, are deemed to have been waived by the applicant for the new trial. Unless the motion for a new trial has been presented, and considered by the lower court, and its ruling preserved, the errors assigned in such motion will not be reviewed by the appellate court. (b) To Obtain Review by Trial Court. To secure a review in the trial court of errors committed at the trial, the complaining party must except to the errors and irregularities at the time when the rulings of the court thereon are made, and must call the attention of the trial court to such rulings by assigning them as errors, and as grounds for a new trial; otherwise such errors will be deemed waived. (c) To Obtain Review by Appellate Court. (1) Necessity of Motion and Ruling Thereon. It is a well-known rule of appellate courts that errors of the trial court occurring during the trial will not be reviewed unless such errors have been called to the attention of the trial court, and an opportunity given to correct them. It is necessary, therefore, to present such errors to the trial court by a motion for a new trial, and to secure a ruling on the motion." And in 2 Thomp. Trials, § 2712: "Motion Necessary to Preserve Errors in the Record for Review. The motion is necessary to enable the court to correct such errors occurring at the trial as do not appear on the face of the record proper, as where it is insisted that there is no evidence to support the verdict, or that the verdict is against the law and the evidence, or that the evidence does not authorize the judgment, or that there is an error in the verdict of the jury, or where it is alleged that the court erred in matter of law, either in admitting or rejecting evidence, or in giving or refusing instructions, or where it is alleged that there has been misconduct on the part of the jury, or that the damages

assessed are inadequate or excessive, or, in a criminal case, for alleged error because of the nonarraignment of the defendant. The grounds upon which the motion is to be made are expressly enumerated in a majority of the practice acts of the various states, and include generally such errors in the mode of trial as do not otherwise appear on the record, but which are proper matters of exception. And when no motion for a new trial is made in the trial court to correct such errors, most of the decisions hold that they are deemed to have been waived, and that the appellate court will refuse to review them." Judge Thompson properly calls attention to the distinction which exists in such cases between those exceptions which would appear on the face of the record, and which the judge would be supposed consequently to have always in mind, and the very different character of exceptions which are made in the current course of a trial, and set forth in the ordinary bill of exceptions, and which do not appear elsewhere. Here we have a case in which it would have been very easy for the defendants to have put the record in such shape by making a motion for a new trial, and have the court overrule it, as would have enabled them, when the appellant brought the whole record here, to cross-assign error. The defendants did not choose to do that. They did not call the attention of the court below, as it was just they should have done, to the errors on which they finally relied, by setting them out in a motion for a new trial; and, of course, there being no such motion, the court below acted on no such motion.

Unlike *Ochastine's* and *Spengler's Cases*, this case contains no motion for a new trial at all, on the part of the defendants below, and, for reasons given in the authorities cited, the motion will be sustained.

YANDELL v. MADISON COUNTY.

(Supreme Court of Mississippi. Oct. 27, 1902.)

OFFICERS—COMPENSATION—SALARY—QUANTUM MERUIT.

1. Where a health officer sued on quantum meruit for medical services, ignoring the fact that his compensation was a salary to be fixed by the board of supervisors, a demurrer was properly sustained.

Appeal from circuit court, Madison county; Robt. Powell, Judge.

Action by W. M. Yandell against Madison county. From a judgment for defendant, plaintiff appeals. Affirmed.

See 30 South. 606.

H. B. Greaves and W. H. Powell, for appellant. A. P. Hill, for appellee.

TERRAL, J. Dr. Yandell, as health officer thereof, sued Madison county upon a quantum meruit in the sum of \$692 for medical services rendered to residents of that

county. To the several counts, three in number, all of like character, he attached a bill of particulars, containing about 93 items, one of which items, which will serve to illustrate all the others, is as follows: "1901, Jan. 14. To visit Jesse Samuel (smallpox), \$15.00." To his declaration a demurrer was sustained, when he filed an amended count in quantum meruit also, but for \$800. In the amended declaration no mention is made of the services performed, but it alleges for the year 1900 his predecessor in office had received at the rate of \$500 per annum, which had been fixed at that sum by the board of supervisors, and that his (Yandell's) services were worth more than the services of his predecessor. His amended declaration further alleges that the board for the year 1901 had fixed the health officer's salary at \$100 per annum, but it makes no use of that fact except to ignore it. In truth, all the counts ignore the fact that his compensation is a salary, to be fixed by the board, and seek to recover upon a quantum meruit for special services to sick persons within the county. We think a demurrer was rightly sustained to all the counts, because Dr. Yandell can claim against the county his salary only, whatever that may be; and for such recovery neither of his counts is a suitable pleading.

Affirmed.

POWELL v. McKEE, Tax Collector.

(Supreme Court of Mississippi. Nov. 3, 1902.)

TAXES — PERSONALTY — ASSESSMENT — "UNKNOWN OWNER" — TAX COLLECTOR — CONSTITUTIONALITY.

1. Code 1892, § 3746, makes taxes on personalty a charge on the property taxed, and a sale of it is declared to be a proceeding against the thing sold, and to vest title in the purchaser, without regard to ownership of the property or the wrongfulness of the assessment. Section 3747 makes a tax on personalty a debt due by the owner, whether properly assessed or not. Notes payable to "bearer," and secured by deeds of trust not naming the cestui que trustant, were assessed "to the unknown owner." *Held*, that the assessment was proper, since the tax was due from the property itself, as well as constituting a debt from the unascertained owner.

2. Code 1892, § 3804, authorizing the tax collector to assess such persons and personal property as he may find unassessed by the assessor, is constitutional.

Appeal from chancery court, Madison county; H. C. Conn, Chancellor.

Bill by W. H. Powell, trustee, against S. T. McKee, tax collector. From a decree dismissing the bill, complainant appeals. *Affirmed*.

A number of persons loaned money in Madison county, Miss., and took notes payable to "bearer," and took deeds of trust to secure same, in which W. H. Powell, appellant, was named as trustee. In August, 1901, the assessor of Madison county assessed them for taxes as "unknown solvent credits to un-

known owner." In March, 1902, appellee, sheriff and tax collector of Madison county, acting under the provisions of section 3804, Code 1892, assessed these same debts to "unknown owner." The taxes on these several debts or solvent credits were not paid, and appellee advertised them for sale under the provisions of section 3826 of the Code of 1892. Thereupon appellant, W. H. Powell, trustee, filed his bill in this case in the chancery court to enjoin the sale, and alleged that the assessments made both by the assessor and the sheriff and tax collector were null and void because made to an unknown owner, and that the property was not sufficiently identified by either assessment, and that the statute required personal property to be assessed to a person by name; that the tax collector could assess only property that had escaped assessment by the assessor, and that in this case the assessor had attempted to assess the very same property in August, 1901; and that the law authorizing the tax collector in any case to assess was unconstitutional and void. A demurrer was sustained to this bill, and the bill dismissed. From that decree, complainant appeals.

W. H. Powell and H. B. Greaves, for appellant. J. B. Chrisman, for appellee.

TERRAL, J. The bill in this case proceeds upon the assumption that an assessment of personal property to "unknown owner" is invalid. By section 3746, Code 1892, taxes are made a charge on the land or upon the personal property taxed; and a sale of it is declared to be a proceeding against the thing sold, and to vest title in the purchaser, without regard to who may own the property when assessed or sold, or whether wrongfully assessed. By section 3747 a tax upon personal property is made a debt due by the person owning the property, when assessed, whether properly assessed or not, and this is entirely in harmony with the preceding section, which makes the tax a charge upon the thing taxable, whether rightfully or wrongfully assessed; and, taking both sections together, it is, we think, a necessary conclusion that personal property may be rightfully assessed to an unknown owner. Under our laws, we see no reason to doubt that an assessment of personal property to an unknown owner is as effective as a like assessment of real estate. It is not denied that the solvent credits here assessed are taxable, and in the face of section 3748, which declares that all taxable property held by any person before the 1st day of February shall be assessed, it is insisted that they are not assessable because they bear no earmarks of ownership. A contention that for the same reason they could not be collected by suit at law would be equally sound. It must be confessed that personalty is usually and almost always assessed to the owner, because the owner is generally known, but there is no incongruity

or hardship in assessing it to the unknown owner. The taxes are due from the property itself, as well as constituting a debt from the owner; and, if the latter secretes himself, it is but just that the former adjust the demand.

2. It is, in the second place, insisted that the provision of the Code (section 3804) authorizing the tax collector to assess such persons and personal property as he may find unassessed by the assessor is unconstitutional. It has been decided, however, several times, that such provision of the Code is unobjectionable, and we see no reason to question their correctness. *Tunica Co. v. Tate*, 78 Miss. 294, 29 South. 74; *State v. Tonneil*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 344.

Affirmed.

CONKLIN et al. v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi. Nov. 3, 1902.)
TRESPASS—PARTIES—HEIRS.

1. Heirs cannot sue for damages for trespass on the lands of an ancestor committed during his lifetime; Code 1892, §§ 1916, 1917, giving such right to executors and administrators.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

Trespass by A. J. Conklin and others against the Alabama & Vicksburg Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

On the trial it developed that the lands described in the declaration belonged to one Mrs. Annie Conklin, who died intestate before this suit was brought, and no administration had been had on her estate. Plaintiffs then offered to prove that Annie Conklin owed no debts at the time of her death, and that plaintiffs, her husband and daughter, were her only heirs and distributees, and that no letters of administration had been issued on her estate. On objection of defendant, the court excluded said evidence. The court then gave a peremptory instruction to find for defendant. There was judgment accordingly.

Shelton & Brunnini, for appellants. McWillie & Thompson, for appellee.

CALHOON, J. The heir could not, nor could the executor or administrator, under the common law, sue at law for damages done by trespass committed during the lifetime of the ancestor on the lands of the ancestor. *Broom*, Leg. Max. top page 911; *Plowd.* 142; 2 *Saund. Pl. & Ev.* 868; 2 *Mod.* 7; 1 *Saund.* 216, note, 217, note; *Barb. Parties*, 176; *Wilbur v. Gilmore*, 21 *Pick.* 252; *Reed v. Railroad Co.*, 18 *Ill.* 403. This, being the common law, is still the law, unless changed by statute. It has not been changed in this state. Sections 1916, 1917, Code 1892, simply give the right to sue

to the executor or administrator. They do not give it to the heir. Hence he cannot sue. The case of *Marshall v. King*, 24 *Miss.* 85, decides that the distributee cannot recover at law. Equity courts may be invoked in certain states of case, but chancery powers, remedial and protective, are large,—such as the requirement of bonds to indemnify, and to restore property to save harmless such persons as premature distribution might injure. Law courts cannot do this. The crucial test in the case before us is that, if recovery were had and the damages paid, and debts of the intestate did develop, the administrator could recover again.

Affirmed.

BUCKNER v. STATE.

(Supreme Court of Mississippi. Nov. 3, 1902.)
NEW TRIAL—NEWLY DISCOVERED EVIDENCE
—ALIBI.

1. Where the defense to a charge of murder was an alibi, and defendant proved his absence from the place where the murder occurred until 2 or 3 o'clock in the afternoon on the day of the murder, and it appeared that he left a certain plantation alone at about that time, and that the news of the murder reached the plantation after he left, he was entitled to a new trial for newly discovered evidence consisting of testimony of witnesses that the death occurred as early as 11 o'clock a. m.; the conviction being based on the testimony of a single witness, which was unsatisfactory.

Appeal from circuit court, Adams county; Jeff Truly, Judge.

"To be officially reported."

Henry Buckner was convicted of murder, and appeals. Reversed.

Buckner and Willie Dobins, the chief witness in the case for the state, were jointly indicted for the murder of one Chas. Myres, a fisherman. Dobins was convicted, and sentenced to the penitentiary, and appellant was sentenced to be hanged. Appellant's defense was an alibi. He proved by several witnesses his absence from the place where the murder occurred until about 2 or 3 o'clock on the day of the killing, and it was shown that he left a gin on a plantation about that time, alone; and it was not definitely shown on the trial what time of the day the killing occurred, but it was shown that the news of the killing reached the gin where appellant was after he left there, and the witness stated that when the body was found it looked like he had been dead for some time. Defendant made a motion for a new trial on the ground, *inter alia*, of newly discovered evidence. In support of the motion for a new trial defendant offered the affidavits of two persons to prove that they heard of the death of Myres as early as 11 o'clock a. m. on the day he was killed, and also offered the affidavits of Buckner and his attorneys to the effect that they had exercised due diligence, and did not learn until after the trial that the man was killed as early as 11 o'clock a. m. that day.

The motion for a new trial was overruled, and defendant appeals.

E. E. Brown, for appellant. Wm. Williams, Asst. Atty. Gen., for the State

WHITFIELD, C. J. The testimony of the witness Dobins, the sole evidence on which this verdict can be supported, is in many respects very peculiar, and this unsatisfactory character of his testimony makes it extremely important that the newly discovered evidence should be heard. We are not willing to sanction a verdict depriving the appellant of his life on the present state of this record; rather let the evidence set out in the motion for a new trial be heard, and its value determined, by another jury. We think that the rules governing new trials on account of newly discovered evidence were fully complied with under all the circumstances of this case. Buckner's defense was an alibi, and the time of the killing, in view of that defense and the evidence in this case, was vitally important to the solution of the question whether Buckner committed the act.

Reversed and remanded

ATKINS et al. v STATE.

(Supreme Court of Mississippi. Nov. 10, 1902.)

CRUELTY TO ANIMALS—EVIDENCE.

1. Where A. hired a team, and alone controlled in loading and driving it, defendants, merely riding and paying A. fare, cannot be convicted of cruelty to the animals in overloading and overdriving.

Appeal from circuit court, Tate county; P. H. Lowrey, Judge.

Lizzie Atkins and another were convicted of cruelty to animals, their motion for a new trial was overruled, and they appeal. Reversed.

Appellants were convicted of cruelty to animals by having overloaded and overdriven a pair of horses hired from a livery stable. The proof showed that appellants and eight other negroes went in a hack drawn by the two horses to church, and drove them in one day a distance of about 46 or 47 miles, and that one of the horses died from the effects of the drive, and the other was badly stove up. The proof further showed that one Henry Anderson made the contract to hire the team with the livery stable keeper, and drove the horses; appellants going along in the hack, and paying Anderson 25 cents each.

Johnson & Johnson, for appellants. Wm. Williams, Asst. Atty. Gen., for the State.

TERRAL, J. The record in this case clearly discloses that Henry Anderson hired the team of Mr. Wooten, and that he alone controlled in the loading and driving of the team, and that appellants were not responsible for the wrong of Anderson. The first instruction for the state is not applicable, in

32 So.—587½

our judgment, to the facts in the record, but the facts themselves do not support the verdict; wherefore the judgment is reversed, and the case is remanded.

STRICKLAND v. STATE.

(Supreme Court of Mississippi. Nov. 10, 1902.)

HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

1. An instruction on the law of manslaughter should be given where four persons unknown to defendant, showing no warrant against him, who had committed no wrong, came to his home late at night, two of them armed, declaring they came to arrest him, and demanding that he throw up his arms, whereupon he fired on them, killing one of them.

2. An instruction that it is murder to kill a human being without authority of law, when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, though without any premeditated design to effect the death of any particular person, is not applicable where four persons unknown to defendant, showing no warrant against him, who had committed no wrong, came to his house late at night, two of them armed, declaring they came to arrest him, and demanding that he throw up his arms, whereupon he fired on them, killing one of them.

Appeal from circuit court, Marshall county; P. H. Lowrey, Judge.

Charles Strickland was convicted of murder, and appeals. Reversed.

L. A. Smith, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

TERRAL, J. The appellant, being convicted of murder and being sentenced to be hanged, assigns error in the proceedings against him. Four persons came to his home somewhat late at night, two of them armed, declaring they came to arrest him, and upon seeing him demanded that he throw up his hands, when he fired upon them, and one of them was killed. His counsel claim that, if he fired upon his assailants because of being unlawfully restrained of his liberty, he is only guilty of manslaughter, and that at least his contention in this respect should have been placed before the jury. This contention is, we think, well grounded. Whenever the life of a human being is in the balance, it is but just to him that the law governing the case made against him be properly stated to the jury. The appellant here is not shown to have committed any wrong; his assailants show no warrant against him; yet he is assaulted in his own home at night by unknown persons, some of whom are visibly armed, and one of them is killed in consequence. Without more, such evidence only presents a case of manslaughter. The fourth instruction for the state is assailed as erroneous. It declares, "It is murder to kill a human being without authority of law, when done in the commission of an act eminently dangerous to others and evincing a depraved heart."

¶ 1. See Homicide, vol. 28, Cent. Dig. §§ 650, 653.

regardless of human life, although without any premeditated design to effect the death of any particular person." Law writers justify this character of instruction where a person wantonly rides a horse used to kick into a crowd, and one is thereby killed; or to random shooting into a crowd without a particular purpose to kill; the malice arising out of the wantonness of the dangerous act done without provocation; but it is not strictly applicable in a case like this, where the accused is suddenly accosted by a crowd of armed men demanding him to surrender, under circumstances where the propriety of their conduct is gravely questionable. The fifth instruction for the state assumed, as we understand it, that the persons who, armed, accosted Strickland and demanded that he throw up his hands and submit to arrest, were officers in the due execution of their office. We think it was for the jury to say, upon the evidence, whether they were officers, and whether they were proceeding with discretion and propriety. In a matter of such grave consequence to appellant it was of vital moment to him that the jury should be correctly informed of his rights in the premises.

Because of the error of instructions 4 and 5 for the state in the case as made before the jury, we think the appellant should have a new trial. Reversed and remanded.

HAYDEN v. STATE.

(Supreme Court of Mississippi. Nov 10, 1902.)
CRIMINAL LAW—APPEAL BEFORE JUDGMENT.

1. Appeal will not lie, before judgment, on a mere verdict of guilty.

Appeal from circuit court, Alcorn county; E. O. Sykes, Judge.

H. Hayden was convicted of practicing medicine without obtaining a license required by law. The trial court did not pass any final judgment, but there is an order or judgment stating that the jury had found defendant guilty, postponing sentence pending the appeal of the case to the supreme court. Defendant's motion for a new trial was overruled, and he appeals. Dismissed.

J. A. P. Campbell and Boone & Curlee, for appellant. Monroe McClurg, Atty. Gen., for the State.

WHITFIELD, C. J. There was no final judgment in this case. There is nothing but the verdict of the jury. We can only entertain appeals from circuit courts in cases of final judgments. In 2 Enc. Pl. & Prac. p. 150, it is said, "No appeal can be taken, therefore, from a verdict of guilty, unless the judgment is entered thereon." In the second volume of the *Cyclopedia of Law & Procedure*, p. 614, it is said: "The existence of a judgment or an appealable order being a ju-

risdictional fact, an appeal or writ of error will not lie unless there has been such a judgment or order in the court below;" and on page 616: "A writ of error or appeal will not lie from the verdict of the jury without an entry of judgment thereon." It is perfectly clear that we are without jurisdiction in this case, and can take no action save to dismiss the appeal. It is due to counsel for appellant to say that they called attention before arguing the case at bar to the absence of any judgment.

Appeal dismissed.

DAVIS v. STATE.

(Supreme Court of Mississippi. Nov. 10, 1902.)
CONVICTS—WHIPPING.

1. A convict cannot be whipped for discipline, punishment by whipping not being allowed; Acts 1896, p. 99, forbidding maltreatment or abuse of a convict; and Code 1892, § 2747, extending to a convict, for one year after release, a right to bring action for assault and battery.

Appeal from circuit court, Copiah county; Robt. Powell, Judge.

"To be officially reported."

Will Davis was convicted of assault and battery, and appeals. Affirmed.

R. B. Mayes, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

TERRAL, J. The appellant, a guard upon a convict farm, whipped one of the convicts with a plow line, and, being convicted of assault and battery, he appeals. He claims a right to castigate a convict if done moderately, and as a punishment for idle or refractory conduct. The whipping or the beating in any way of a convict by the contractor or by his guard is unlawful. Whatever correction by way of discipline may be imposed upon a convict, he cannot be lawfully whipped or beaten, whether moderately or immoderately. That mode of correction or punishment is illegal. Such punishment, in olden times, was a badge of slavery; but slavery is abolished. With it have departed its incidents. Acts 1896, p. 99, forbids the maltreatment or abuse of a convict. The inhibition is idle unless it includes the prohibition of whipping convicts with plow lines or otherwise. The conviction of a free man of crime subjects him only to the punishment the law imposes, and whipping is not a punishment recognized by law. What it is unlawful to impose as a punishment, it is unlawful to impose as discipline. Section 2747, Code 1892, extends to a convict, for one year after release, a right to bring an action for assault and battery, and this manifestly applies to an assault and battery by the contractor or guard; for what good is the limitation unless an assault and battery upon a convict be forbidden? We have had no difficulty in reaching the conclusion that a convict cannot be punished in a man-

[1. See Criminal Law, vol. 15, Cent. Dig. § 2596.

ner different from that prescribed by law, and that a punishment not so authorized cannot be inflicted under the guise of discipline. Whatever acts the right to discipline a convict may justify, it cannot authorize the infliction of corporal punishment by whipping. With us such punishment, under whatever name, is abolished.

Affirmed.

FLETCHER v. SOVEREIGN CAMP WOODMEN OF THE WORLD.

(Supreme Court of Mississippi. Nov. 10, 1902.)

BENEFIT INSURANCE—SUICIDE—EVIDENCE—HARMLESS ERROR.

1. Evidence of suicide of the member, in action on a benefit certificate, held so clear and convincing as to make proper a peremptory instruction for defendant.

2. The evidence of suicide, outside of the coroner's verdict, being so overwhelming as to make a peremptory instruction for defendant proper, admission in evidence of the coroner's verdict was harmless.

Appeal from circuit court, Attala county; J. H. Neville, Judge.

"To be officially reported."

Action by John M. Fletcher, guardian, against the Sovereign Camp Woodmen of the World. Judgment for defendant. Plaintiff appeals. Affirmed.

D. B. Noah was the holder of a benefit certificate in the Sovereign Camp Woodmen of the World, payable at his death to his two infant daughters, as beneficiaries, provided he did not commit suicide. He died at Fayette, away from his home, which was at Kosciusko, December 1, 1899. This suit was brought by appellant, as guardian of the children of Noah, to recover the amount of the certificate. The defense was that Noah committed suicide. The cause was tried at the March, 1901, term of the Attala county circuit court, and resulted in a verdict for defendant, but on motion of plaintiff the verdict was set aside. At the September, 1901, term of that court, the case was again tried, and there were verdict and judgment for defendant; the court giving a peremptory instruction to find for defendant. From that judgment plaintiff appeals, and defendant prosecutes a cross-appeal from the order setting aside the former verdict in its favor. The only issue before the jury was as to whether Noah committed suicide or not. The evidence as to this on the part of defendant was, in substance, as follows: Noah and one Perkins occupied the same room in a hotel at Fayette the night of November 30, 1899. The next morning Perkins got up early and went to his work, and left Noah in the room alone. Noah was awake when he left, and they had some conversation. About two hours afterwards Noah was found dead, lying across the bed in his night-clothes, with a gunshot wound entering just above and in the rear of the right ear, passing out just above and in the rear of the left

ear, with a pistol gripped in his right hand, powder indications on left forefinger and thumb, and also on the side of the head, where the wound was, and one chamber of the pistol freshly discharged. He was lying in a pool of blood, his brains issuing from the wounds. He had a gold watch and \$1.40 in money in his pockets. He had requested an acquaintance in Fayette to have his remains shipped to Kosciusko if anything should happen to him,—if he should be killed,—and afterwards wrote him a note reminding him of his promise to comply with this request. A few days before his death he went hunting with a friend, and talked with him about his life insurance, and told him that if he (Noah) should be killed, or fall down and kill himself, to roll him in the buggy and haul him to town, and turn his body over to Tom (the one he had requested to send his remains to Kosciusko). While hunting he was found with his gun muzzle resting on his breast, in a dangerous position, and was seen that day sitting on a log near some bushes, with his handkerchief to his eyes, crying. The pistol in Noah's hand was a 38 Smith & Wesson, and a ball in the wall of his room was a 38-caliber ball. There were some unsatisfied judgments against Noah for more than \$1,000, and he owed his landlady in Fayette \$20, and he was in arrears with his insurance company, for which he had been working, some \$100, and had been written to several times about it, and had promised to pay it the day he died.

The evidence for plaintiff was that a bullet was found in the wall of the room about 44 inches from the floor, and that Noah's head was only about 22 inches above the floor, and that the bullet ranged downwards. There was also some evidence of some parties who looked at the corpse at Kosciusko to the effect that they saw no wound or hole in the head of the deceased, but saw a bruise just under one of his eyes.

Dodd & Lockett, for appellant. J. A. P. Campbell and C. H. Campbell, for appellee.

WHITEFIELD, C. J. There is no material difference between the evidence in this cause and that in the case of *Supreme Lodge v. Fletcher*, reported in 78 Miss. 377, 28 South. 872, 29 South. 523. The evidence before the circuit court of appeals of the United States does not materially vary the case. It seems to us very obvious from the opinion of Shelby, Circuit Judge (111 Fed. 773),¹ that the circuit court of appeals would have affirmed the action of the district judge if he had granted the peremptory instruction. That court distinctly says that the evidence "seemed to show, almost if not quite conclusively, that the deceased held the pistol that fired the shot"; but because it was not "absolutely certain that he committed suicide," from the evidence, the court was constrained,

¹ *Fidelity & Casualty Co. of New York v. Love*, 49 C. C. A. 602.

under its rules of practice, not to reverse the action of the district judge in refusing the peremptory instruction. As we construe this language, it is perfectly manifest the granting of the instruction would have been approved. No fact is required in civil cases, under our practice, to be shown with "absolute certainty." Where the lower court would not be willing, on the evidence, to permit a verdict to stand, except for one party, under our practice the court should give a peremptory charge. We think the evidence in this case is so clear and convincing that Noah did commit suicide that the circuit judge should have refused to allow a verdict for plaintiff to stand, if rendered; and, under the practice obtaining in this state, it has long been settled that whenever that is the case the court should give a peremptory instruction for the party for whom alone it would permit a verdict to stand. It may be said, in passing, that if the terms of the policy here vary from the terms of the policy in the case in 78 Miss., 28 South., 29 South., and if, as we think, the verdict of the coroner's jury was incompetent in this case as evidence of the cause of death, it nevertheless remains true that the evidence of suicide is so overwhelming that the peremptory instruction should have been given, whether the coroner's verdict was in or out, since, either way, no verdict could have been properly reached, except for the defendant.

Affirmed.

DARDEM v. STATE.

(Supreme Court of Florida. Sept. 23, 1902.)

STATUTES—REPEAL—GAMING.

1 The provisions of section 2644, Rev. St., prescribing a penalty against one who "has, keeps, exercises or maintains gaming implements or apparatus for the purpose of gaming or gambling," were not repealed by the provisions of section 3, c. 4373, Laws approved May 28, 1895, which prescribes a penalty against one who "sets up, promotes or plays at any game of chance by lot, or with dice, cards, numbers, hazard or any other gambling device whatever for, or for the disposal of, money or other thing of value," etc.

(Syllabus by the Court.)

Error to criminal court of record, Hillsborough county; William S. Graham, Judge.

Mack Dardem was convicted of maintaining a gaming apparatus, and brings error. **Affirmed.**

Geo. G. Clough, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. On September 16, 1901. an information was duly filed in the criminal court of record of Hillsborough county, charging that plaintiff in error on the 30th day of June, A. D. 1901, in the county of Hillsborough in this state, "did then and there unlawfully, willfully, and feloniously have, keep,

and maintain a gaming apparatus, commonly called a 'slot machine,' for the purpose of gaming and gambling, against the form of the statute," etc. At the same term of the court, defendant was arraigned, pleaded "guilty," and was sentenced to pay a fine of \$150 and costs. From the judgment so entered, writ of error was taken, returnable to the present term of this court.

The information was manifestly framed under section 2644, Rev. St., which, so far as applicable to the present case, prescribes a punishment by imprisonment in the state prison not exceeding three years, or fine not exceeding \$5,000, against one who "has, keeps, exercises or maintains gaming implements or apparatus for the purpose of gaming or gambling," and the fine imposed does not exceed that prescribed by the section quoted. It is contended in this court that the quoted section of the Revised Statutes was repealed by section 3, c. 4373, Laws approved May 28, 1895, which reads as follows: "Whoever sets up, promotes or plays at any game of chance by lot, or with dice, cards, numbers, hazard or any other gambling device whatever for, or for the disposal of, money or other thing of value, or under the pretext of a sale, gift or delivery thereof, or for any right, share or interest therein, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$100, or be imprisoned in the county jail not exceeding three months, or be punished by both such fine and imprisonment;" that the information must be construed as charging an offense under the latter act; and that therefore the fine imposed upon plaintiff in error in the court below was unauthorized, because it exceeds the maximum prescribed thereby. This question is properly raised by the assignments of error, and is the only question presented by the briefs for our consideration.

The act of 1895 does not, in terms, repeal section 2644, Rev. St., but by section 5 it does repeal "all laws or parts of laws in conflict with or inconsistent" with its provisions. Unless there is in a later statute something in conflict or inconsistent with an earlier one, no repeal of the latter is effected. Properly construed, there is no inconsistency between these statutes, for each punishes different and distinct acts. The Revised Statutes is directed against having, exercising, or maintaining gaming implements, or apparatus for the purpose of gaming, while the act of 1895 is directed against the setting up or promoting of any game of chance "with dice, cards, * * * or any other gambling device whatever for, or for the disposal of, money," etc. The latter act does not punish one who sets up or promotes a gambling device, as contended by plaintiff in error, but punishes the setting up or promoting of any game of chance conducted by means of any gambling device.

The contention made in this court cannot be sustained, and the judgment will therefore be affirmed.

RAY et al. v. FRANK et al.

(Supreme Court of Florida. July 8, 1902.)

APPEAL—REVIEW—EQUITY—OVERRULING DEMURRER—DECREE PRO CONFESSO.

1. An appeal entered from two interlocutory decrees in a chancery cause, one of which was entered more than six months prior to the entry of the appeal, will entitle the party appealing to have reviewed the propriety of the decree entered within six months of the entry of the appeal, but not the one entered more than six months prior to such entry of appeal.

2. Where, in a chancery cause, upon the overruling of a demurrer to the bill the court grants time within which the demurrant shall answer, and no answer is filed in pursuance of such leave, but no decree pro confesso is entered, and application is thereafter made to the court for a decree pro confesso, the court is justified in granting it, in the absence of a sufficient excuse for not pleading, or good cause shown for the allowance of further time to plead.

(Syllabus by the Court.)

Appeal from circuit court, Alachua county; William A. Hocker, Judge.

Bill by Isaac M. Frank and Ferdinand A. Well against C. K. Ray and others. From the decree, defendants appeal. Affirmed.

Evans Halle, for appellants. Hampton & Ammons, for appellees.

PER CURIAM. This cause was referred by the court to two of its commissioners, Messrs. Maxwell and Glen, for investigation, who report the cause for disposition as hereinafter stated.

The appeal was entered October 1, 1896, and purports to have been taken from two interlocutory decrees,—one overruling appellants' demurrer to the bill of complaint, on January 30, 1896; the other granting a decree pro confesso against appellants April 4, 1896.

The two assignments of error complain that the court erred in entering the two interlocutory decrees mentioned. As the appeal is not from a final decree, and was not entered within six months after the entry of the interlocutory order of January 30, 1896, overruling the demurrer, the propriety of such order cannot be considered on this appeal. *Navigation Co. v. Broughton*, 38 Fla. 139, 20 South. 829.

The order overruling the demurrer granted leave to answer, but no answer was filed in pursuance of such leave. On March 23, 1896, appellees gave notice of a motion for a decree pro confesso against appellants for their failure to plead or answer, and upon the hearing had April 4, 1896, that motion was granted, and the decree pro confesso entered by the judge. Affidavits on the part of the respective parties were filed at the hearing, which have been given due consideration by this court, and upon such consideration no error in the decree is perceived. The appellants were clearly in default for not pleading, and, upon the affidavits presented at the hear-

ing, this court is of opinion that the circuit judge was justified in his finding that no sufficient showing was made to entitle appellants to further time to plead, or to preclude the entry of a decree pro confesso consequent upon such default. As this court cannot, for the reason stated, consider the propriety of the ruling on demurrer, it is unnecessary to set forth the allegations of the bill.

The interlocutory order entered April 4, 1896, for a decree pro confesso, is affirmed, the costs of this appeal to be taxed against appellants.

MATTAIR et al. v. FURCHGOTT.

(Supreme Court of Florida. July 8, 1902.)

APPEAL—REVIEW—RECORD—DISMISSAL.

1. An appeal entered from two interlocutory decrees in a chancery cause, one of which was entered more than six months prior to the entry of the appeal, will entitle the party appealing to have reviewed the propriety of the decree entered within six months of the entry of appeal, but not the one entered more than six months prior to such entry of appeal.

2. Decrees appeal from must appear in the transcript of the record, to authorize their review by an appellate court. If they do not so appear, the court cannot review them, even though the abstract of the record filed by appellant states that such decrees were duly made and entered.

3. Where, upon an appeal from two interlocutory decrees, it appears that one of them was entered more than six months prior to the entry of appeal, and the other is not brought up in the transcript of the record filed upon such appeal, the appeal will be dismissed.

(Syllabus by the Court.)

Appeal from circuit court, Alachua county; William A. Hocker, Judge.

Bill by Leopold Furchgott against S. L. Mattair and J. B. Mattair. Decree for plaintiff, and defendants appeal. Dismissed.

Evans Halle, for appellants. Hampton & Ammons, for appellee.

PER CURIAM. This cause was referred by the court to two of its commissioners, Messrs. Maxwell and Glen, for investigation, who report the cause for disposition as hereinafter stated.

The appeal was entered October 1, 1896, and purports to have been taken from two interlocutory decrees,—one overruling appellants' demurrer to the bill of complaint, on January 30, 1896; the other granting a decree pro confesso against appellants April 4, 1896.

The two assignments of error complain that the court erred in entering the two interlocutory decrees mentioned. As the appeal is not from a final decree, and was not entered within six months after the entry of the interlocutory order of January 30, 1896, overruling the demurrer, the propriety of such order cannot be considered on this appeal. *Navigation Co. v. Broughton*, 38 Fla. 139, 20 South. 829; *Ray v. Frank* (decided at this term) ubi supra.

The abstract filed March 13, 1897, not excepted to, shows that the court granted an order, dated April 4, 1896, that the bill be taken as confessed against appellants, for failure to plead; but, upon inspection of the transcript of the record, we fail to find that any such order was ever made by the court. This court has no jurisdiction to review an order appealed from, unless that order be exhibited to it in the transcript. *Railway Co. v. Boy*, 34 Fla. 389, 16 South. 290. As we must be governed by the transcript, and not by the abstract, in determining our jurisdiction, and the transcript fails to embrace the order complained of by this the second assignment of error, and the first assignment cannot be considered for reasons stated, the appeal must be dismissed. Accordingly the appeal is dismissed at the cost of the appellants.

STATE ex rel. ROWE et al. v. MARTIN,
County Judge.

(Supreme Court of Florida. June 9, 1902.)

WRIT OF ERROR—DISMISSAL.

1. A writ of error to review the judgment of a circuit court refusing to compel by mandamus the issuance of a license to carry on and conduct a mercantile business will be dismissed where it appears that the time during which such license would have remained operative has expired.

(Syllabus by the Court.)

Error to circuit court, Madison county; John F. White, Judge.

Application by the state, on the relation of Rufus D. Rowe and James W. Barrett, for writ of mandamus to James P. Martin, county judge. From an order denying the writ, plaintiffs bring error. Dismissed.

H. J. McCall, for plaintiffs in error. Chas. E. Davis, for defendant in error.

PER CURIAM. This cause was referred by the court to its commissioners, who report that the writ of error ought to be dismissed.

The writ of error is sued out from a judgment of the circuit court of Madison county, rendered on September 10, 1897, in a proceeding by mandamus to require the defendant in error, as county judge of Madison county, to issue to the relators a license to carry on, conduct, and manage a mercantile business in said county and state.

An alternative writ issued, and defendant in error filed his answer, to which a demurrer was interposed. The court overruled the demurrer, denied the application for peremptory writ, and adjudged that defendant in error go without day.

The time during which such license would have remained operative, if issued, has long since expired. It would therefore be fruitless to pass on the merits of the case on this writ of error, and it will therefore be dis-

missed. *Broward v. Bowden*, 39 Fla. 751, 23 South. 499; *State v. Commissioners of Marion Co.*, 27 Fla. 438, 8 South. 749.

JACKSON v. STATE.

(Supreme Court of Florida. Sept. 16, 1902.)

CRIMINAL LAW—WRITS OF ERROR—TRANSCRIPTS—CERTIFICATION.

1. Writs of error in criminal cases lie only from final judgments, and, where no final judgment is found in the transcript filed in the appellate court upon a writ of error in such cases, the writ will be dismissed.

2. Transcripts upon writs of error in criminal cases must be certified in the form prescribed by rule 103 of the rules of the circuit courts in common-law actions, adopted at the April term, A. D. 1873, by the supreme court; and, if not so certified, the writ of error will be dismissed.

(Syllabus by the Court.)

Error to criminal court of record, Hillsborough county; William S. Graham, Judge.

Will Jackson was convicted of breaking and entering a dwelling house, and brings error. Dismissed.

John P. Wall, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. On December 6, 1901, an information was duly filed in the criminal court of record of Hillsborough county charging the plaintiff in error with breaking and entering in the nighttime the dwelling house of one Thomas D. Fisher, with intent to steal property exceeding the value of \$20, and committing an assault upon a person lawfully in said dwelling house.

On March 11, 1902, the defendant was duly arraigned and tried, and the jury, by their verdict, found him guilty as charged in the information. Defendant's motion for a new trial having been overruled, he sued out writ of error, returnable to the present term of this court.

Writs of error in criminal cases like the present lie only from final judgments therein. Section 2969, Rev. St. The transcript filed in this court fails to show the sentence or judgment of the court entered upon the verdict, if any, and consequently the writ of error must be dismissed. *Savage v. State*, 19 Fla. 561; *Hart v. Cotten*, 44 Fla. —, 31 South. 817. Moreover, the clerk certifies the transcript in the form prescribed by special rule 3 for the government of circuit courts in the preparation of bills of exceptions and transcripts of records in civil causes, whereas the transcript should be certified in the form prescribed by rule 103 of the rules of the circuit court in common-law actions, adopted at the April term, A. D. 1873, of the supreme court, which rule is applicable to writs of error in criminal cases. See special rule 5, adopted February 18, 1897. This defect in the form of the certificate is sufficient, also, to justify this court

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2867.

in dismissing the writ of error. *Hart v. Cotten*, *supra*.

The writ of error, for reasons stated, will be dismissed.

CAMP et al. v. McLIN, Com'r of Agriculture, et al.

(Supreme Court of Florida. June 11, 1902.)

CONVICTS—CONTRACTS TO LEASE—BOND—APPROVAL—ESTOPPEL.

1. Under section 3066, Rev. St., a contractor for state convicts is required to give a bond, and such bond must be approved by the board of commissioners of state institutions before either his contract or the bond shall be of any effect. The courts cannot in any case compel the approval of such bond, or treat such bond as approved notwithstanding its disapproval, because the matter of approval rests in the discretion of the board, and this discretion is not subject to judicial control.

2. Where a statute prescribes the terms upon which the state is to be bound by a contract executed by a public officer in its behalf, and declares that a failure to comply with such terms will result in no contract, such statute is mandatory, and constitutes a limitation upon the power of the officer to bind the state by such contract.

3. Where a public officer undertakes to bind the state by a contract made in its behalf, he must possess a real, as distinguished from an apparent, authority, derived from statute; and if the authority does not exist the state cannot be held bound by such contract, upon the theory that the officer has so conducted himself with respect to the contract as to estop himself from denying its validity.

4. Though the board of commissioners of state institutions formally approves a contract for the hire of state convicts made by the commissioner of agriculture under section 3065, Rev. St., the state is not bound by such contract where nothing is done in performance thereof by either party except the delivery to the commissioner of agriculture by the contractor of a sum of money as an advance payment under the terms of the contract, and the board refuses to recognize the alleged contract or to approve the contractor's bond, and the advance payment is returned or offered to be returned to the contractor by the commissioner of agriculture.

5. Where the board of state institutions prepared a bond to be executed by a contractor of state convicts, with two sureties, and delivered the same to the contractor to be executed, but the names of the proposed sureties were not mentioned or agreed upon, and such bond was then executed by the contractor, who subsequently procured two solvent sureties to execute it, and delivered same to the commissioner of agriculture, who at a subsequent meeting of the board presented the contract with the contractor, which the board proceeded to disapprove and reject, there was no valid contract binding the state, for the reason that the acts of the board stated would not constitute an approval of the bond, and such approval of the bond is necessary to the validity of such contract, under section 3066, Rev. St.

(Syllabus by the Court.)

Appeal from circuit court, Leon county; John W. Malone, Judge.

Suit by William N. Camp and another against Benjamin E. McLin, commissioner of agriculture, and others. From a judgment dismissing the bill, plaintiffs appeal. Affirmed.

On October 22, 1901, appellants filed their bill in equity against appellees in the circuit court of Leon county, alleging that on February 13, 1901, the board of commissioners of state institutions, consisting of the governor, secretary of state, treasurer, comptroller, superintendent of public instruction, attorney general, and the defendant McLin, commissioner of agriculture, was in session, a quorum being present, for the purpose of transacting such business as might come before it; that at and during said session on said day the board made to complainants the direct and distinct proposition and offer to lease to complainants 300 state convicts, at the price of \$100 each per annum, for the period of four years, commencing January 1, 1902, \$10 for each of said convicts to be paid down in cash by complainants upon the execution of a contract embracing said proposition and offer, and all other usual provisions of such a contract; that thereupon complainants, being then and there present and represented at said session, immediately accepted said proposition and offer unconditionally, and thereupon the board at said session on said day, by and through the governor, and in the presence of said board, then and there drafted and proposed a written contract of lease, embracing the said proposition and offer and the said terms and provisions, which said contract was drafted and prepared by filling up the blanks in a type-written form of a contract that the board had prior to said day prescribed and adopted as being in accordance with the laws of Florida in such cases provided; that immediately after said contract was prepared, and on the said day, said McLin, as commissioner of agriculture, voluntarily and by the direction and request of said governor, and by the request of the board and in its presence, executed said contract by signing his name thereto officially and affixing his private seal; that thereupon on the said day each of the complainants executed said contract by signing his name thereto and affixing his private seal, which execution was in the presence of, and duly attested by, two competent witnesses, and said contract so executed was on the next day delivered to said McLin, commissioner, and received by him; that at said session the said board, by and through the said governor, drafted and prepared a bond, with two sureties, in the penal sum of \$7,500, conditioned in accordance with the laws of Florida in such case made and provided, to secure the due performance of such contract, and delivered same to complainants, to be executed by them and by such sureties; that said bond was dated February 13, 1901, and on said day was duly executed by each of the complainants signing his name and affixing his seal thereto; that W. S. West and C. B. Rogers, sureties named in said bond, did on said day duly execute the same by each signing his name and affixing his seal to the

same, which execution of said bond by complainants and said sureties was done in the presence of two competent witnesses; that on the same day the said W. S. West and C. B. Rogers each for himself verified and swore to an affidavit before a notary of said state to the effect that each of them possessed in the state of Florida sufficient property to make good the amount mentioned in the bond, unincumbered, and not exempt from sale under legal process; that each of complainants and each of said sureties is the owner of property in the state of Florida, subject to sale on execution, which is worth several times the amount of the penalty of said bond, and not subject to exemption under the laws of the state; that on the 14th day of February, 1901, complainants delivered said bond, executed and proven as aforesaid, to the said McLin, commissioner, and on said day delivered to him \$3,000 in United States currency, said sum being the amount required to be paid down by said board and by said contract; that said McLin, commissioner, on said day officially received said bond and said sum of \$3,000, and gave complainants a receipt therefor; that said contract was approved by said board at the time same was executed in the manner and form previously alleged; and that afterwards, to wit, on March 2, 1901, said board had no power or authority to reject or abrogate said contract.

The bill further alleged that since the execution of the contract the board and McLin, commissioner, had advertised for bids for convicts, to be received not later than March 20, 1901; that under color of such advertisement other and further bids leasing all the state convicts had been made, including the 300 so leased to complainants; that the board and commissioner had received and entertained said bids; that afterwards, about June 28, 1901, the commissioner, with the approval of the board, entered into another contract with the defendant the Florida Naval Stores & Commission Company, as lessee, by the terms of which the commissioner had covenanted and bound himself to lease and deliver to said defendant company on January 1, 1902, all the convicts and prisoners of the state, including the 300 so leased to complainants; that although the defendant company had full notice of complainants' contract, and the contract of the defendant company was subsequent and subject to the contract with complainants, McLin, commissioner, would deliver all of said convicts to defendant company in accordance with its contract unless enjoined by the court; that McLin, commissioner, refused in any manner to recognize the contract with complainants as an existing contract, and refused to retain such possession and control of said 300 convicts as to be able to deliver said convicts to complainants under the terms of their contract, and had declared his intention not to deliver said convicts, or

any of them, to complainants at the time specified in and by the terms of said contract, although it is his duty, under the statutes of the state, to retain such possession and control of said 300 convicts, so as to be able to deliver them to complainants in accordance with the terms of the contract so made with them.

It was further alleged that said contract and bond contained and embraced all the covenants and provisions required by the laws of Florida to be included in said contract and bond; that such contract was a perfect contract, and such bond a perfect bond, and that both were perfectly executed; that neither said board, nor any member thereof, ever made any objection to the substance, execution, or sufficiency of said bond, and that it was legally impossible to make any such objection or any valid objection to said bond; that more than two weeks after the execution and delivery of said contract and bond, and the payment of said sum of \$3,000, complainants received by mail from said McLin, commissioner, a copy of a paper writing to the following effect: "Copy of Order of Board of State Institutions, March 2, 1901. Hon. B. E. McLin, commissioner of agriculture, submitted to the board certain contracts he had entered into with different parties for the hire of state convicts for four years, beginning January 1, 1902; and upon consideration it is ordered that the contracts be, and are hereby, severally disapproved and rejected, and it is further ordered that this order be indorsed on each of said contracts by the secretary of this board;" that the word "contracts," in said writing contained, included, and was intended by the said board to include, said contract made and executed with complainants; that under and by virtue of the pretended authority of said writing, said McLin, commissioner, arbitrarily, willfully, and without any good reason whatever, immediately after the date thereof, announced his intention to repudiate and refuse to perform said contract, to the great wrong and injury of complainants; that said writing, to wit, the order of said board, was a willful, arbitrary, and capricious act, and not founded upon any reason whatever; that, a few days after the date of said writing, complainants notified said board and McLin, commissioner, in writing, that the contract with complainants was a valid contract, obligatory upon all parties thereto, and that complainants would insist upon and demand performance of said contract by the said McLin, commissioner, and the said board; that complainants were informed and believed that the contract so made with the defendant company contains a provision, condition, reservation, and exception whereby the lessee in said contract takes and holds all its rights thereunder subject to all the rights and interests of complainants under their contract.

The bill also alleged that the present number of convicts in the state prison was about

300. and would on January 1, 1902, exceed 300; that by the terms of the contract with complainants it was the duty of McLin, commissioner, to prescribe a plan and basis for a fair and equitable division of the state convicts, with the approval of the board, and the duty of the board under such contract to approve the same; that it was necessary that such plan and basis should be prescribed without delay, in order that complainants might make provision for the reception, custody, care, maintenance, employment, and disposition of said convicts; that complainants were then in possession, and would on January 1, 1902, have possession, of about 300 convicts, under contracts made by the commissioner of agriculture, expiring December 31, 1901, which it was claimed complainants would be entitled to retain until the 300 convicts mentioned in the contract of February 13, 1901, are delivered to complainants in accordance with its terms; that the actions and doings of the defendants, after the contract with complainants and the bond was made, complained of in the bill, have the effect to impair the obligations of "said commissioner," and to deprive complainants of their property and rights under their contract without due process of law; that such actions and doings constituted an invasion of complainants' rights guarantied by the constitution of Florida and the United States.

The bill prays that the court decide and declare that the contract of February 13, 1901, is a valid contract; that complainants are entitled to possession of the prisoners or convicts provided for therein according to its terms; that McLin, commissioner, be temporarily and permanently enjoined and restrained from refusing or failing forthwith to prepare and submit for the approval of the board a plan and basis for a fair and equitable division of the state convicts, so that the number contracted to be delivered under complainants' contract may be delivered to them in accordance with its terms, and from refusing to deliver said convicts according to the contract; that defendants be temporarily and permanently enjoined from taking from the possession, control, or custody of complainants any convicts which complainants might have in their custody, up to the number of 300; that the defendant company be enjoined temporarily and permanently from receiving, retaining, having, controlling, working, employing, hiring out, or in any manner interfering with any state prisoners or convicts until McLin, commissioner, shall have prescribed, and the board shall have approved, a plan and basis for a fair and equitable division of state convicts, so that the number contracted to be delivered to complainants may be delivered in accordance with the terms of their contract.

The bill also prays for general relief and subpoena.

By an amendment of the bill, a copy of the contract of February 13, 1901, was attached as an exhibit, and made a part of the

bill. It is signed by B. E. McLin, commissioner of agriculture, and by W. N. Camp and E. E. West, under the private seals of the parties, and purports to have been signed, sealed, and delivered in the presence of C. H. Dickinson and E. E. Philbrick, subscribing witnesses. It purports on its face to have been made and entered into February 13, 1901, under and in pursuance of sections 3065, 3067, 3069, 3070, 3072-3075, 8077, 3078, Rev. St. Fla., "being article 7 of said Revised Statutes, 'Contracts for Labor of State Prisoners,'" between B. E. McLin, commissioner of agriculture, for and on behalf of said state, under the provisions of said statutes, party of the first part, and W. N. Camp and E. E. West, parties of the second part. It provides that said W. N. Camp and E. E. West, for and during the period of four years, commencing January 1, 1902, and ending December 31, 1906, shall have the use of, and enjoy the control, labor, services, use, and custody of, 300 state prisoners, of the whole number of persons, whether male or female, who may on the 1st day of January, 1902, be under sentence of imprisonment in the state prison of the state, and their proportionate share of state prisoners to maintain said contract number of the whole number of persons, whether male or female, who may during said period of four years be sentenced by any court of Florida of competent jurisdiction to imprisonment in the state prison. The contract contains a stipulation to the effect that the lessees shall and will execute a good and sufficient guaranty or other bond, payable to the governor of the state, and his successors in office, in the penal sum of \$7,500, conditioned to secure the faithful performance of the contract as may be required by the party of the first part, with good and sufficient sureties, to be approved by the board of commissioners of state institutions. It also contains many other stipulations and provisions, which it is not deemed necessary to set forth in detail, including a provision to the effect that said contract or lease is to be construed by the board of commissioners of state institutions with the lessees of state convicts, that all leases or contracts shall be placed upon an equitable or fair basis, maintained so far as practicable, and the division of said convicts shall be made at all times on such plan and basis as said commissioner of agriculture may prescribe, with the approval of the board of commissioners of state institutions, fairly and proportionately, during said four-year lease or contract.

The defendant McLin, commissioner, filed his answer to the bill, therein insisting and reserving as grounds of demurrer that the suit was, in substance, a suit against the state, and that there was no equity in the bill. The defendant company filed its demurrer, asserting, among other grounds, the matters assigned as grounds of demurrer in the answer of its codefendant, and in addition

thereto, specifically, that there was no valid contract between complainants and the defendant McLin, commissioner, as the bill failed to show that the contract, and bond given to secure the performance thereof, had ever been approved by the board of commissioners of state institutions, as required by law. The cause was brought on for hearing upon the demurrers and upon application for temporary injunction prayed in the bill. The court made an order as follows: "This cause came on to be heard on the demurrer to the bill and the application for a restraining order, and was argued by counsel, and, upon consideration thereof, it is the opinion of the court that the demurrer is good, and that the suit is really against the state of Florida. Therefore it is ordered, adjudged, and decreed that the demurrer be sustained, that the application for a restraining order be denied, and that the suit be dismissed, and that the plaintiffs pay to the defendants their costs by them about their defense in this behalf expended. Done and ordered at chambers this 23d day of December, A. D. 1901." From this decree this appeal was taken, and the errors assigned question the propriety of the decree. Various affidavits were filed at the hearing, which, in view of the conclusions reached by the court, it is not necessary to notice.

H. Bisbee, Geo. C. Bedell, Cooper & Cooper, and O. T. Green, for appellants. T. L. Clarke, R. W. Williams, D. U. Fletcher, and Stephen E. Foster, for appellees.

PER CURIAM. This cause has been referred by the court to its commissioners, who report that the judgment ought to be affirmed; and the court, having duly considered the case upon the record, briefs, and argument, is of that opinion.

By section 2, art. 13, Const. 1885, which deals with the subject of public institutions, it is provided that "a state prison shall be established and maintained in such manner as may be prescribed by law." Section 26, art. 4, provides, among other things, that the commissioner of agriculture shall "have supervision of the state prison." Section 17 provides that "the governor and the administrative officers of the executive department shall constitute a board of commissioners of state institutions, which board shall have supervision of all matters connected with such institutions in such manner as shall be prescribed by law." The legislature of 1889 passed an act entitled "An act to establish and maintain a state prison, and provide for the employment of persons convicted of crime and sentenced to the state prison, and for the custody, maintenance and discipline of such convicts, and for other purposes." Chapter 3883, Acts 1889. Most of the provisions of this act were incorporated into the Revised Statutes of 1892, beginning with section 3065 of that revision. It is unnecessary to refer

to those provisions of the revision providing for the establishment, maintenance, and discipline of a state prison, but only to a few of those relating to contracts for the labor of state prisoners. By section 3065 it is provided that the commissioner of agriculture, with the approval of the board of commissioners of state institutions, may enter into contracts with any person or persons for the labor, maintenance, and custody of any or all prisoners sentenced to or confined within the state prison, in such manner as the said board may deem most advantageous to the interests of the state, and with due regard for the health, humane treatment, and safe custody of the prisoners; that such contracts may be made for a term of years, not exceeding four; that such contracts may provide for surrendering the control and custody of the prisoners to the person or persons contracting for their labor, subject to such supervision of the commissioner of agriculture as is provided by that article of the revision, and for the payment to the state by such person or persons of such sums of money for the labor of such prisoners on such contracts as may be deemed advantageous to the interests of the state, which said sums of money shall be paid to the state treasurer in accordance with the terms of the contract or contracts. It also provides that, in case the commissioner of agriculture does not receive any applications to pay the state for the labor of such prisoners, then he shall enter into such contracts, with the approval of the board, for the payment by the state to any person or persons of such sums of money for taking such prisoners on such contracts as may be deemed advantageous to the interests of the state. Section 3066 provides that "such contractor or contractors shall give bond with two or more sureties in a sum not exceeding twenty thousand dollars, payable to the state, to be prescribed by the board of commissioners of state institutions and conditioned for the faithful performance of such contract and the duties imposed by this chapter, and such contract and bond shall be approved by the board of commissioners of state institutions before either shall be of any effect, and they shall be filed in the office of the state treasurer."

An essential question involved here is whether, upon the allegations of the bill, the appellants have a valid contract, as claimed. The provisions of section 3066, Rev. St., above quoted, require that a bond be given, and declare that "such contract and bond shall be approved by the board of commissioners of state institutions before either shall be of any effect." This language is plain and unambiguous. It requires the contract and bond to be approved, and declares in unmistakable terms that their effectiveness shall be conditioned on approval. It must be borne in mind that section 3065 had already provided that any contract shall be approved by the board, and, if the contract were to become

operative as such upon its approval, section 3066 need only have referred to the approval of the bond; but that section expressly provides for the approval of the contract and bond "before either shall be of any effect." Under the terms used, the failure to secure such approval leaves both the contract and bond without any effect. The effect of this statute is to make an approved bond a necessary concomitant of a consummatedly effective contract. The evident purpose of this provision was to guard against the possibility of the state being bound by an enforceable contract, without security for its faithful performance by the lessee satisfactory to the board, which is by the law invested with the power of supervision over the convicts even when such convicts are in possession of the contractor. In order to secure this very important object, the statute makes the approval of the bond a condition precedent to the validity of the contract. The approval of the bond being made a condition precedent, and in the present case operating also as a limitation upon the power of the officers to contract, the parties must be presumed to have had in mind this condition and limitation in negotiating the contract. Each, it is reasonable to suppose, negotiated with the other upon the assumption that the bond must be given and approved before the state's liability upon the contract would arise; and, even if they did not so negotiate, the state could not be bound, without the giving and approval of the bond, because the statute plainly so declares. It is claimed by appellants that the law does not require written evidence of the board's approval, or that the approval of the contract and bond be shown by the records of the board, or a formal declaration by the board that the contract and bond are approved, but that any act or conduct on the part of the board which shows that it accepts or is satisfied with the contract, and with the bond given to secure it, will be deemed in law an approval. For the purposes of this case, we may admit that such is the law, and that under such view of the law the action of the board in making the proposition to appellants, in drafting the contract, and directing the commissioner to execute it as drafted, constituted an approval of the contract, as distinct from the bond, its concomitant, within the meaning of the statute. The allegations with reference to the bond show that the board, through the governor, drafted and prepared a bond to be executed by appellants and two sureties, and delivered same to appellants, to be executed by themselves and two sureties, but it is not alleged that the names of the sureties were agreed upon or discussed, or that the board agreed to accept W. S. West and C. B. Rogers, the parties named in the bond subsequently delivered to the commissioner of agriculture, as such sureties, or knew that these gentlemen would be tendered. The parties evidently did not consider that the board had

approved the bond at the time it was drafted, for one provision of the contract bound the appellants thereafter to give a bond to be approved by the board. Under these circumstances, how can it be said that the board approved a bond not then executed, the sureties upon which were not then determined? Even if the board could lawfully have bound itself in advance to approve a bond to be thereafter executed by good and sufficient sureties (the approval of the bond being a matter resting in discretion,—*Cope v. Hastings*, 183 Pa. 800, 38 Atl. 717), it does not appear from the allegations of the bill that it attempted to do so, and therefore it does not appear that the bond was approved. Authorities have been cited to the effect that where parties have given bonds required by some law or by contract in order to authorize some action, and a party has proceeded to do the act, and the bond is found in the possession of the party or tribunal whose duty it was to approve it, with no evidence of its disapproval, or where the terms of the bond and the names of the sureties are previously agreed upon, and such a bond is afterwards found in the possession of the party whose duty it was to approve it, and the party for whose benefit the bond was given has permitted the performance of acts which the bond was given to secure, the bond will be deemed by the law to have been approved. The facts of this case do not, however, bring it within the rule announced in those cases, for no act in performance of the contract has been done by appellants, except the deposit with the commissioner of agriculture of the \$3,000 and the bond, neither of which have ever been accepted or approved by the board. The board proceeded within about two weeks to disapprove the contract which the bond was given to secure, and ever since has declined to recognize it; thereby announcing unequivocally its purpose to refuse its approval of any bond in consummation of such contract. Besides, it does not distinctly appear that the bond delivered to the commissioner was ever presented to the board, or that the latter knew that it had been executed and delivered to the commissioner,—certainly not prior to the day it adopted the resolution disapproving the contract. Under these circumstances, it cannot be said that the bond was ever approved by the board. It is insisted in argument that the provision of the statute relating to the giving and approval of the bond is directory, merely; that, a good and sufficient bond having been tendered, it was the duty of the board to approve it; that its refusal to do so was a capricious and arbitrary act, and under such circumstances the court ought to treat the bond as sufficient under the law, and either regard the bond as approved, or its formal approval as being immaterial.

A statute which requires a thing to be done, and declares in plain and unmistakable terms the legal consequences to flow from a failure to do it, must generally be regard-

ed as mandatory; and especially where, as in this case, the requirement is made a condition precedent to any effectiveness of a contract authorized to be made on behalf of the state. *People v. Dulaney*, 96 Ill. 503; *Agent of State Prison v. Lathrop*, 1 Mich. 438; *State v. Hogan*, 22 Mont. 384, 56 Pac. 818; *Penitentiary Co. No. 2 v. Rountree*, 113 Ga. 799, 39 S. E. 508; *Bladen v. City of Philadelphia*, 60 Pa. 464; *Pearse v. Morrice*, 2 Adol. & E. 84; *Suth. St. Const.* §§ 446, 447; *End. Interp. St.* § 431. The statute prescribes the terms upon which the state is to be bound by a contract authorized to be made in its behalf. It declares that a failure to comply with those terms will result in no contract. Unless those terms are complied with, there can be no contract with the state, for the obvious reason that neither the state nor an individual can be bound by the terms of a contract to which it or he has not consented. If the clause of the statute under consideration be directory as to the approval of the bond, it is directory also as to the contract, for they are each embraced in the language which declares that "such contract and bond shall be approved by the board * * * before either shall be of any effect."

No one, we suppose, would for a moment contend that the provision requiring the contract to be approved is merely directory, and yet this must be so if the provision for approval of the bond be so held. The provision of the statute requiring the bond to be approved is mandatory, and such approval is a condition precedent to the effectiveness of the contract. Until and unless the bond is approved, the contract, though formally approved, is a mere offer upon the part of the state, subject to be revoked by the commissioner or rejected by the board at any time or for any cause. It stands precisely upon the same basis as any other proposal, a term of which provides that there shall be no binding obligation until mutual assent is thereafter evidenced at some particular time, or in some particular manner, or upon the happening of some contingency. Even though accepted by the other party, no binding contract is created, and, until the condition is performed or the contingency removed, either party can recede from the proposed contract. In such cases, though the condition is to be performed by one of the parties, he may decline to perform it, even arbitrarily and without reason, and thereby prevent the offer from becoming a binding contract. This results from the principle that a party must assent to the precise terms of a proposed contract, unconditionally, in order to bind him by such contract. The principle is well illustrated by the many cases which hold that, even though the precise terms of a contract are agreed upon, yet, if it is understood by the parties that the contract is not to become binding unless reduced to writing and signed by the parties, neither party is bound by such con-

tract until it is reduced to writing and signed; and in such cases, if the contract be in fact reduced to writing and signed by one party, the other is not bound unless he signs, even though his refusal to sign be arbitrary and without reason. *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638; *Morrill v. Mining Co.*, 10 Nev. 125; *Dietz v. Farish*, 53 How. Prac. 217; *Poll. Cont.* p. 41; 1 *Par. Cont.* p. *477, note; 1 *Add. Cont.* *15. And this rule applies especially to public officers contracting on behalf of the public. If the statute or authority to act requires the contract to be written, or it is so agreed, as a condition precedent to its effectiveness, the condition must be performed, to make the contract binding, and until this is done the negotiations may be discontinued at any time by the officer. *Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160; *State v. Hogan*, 22 Mont. 384, 56 Pac. 818; *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 523, 49 N. E. 918; *Commissioners v. Brown*, 32 N. J. Law, 504; *Eads v. City of Carondelet*, 42 Mo. 113; *Sanders v. Fruit Co.*, 29 L. R. A. 434, note (s. c., 39 N. E. 75, 43 Am. St. Rep. 757). The bill alleges and the demurrer admits that the bond tendered by appellants was sufficient, and properly executed. But this does not dispense with the requirement that it be approved by the board as a prerequisite to the effectiveness of the contract. The law placed no limitations upon the power of the board to reject it, and thereby prevent the contract from becoming effective. Nor can the court treat the bond as approved because it is found to be a proper one to be approved by the board, nor treat its approval as immaterial. The approval is a matter in the discretion of the board.—made so by statute,—and, as we have shown, constitutes a condition precedent, material to the making of the contract. If the board has arbitrarily exercised its discretion in a matter as to which it owed no legal duty to the appellants, the members must answer to the people who elected them, and not to the courts, for the latter are given no supervisory power over the board in such matter invested in its discretion. The statute nowhere makes it a duty on the part of the board to approve the bond if a valid and legal one is tendered. If there was a duty imposed, to approve the bond, the courts might compel approval in proper cases, but where no duty is imposed the courts can neither compel such approval, nor dispense with it when made a condition precedent to the validity of some act. *State v. Smith*, 23 Mont. 44, 57 Pac. 449. The commissioner and the board are by the provisions of the statute invested with a very broad discretion in the matter of making contracts for the labor of state prisoners, and must have in view the state's interest, and the health, humane treatment, and safe custody of the prisoners, in making or approving such contracts. They are not by the statute required to advertise for bids,

or to let a contract to the highest or lowest bidder, or to any particular class of persons, or for any particular class of work. While the statute does not expressly require the contract to be in writing, its provisions can only be complied with by a contract in writing, because the contract and the contractor's bond are required to be filed in the office of the state treasurer. The commissioner has no power to enter into a contract that shall be binding upon the state without the approval of the board; neither does the statute make it the duty of the board to approve a contract made by the commissioner, even though the commissioner believes, and a court should find as a fact, that such contract is advantageous to the state, and secures to the prisoners every right which it was the purpose of the law to secure to them. The power of the board in the matter of approval of such contracts is an absolute one, committed to its discretion, and it can be held answerable for an abuse of such discretion only by the people from whom its authority is derived, for no supervisory power over its action is anywhere given to the courts. The commissioner and the board in making these contracts act as agents of the public, and their authority is derived from a public statute, of which every person must take notice. Under such circumstances, the officer or board must possess a real, as distinguished from an apparent, authority, in order to bind the state by a contract made in its behalf. *Carolina Nat. Bank v. State*, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865; *Throop*, Pub. Off. § 551; *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262. We refer to these elementary principles in answer to the argument advanced on behalf of appellants that the acts and conduct of the commissioner and the board estop them from denying the validity of the contract set forth in the bill. The doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit; but in cases like the present it has no application at all. Within about two weeks after the alleged contract was made, appellants were put upon notice that the commissioner and the board did not recognize it as an obligation binding upon the state. Appellants do not claim to have expended any money or to have done any act detrimental to their interest upon the faith of the supposed contract, nor has the state derived any benefit whatever from it. Under these circumstances, if there is in law no contract by which the state's right to control the labor and services of the 300 convicts has been transferred to the appellants by her agents according to the real authority granted them by statute, it would be in direct violation of law for the courts to compel their delivery under an invalid contract, upon the ground that the agent who made

the contract had by his conduct estopped himself from denying the validity of the same. A conclusive answer to such a proposition is that the principal, the state, has not delegated to such agent the power to thus estop it. There must be some act or conduct upon the part of the state, through its legislature or other competent authority, upon which to base such estoppel; otherwise her agent might, by assuming to act in a matter without authority, and afterwards doing some act or being guilty of such misconduct as to estop him from denying the validity of his unauthorized act, bind his principal, thus by two wrongful and improper acts outside of the powers committed to him giving life to an act originally beyond the scope of his powers.

In view of the conclusion reached, it becomes unnecessary to determine whether this proceeding is in effect a suit against the state, or whether equity has jurisdiction to grant the relief prayed, in the event a valid contract were shown.

The case was heard in the circuit court upon bill and demurrer of the defendant company, and on an application for a restraining order. A ground of the demurrer, that there was no completed contract with complainants, because it appeared that no bond had been approved, goes to the basis of relief, not only against the Naval Stores Company, but also the commissioner, McLin. It is not insisted that, if the demurrer was rightfully sustained on the ground stated, the decree dismissing the bill was improper. The circuit court correctly sustained the demurrer, and, as it contained a ground extending to the right of recovery to any extent, we affirm the decree dismissing the bill. Ordered accordingly.

STATE ex rel. CAMP et al. v. McLIN, Com'r of Agriculture.

(Supreme Court of Florida, June 11, 1902.)

APPEAL—REVIEW.

1. All questions of law and fact necessary to be considered in disposing of this writ of error having been discussed and decided by this court in an opinion filed at the present term in the case of *Camp v. McLin*, 32 South. 927, the judgment of the circuit court in this case must be affirmed, in accordance with the decision in that case.

(Syllabus by the Court.)

Error to circuit court, Leon county; John W. Malone, Judge.

Application by the state, on the relation of William N. Camp and Eugene E. West, for a writ of mandamus against Benjamin E. McLin, as commissioner of agriculture. From an order denying the writ, the relators bring error. Affirmed.

H. Bisbee, Geo. C. Bedell, Cooper & Cooper, and O. T. Green, for plaintiffs in error. T. L. Clarke, R. W. Williams, and D. U. Fletcher, for defendant in error.

PER CURIAM. This cause has been referred by the court to its commissioners, who report that the judgment ought to be affirmed, and the court, having duly considered the case upon the record, briefs, and argument, is of that opinion.

This case is brought here by writ of error from a judgment of the circuit court of Leon county rendered on July 26, 1901, quashing an alternative writ of mandamus theretofore issued at the instance of plaintiffs in error, as relators, against the respondent, as commissioner of agriculture of the state of Florida. The object of the proceeding was to secure recognition of the validity of an alleged contract claimed to have been entered into, whereby relators claimed to have acquired the right to use, enjoy, and control the labor and services of 300 state convicts for a period of four years, commencing on January 1, A. D. 1902.

Under the decision this day rendered in a chancery cause pending on appeal between the same parties, and determined on the same state of facts (32 South. 927), it is held that there was in fact no completed contract, to be enforced at the instance of plaintiffs in error; and, for the reasons stated in the opinion rendered in that case, the judgment sought to be reviewed in this case should be, and is hereby, affirmed.

CAMP et al. v. JENNINGS, Governor, et al.
(Supreme Court of Florida. June 11, 1902.)

WRIT OF ERROR—DISMISSAL.

1. A writ of error to review a judgment dismissing an application for an alternative writ of mandamus to compel public officers to recognize and perform an alleged contract made on behalf of the state will be dismissed where, in other cases between plaintiffs in error and some of the defendants in error involving the validity of the same contract, this court has decided that no valid contract exists, and there is doubt as to whether this court has acquired jurisdiction over the persons of the defendants in error in such writ of error.

(Syllabus by the Court.)

Error to circuit court, Leon county; John W. Malone, Judge.

Application of William N. Camp and Eugene E. West for a writ of mandamus to William S. Jennings, governor, and others. From a judgment denying the writ, plaintiffs bring error. Dismissed.

H. Bisbee, Geo. C. Bedell, Cooper & Cooper, and O. T. Green, for plaintiffs in error.

PER CURIAM. This cause has been referred by the court to its commissioners, who report that the writ of error ought to be dismissed; and the court, having duly considered the matter, is of the same opinion.

On November 18, 1901, a writ of error was issued from this court in the above-stated cause, directed to the circuit court of Leon county, to review a judgment therein render-

ed on May 31, 1901, denying an application of plaintiffs in error, as relators, for an alternative writ of mandamus against defendants in error, and dismissing their petition therefor. The alternative writ was denied, and the respondents never became parties to the suit in the court below. They have not appeared in this court, and there has been no service upon them of any *scire facias ad audiendum errores*, but the writ of error as issued by this court appears to have been duly recorded in the minutes of the circuit court, as provided by chapter 4529, Laws of Florida, Acts of 1897. Whether the provisions of that act were intended to apply to a case where no service is had upon parties in the court below, and, if so, whether this court could thus be constitutionally invested with jurisdiction of such parties, or whether notice in such a case is necessary at all, are questions that would require some consideration, and which it would be fruitless to consider, in view of the fact that two cases this day decided between the plaintiffs in error and B. E. McLin, as commissioner of agriculture of the state of Florida (32 South. 927, 983), determined upon substantially the same state of facts shown by the record in this, adjudicate that the alleged contract, recognition of which was sought in this proceeding, had no existence as a contract. That being true, the plaintiffs in error could obtain no benefit on this writ of error, and it is accordingly dismissed, without passing on the question whether or not the proceedings had were sufficient to invest this court with jurisdiction of the cause.

ROSS et al v. WALKER et al.
(Supreme Court of Florida. Sept. 30, 1902.)
GIFT—VALIDITY—DELIVERY—DUEBILLS—INTEREST.

1. In order to constitute a valid gift, the transaction must be consummated by delivery of the thing given.

2. Where the subject-matter of an alleged gift consists of a debt due the donor by the donee, evidenced by duebills, and no receipt for the debt is actually given, and no credit entered, and where the evidence of the debt is not canceled, destroyed, delivered to the donee, or otherwise placed beyond the control of the donor, no valid gift is effected. Until consummated in the manner stated, the transaction amounts to no more than a promise to give, which, being without valuable consideration, will not be enforced by the courts.

3. Where duebills are given for money loaned, specifying no time of payment, with no mention of interest therein, and from written correspondence between the parties at the time of the loans and the giving of the duebills it appears that the parties did not regard the duebills as due immediately, or as bearing interest until a demand for payment of the sums loaned, interest should be computed upon such loans from the time of such demand for payment, and not from the date of the duebills.

(Syllabus by the Court.)

¶ 2. See Gifts, vol. 24, Cent. Dig. § 66.

Appeal from circuit court, Leon county; John W. Malone, Judge.

Bill by Lizzie D. Walker, executrix of A. A. Fisher, deceased, against Fannie T. Fisher and others. Decree for plaintiff, and William H. Ross and others, certain defendants, appeal. Reversed.

H. H. Buckman, for appellants. Fred T. Myers, for appellees.

CARTER, J. In a cause in chancery pending in the circuit court of Leon county, wherein Lizzie D. Walker, as the executrix de bonis non of the will and estate of Alfred A. Fisher, deceased, was complainant, and Fannie T. Fisher, William H. Ross, and George G. Lyon were defendants, an order was made referring the cause to a master; requiring all creditors of the deceased, A. A. Fisher, who had seasonably presented their claims to the executor, to file them with the master; authorizing the parties to the suit to contest the validity of any claim so filed; and directing the master to inquire and report whether or not contested claims were proper charges against the estate. Appellants filed a claim, which was contested by the defendant Fannie T. Fisher, and, after having taken testimony as to its validity, the master found it to be a proper charge against the estate, and so reported to the court. Mrs. Fisher filed exceptions to the report, which were sustained, and an order was made September 23, 1896, decreeing that the claim of appellants was not a valid claim against the estate. From this decree an appeal was taken to this court.

It appears from the evidence that William H. Ross, who resides in Mobile, Ala., was a nephew of the deceased, who resided at Tallahassee, Fla. In a letter written December 29, 1887, by Col. Fisher to Mr. Ross, he states: "Last Christmas makes the eightieth I have seen, and I have no right to expect much longer to live. I wish to talk with you more about my business, and wind up my affairs on earth, so that I can depart contentedly. I have not got along so well this year as I anticipated. I have made but little at farming,—not enough to pay expenses. Gov. Walker has been very kind to me, and has pressed me time and again to call on him, should I want money or anything else; he would be happy to aid me any way he could; and I have accepted his kindness to the amount of about forty dollars, in small amounts, at different times, as I wanted. My taxes is about a hundred dollars; my medical bills and store account, included, will require about three hundred and twenty dollars to satisfy them; and, if you can conveniently spare me that amt., you will gratify me very much, and will esteem it very highly. I hope to get my claim in Washington or congress settled this session, if possible. If so, I will return you the money. At the same time, you and Geo. may expect to receive what property I have at my

death, having full confidence that you will care for your aunt." On December 30, 1887, Mr. Ross replied to this letter, stating: "I am in receipt of your letter of 29th inst., and hasten to reply. I inclose you a check on Mechanics' Nat. Bank, New York, for three hundred and twenty dollars,—the amount you state will carry you along. I inclose a duebill for \$420, including \$100 last year, which you can return to me. This duebill need not trouble you at all. The amount can be returned only when you are able to do so. If it is never paid, it will do me no harm." On January 1, 1888, Col. Fisher replied to this letter, stating: "Yours of the 30th Dec'r last came safely to hand, with the inclosed check for \$320, for which I feel very thankful and unbounded gratitude. I herewith inclose the duebill, as required, for the \$420. May God ever bless you, and I hope to be able to return you the same kindness some day yet."

On January 13, 1889, Col. Fisher wrote Mr. Ross quite a lengthy letter, in which he says: "I was again forced to call on you for further favors to help me meet my little liabilities of last year. I was unfortunate enough not to have income sufficient to pay my liabilities. * * * My creditors have been very kind so far. I don't want them to be disappointed. I have their confidence, and they shall not be disappointed. I hope you will realize my situation, and grant me the kindness. You will not lose anything by it, eventually." On January 21, 1889, he wrote: "Your very welcome letter of the 18th inst. I have just received, and the check for the \$250 inclosed, for which I am truly very thankful, and will try and make it answer the purpose of relief. I herewith inclose back to you the duebill for the same. I fear very much that I trouble you more than I ought, and will try to do the best I can to prevent it. I assure you that no one on earth could appreciate your kindness more than I do. If I was not worn out by old age, and bad health, I would not be so dependent, but I trust it will not be so long." The duebills referred to in these letters are as follows:

"Tallahassee, Fla., Dec'r 30, 1887. Due Wm. H. Ross & Co. four hundred twenty and 00/100 dollars, borrowed money. A. A. Fisher. \$420.00."

"\$250.00. Tallahassee, Fla., Jany. 18th, 1889. Due Wm. H. Ross & Co. two hundred and fifty and 00/100 dollars, borrowed money. A. A. Fisher."

Col. Fisher died November 6, 1889, and on February 13, 1890, Wm. H. Ross & Co. presented the duebills to his executor for payment. Regarding these transactions, Mr. Ross testified that in 1887 and 1889 he was a member of the firm of Wm. H. Ross & Co.; that the sums mentioned in the duebills were loaned Col. Fisher by him for his firm; that he considered the loans a debt, which he expected Col. Fisher or his estate to pay at some future time; that the debt was charged

on the books of the firm, and was considered a firm asset; that the money was advanced as a loan, which witness intended and expected should be returned during Col. Fisher's lifetime, if it could be done without inconvenience, and, if not, to be paid out of his estate after his death; that the money was not advanced as a gratuity; that the loan to Col. Fisher was not in the usual course of the firm's business, but was actually made out of the firm assets, and charged on its books; that it was made on the witness' responsibility, and, if it should not be paid or collected out of Col. Fisher's estate, he intended to make it good to the firm; that the money was loaned Col. Fisher because he was witness' uncle, and had written witness letters saying he was in reduced circumstances and needed the money; that the money was not loaned upon any further consideration, beyond the return of the amount loaned, and the desire to relieve the necessities of his uncle; that Col. Fisher was not pressed for payment in his lifetime, nor was any demand made upon him for repayment of the loan, but immediately upon his death the duebills were presented to his executor, with a view to having them allowed as legal claims.

On February 3, 1888, Col. Fisher executed his last will and testament, by which, after directing that his just debts be first paid, he gave, devised, and bequeathed all his property, real and personal, to his wife, Fannie T. Fisher, for and during her natural life, with remainder to be equally divided between his nephews, the said William H. Ross and George G. Lyon. By a codicil dated October 14, 1889, he authorized and empowered his executor, who was also by the will appointed trustee of the property devised to Mrs. Fisher, to mortgage or sell or convey and make good title to any portion of his real estate, and with the proceeds to improve any portion of the real estate not sold, or, if necessity required, to use the proceeds, or any necessary part of it, toward the comfortable support of Mrs. Fisher. It also appears that Mr. Ross, while not a man of large means, was financially able to help his uncle, and that the latter at the time of his death owned personal property not exceeding \$500, and some real estate in Tallahassee, the value of which is not stated, but presumably of no great value.

Mrs. Fisher testified that: "Wm. H. Ross and George G. Lyon visited Tallahassee, Florida, to see their late uncle, Alfred A. Fisher, who was at the time a very old man and in failing health. This was, to the best of my recollection, in the spring of 1889. They came out to his house to see him. During the conversation my husband spoke to them about the moneys they had advanced him, and Mr. Lyon told him that what he had sent him was intended as a present, and was never considered as a debt. Mr. Ross also stated that he did not intend to claim

what he had advanced as a debt, and that when he returned home he would destroy the duebills which his uncle had given him." Mr. Ross denied having such a conversation. He states that while in Tallahassee with Geo. G. Lyon, on a visit to their uncle, the latter intimated that he desired to leave his property to them, but that witness told him it was his duty to leave it to his wife during her lifetime, after the payment of his debts, and that his uncle had also intimated in one of his letters that he intended leaving his property to said nephews.

It is contended that the evidence shows that the moneys advanced Col. Fisher by Wm. H. Ross were advanced, not as a loan, but as a gratuity, or, if as a loan, were only to be repaid upon the payment of a certain claim that Col. Fisher was pressing against the United States, or by devise to Ross in his last will and testament. These contentions were made grounds of exception to the master's report.

A careful consideration of the evidence leads us to the conclusion that the moneys advanced by Mr. Ross constituted a loan, and not a gift. Duebills expressing the consideration as borrowed money were given. Mr. Ross testified that the transactions were loans. There is nothing in Col. Fisher's letters indicating that he regarded them otherwise, and Mr. Ross' testimony as to the circumstances attending them is not contradicted. Mr. Ross' letter of December 30, 1887, shows that, though he did not expect to press his uncle for the money represented by the first duebill, yet he did expect the money to be returned when his uncle was able to return it. Col. Fisher's reference to his claim against the United States in his letter dated December 29, 1887, shows that he expected to return the money in a short time, if he could get his claim against the United States settled at the then session of congress, as he hoped to do.

Without further commenting on the evidence, which we have set forth at length, and which speaks for itself, our conclusions are that it shows a loan of the money represented by the duebills, and not a gift; that such loan was general, and not a special one, to be repaid only from a particular fund, or in the event such fund was collected, or by devise by last will and testament; and that the amount represented by such duebills is a valid, legal claim against the estate of Col. Fisher, unless same has been released or discharged by some act of the creditor, which will now be considered.

Mrs. Fisher testified that during a conversation with her husband, she thinks in the spring of 1889, Mr. Ross stated that he did not intend to claim what he had advanced as a debt, and that when he returned home he would destroy the duebills which his uncle had given him. Mr. Ross, it is true, denies that any such conversation occurred; but we must assume, in support of

the ruling of the court below, that the judge gave credit to Mrs. Fisher, rather than to Mr. Ross, and, as it was his province to settle conflicts in the testimony, we see nothing which justifies us in overruling his conclusion upon this question of fact. The conversation testified to by Mrs. Fisher does not, however, constitute, in law, a release, discharge, or gift of the debt due by Col. Fisher. No consideration for Ross' promise appears. No receipt for the debt was given. The evidences of the debt—the duebills—were neither canceled, destroyed, nor delivered to the debtor. In order to constitute a valid gift, the transaction must be consummated by delivery of the thing given. *Horn v. Gartman*, 1 Fla. 73; *Powell v. Leonard*, 9 Fla. 359. Where the thing given consists of a debt due the donor by the donee, and no receipt is actually given, no credit entered, and where the evidence of the debt is not canceled, destroyed, delivered to the donee, or otherwise placed beyond the control of the donor, no valid gift is effected. Until consummated in the manner pointed out, the transaction amounts to no more than a promise to give, which, being without valuable consideration, will not be enforced by the courts. The transaction testified to by Mrs. Fisher falls within this category, and therefore does not operate to discharge the debt of Ross & Co. 14 Am. & Eng. Enc. Law (2d Ed.) p. 1031; 2 Schouler, Pers. Prop. § 97; *Young v. Power*, 41 Miss. 197; *Wilson v. Keller*, 9 Ill. App. 347; *McGuire v. Adams*, 8 Pa. 286; *In re Campbell's Estate*, 7 Pa. 100, 47 Am. Dec. 503; *Irwin v. Johnson*, 36 N. J. Eq. 347; *Snowden v. Reid*, 67 Md. 130, 8 Atl. 661, 10 Atl. 175; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Buswell v. Fuller*, 156 Mass. 309, 31 N. E. 294; *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638.

The only question remaining relates to the period from which interest should be computed upon the debt. The master allowed interest from the dates of the duebills, respectively. In this he was in error. No time of payment was specified in the duebills, nor was any mention of interest made therein. It appears to the court, from the written correspondence between the parties at the time of the loans and giving of the instruments, that they did not regard the debts as due immediately, or that interest was to be computed upon them,—certainly not until after demand made for payment. No demand for payment thereof was made until the duebills were presented to the executor, February 18, 1890. Interest should be allowed from that date. *Milton v. Blackshear*, 8 Fla. 161.

The decree adjudging the claim of appellants not to be a valid claim against the estate of A. A. Fisher, deceased, is reversed, and the cause is remanded, with directions to enter a decree allowing the same, with interest computed from February 18, 1890, and

for such further proceedings as may be conformable to equity and consistent with this opinion.

YAZOO & M. V. R. CO. et al. v. ADAMS,
Revenue Agent.

(Supreme Court of Mississippi. Nov. 18, 1902.)

TAXATION—EXEMPTIONS—RAILROAD PROPERTY—CONSTITUTIONALITY—BACK TAXES—INNOCENT PURCHASER—LIABILITY—ESTOPPEL TO ASSERT—BOARD OF RAILROAD ASSESSORS—QUESTIONS OF EXEMPTION—JURISDICTION—RES ADJUDICATA—APPEAL—REMOVAL OF CAUSES.

1. A bill seeking to subject railroad property to state taxes, and in which the cause of action is based solely on state laws, is not removable to the federal courts, though it may suggestively state defenses involving federal questions which may be interposed by the company.

2. Const. 1890, § 112, authorizes the legislature to provide for a special mode of assessment of railroad property. Code 1892, § 3875, provides that, if any property is "claimed by a railroad company to be exempt," it shall be separately listed by the company in its schedule submitted to the railroad commissioners. Section 3876 provides that the commissioners, on the failure of a company to make the schedule, shall make it out from the best information obtainable. Section 3877 provides that the members of the commission, who are also made railroad assessors, shall assess all railroad property "liable to taxation." Section 3878 provides that the assessor need not be bound by a false or fraudulent schedule, but may make out a new one, on giving notice to the company, served and returned as a summons. *Held*, that the board of railroad assessors has no jurisdiction to determine questions of exemption, so as to render them res adjudicata.

3. Const. 1890, § 146, defines the jurisdiction of the supreme court as such jurisdiction "as properly belongs to a court of appeals." Code 1892, § 4360, provides that the supreme court may determine all issues of fact arising out of an appeal and necessary to its disposition. Section 4353 gives it power, in case of reversal, to render such judgment as should have been rendered below. In a certain action the cause was submitted and judgment rendered on the merits, but the judge based his judgment on certain legal principles, and specially declined to pass on other questions, on a determination of which the same judgment might have been based. *Held*, that the supreme court might nevertheless affirm the judgment on these grounds.

4. An appellee is not restricted to the examination of error contained in the assignment of errors.

5. Code 1892, § 540, provides that no replication to an answer is required in chancery. An answer to a bill which sought to have certain railroad property subjected to the payment of taxes set forth that the roads were constructed by companies having charters containing certain exemption privileges. *Held*, that an issue was raised, without any replication, to which evidence was referable, showing what company constructed the road.

6. Though an action to subject the property of a railroad to back taxes for certain years may involve some of the same legal questions, and be in regard to the same property, as a previously adjudicated litigation between the same parties in regard to taxes for other years, the principles involved are not res adjudicata, but only invite the application of stare decisis.

7. Under Const. 1869, art. 12, § 13, providing that the property of corporations for profit shall be subjected to taxation, the same as that of individuals, a section of a charter of a railroad company, afterwards incorporated into the char-

ters of other railroad companies, was void, which granted to the company the right to appropriate the taxes on the road for 30 years to the payment of debts incurred in the construction thereof, unless 8 per cent. dividends were being earned on the capital stock. Laws 1870, pp. 268, 316, 326; Laws 1871, p. 237; Laws 1873, p. 562; Laws 1882, p. 1011; and Laws 1884, p. 886.

8. Where railroad property had escaped its just taxation, owing to a mistake as to the constitutionality of certain provisions of its charter, and the legislature afterwards provided a method for the assessment and collection of the back taxes, the property, though in the hands of one who purchased after the default, was subject to such taxes, unless the state was estopped by the operation of the rule of property as it existed at the time of the transfer.

9. Where railroad property alleged to have been constructed under provisions of a charter exempting it from taxation was acquired prior to any decision of the supreme court necessarily involving the constitutionality of the charter provision, no rule of property was in effect which could operate as an estoppel to prevent the state subjecting the property to the payment of back taxes under the claim that the charter exemptions were unconstitutional.

10. Two companies had charters authorizing the construction of railroads, part of which would have covered the same general territory, but only one of the charters contained a provision for tax exemption to aid in paying the debts incurred by the construction. Both charters eventually came into the hands of the same parties, and only one line was built, in the construction of which the accounts of the two companies were inextricably confused. *Held*, that the road was not constructed under the charter granting the exemption, so as to give a new company, formed by the consolidation of the two, any claim for exemption from taxes under the charter.

11. Laws 1882, p. 1011, and Laws 1884, p. 886, amendatory thereto, providing for the consolidation of two railroad companies into one, each contained a provision whereby the new company might for 30 years, unless the earnings would pay 8 per cent. dividends on the capital stock, appropriate its taxes to debts to be incurred in the construction of the railroad. *Held*, that no exemption from taxation was made as to the road already constructed at the time of the consolidation.

12. One who claims exemption from taxation has the burden to show that all the conditions on which the exemption was based have been at all times fulfilled.

13. Laws 1870, p. 268, is a provision in the charter of a certain railroad company whereby it was allowed to appropriate its taxes to the payment of debts to be incurred in the construction of its road. Laws 1875, p. 66, in relation to the collection of a privilege tax from railroads, provided that all other acts under which railroad taxes might be collected in a different way were thereby repealed. Laws 1878, p. 78, increasing the amount of the privilege tax, made a special exception of another road than the one in question. Code 1880, §§ 597-608, provide that all railroads shall be subject to taxation, except the very portions in process of construction. Laws 1882, p. 1011, authorizing the consolidation of the road in question with other roads, provided that the new company should have all the "rights, grants, and immunities now enjoyed by such companies." *Held* that the immunity from taxation having been repealed, no rights in that regard were acquired by the new company.

14. Laws 1884, pp. 29-31, Laws 1888, p. 49, and Laws 1890, p. 13, recognizing the supposed exemption of certain railroads from taxation by previous charters, and declaring the legislative intent that general taxation laws should not

interfere therewith, do not thereby create an exemption otherwise nonexistent.

15. Laws 1878, p. 238, included in the charter of a certain railroad company a permission to appropriate, under certain limitations, taxes for a period of 30 years to the payment of debts to be incurred in the construction of the road. By Code 1880, §§ 597-608, all railroads are made subject to taxation, except the very portions in process of construction. *Held*, that the exemption was repealed.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Bill by Wirt Adams, revenue agent, against the Yazoo & Mississippi Valley Railroad Company and another, to subject certain property to the payment of back taxes. From a judgment in favor of complainant, defendants appeal. Affirmed.

Mayes & Harris, for appellants. Critz, Beckett & Kimbrough, J. A. P. Campbell, and Green & Green, for appellee.

OATCOE, Special Judge. This suit was brought by appellee against the railroad property formerly owned by the Louisville, New Orleans & Texas Railroad Company, including the Natchez, Jackson & Columbus Railroad Company, for the ad valorem taxes claimed to be due thereon for the years 1886 to 1891, inclusive, and to enforce a lien therefor on that part of the line of said railroad extending from the Louisiana state line, on the south, to the Tennessee state line, on the north, a distance of about 315 miles, and upon the branches of said road,—one known as the Tallahatchie Branch, about the distance of 39 miles, and a part of the branch known as the Riverside Division or Loop, a distance of about 86 miles. The suit is brought under the act of 1894 (Laws 1894, p. 29) authorizing the revenue agent to sue for and recover back taxes. It is a proceeding wholly in rem, no personal judgment being sought. The suit against that part of the line above mentioned was numbered originally No. 1,449. This suit includes a similar claim for ad valorem back taxes for same period on the property known as the Natchez, Jackson & Columbus Railroad; the last-named road having been purchased by the Louisville, New Orleans & Texas Railroad Company in the year 1890. This suit was numbered originally No. 1,681. The two suits were consolidated in the lower court, to facilitate trial; each party reserving the right to interpose any and all defenses or claims as if no consolidation had occurred. Judgment was rendered in the lower court for appellee for the amount claimed, and the property mentioned subjected to the payment of said judgment. Appeal was taken therefrom to this court, and appellants assign errors as follows: That the court below erred: (1) In not granting application to remove case No. 1,681 (original) to the federal court. (2) That the property was not liable to be assessed for back taxes, as claimed, because the ad valorem taxes for said years, pursuant to law, were authorized to be paid by a priv-

ilege tax in lieu thereof, rated at a specified sum per mile of said road, and that said privilege tax was paid, pursuant to law, by the appropriation of the amount of each year's taxes on said line of road to the debt incurred in the construction of said road, pursuant to the provisions of section 21 of the Mobile & Northwestern Railroad Company charter (Laws 1870, p. 268), which said section 21 was incorporated in the charters of the companies [railroad] constructing said road; said roads being afterwards consolidated into the Louisville, New Orleans & Texas Railroad Company, and said section 21 being also incorporated into the act of the legislature authorizing said consolidation; said railroads not having been able to pay out of their earnings the dividend of 8% as provided in said section 21. (3) That the Illinois Central Railroad Company was a bona fide purchaser of said property for a valuable consideration, without notice of any taxes being due or claimed upon said property. (4) That the state was estopped in this case from claiming said section 21, and the acts of the legislature amendatory thereof, to be in violation of the constitution of 1869 of Mississippi." Appellants also insist that this court has no power to examine and determine questions of fact appearing in the record, but which were not considered and acted upon by the lower court. To these defenses appellee interposes the following objections: "(1) That these defenses were interposed by appellants before the railroad assessors at the time of the assessment under which this suit was instituted was being considered by them, and was considered by said railroad assessors, and by them adjudged against appellants, and by reason thereof became res adjudicata; that the order of the railroad assessors making the assessment was conclusive, and not subject to collateral attack. (2) That the same defenses had been interposed in previous suits in the supreme court of this state between the parties hereto, and had been in said suits adjudged against appellants, and by reason thereof become and were res adjudicata of the legal questions involved, and, if not res adjudicata, were conclusive against appellants under the rule of stare decisis. (3) That section 21 of the Mobile & Northwestern Railroad Company, and the acts of the legislature amendatory thereof, had been repealed by subsequent acts of the legislature and by the Code of 1880, and that the attempted exemption or appropriation of taxes by said section 21 was in violation of the constitution of 1869, and void ab initio. (4) That the railroad was constructed by a railroad company whose charter contained no exemption or appropriation of taxes, and that the construction of the branch roads by the Louisville, New Orleans & Texas road did not entitle them to claim exemption of said branches from taxation. (5) That the roads had been able to pay out of their earnings a dividend of 8% upon their capital stock, ever

and above their proper debts and liabilities, and for that reason were not entitled to claim exemption from taxation."

In the scope of the investigation necessary for the proper comprehension and application of the legal principles involved, we are much indebted to counsel for the industry and ability and the thoroughness with which they have presented the various questions to us, leaving the court but little to do, save collate and apply the principles invited by the facts.

The portion of the railroad line upon which the taxes are claimed extends from the Louisiana state line, on the south, to the Tennessee state line, upon the north, passing through portions of the counties of Amite, Franklin, Jefferson, Claiborne, and Warren, south of Vicksburg, a distance of about 101 miles; thence northward, through portions of the counties of Warren, Issaquena, Sharkey, Washington, Bolivar, Coahoma, Tunica, and De Sota, a distance of about 214 miles; aggregating upon the main line a distance of 315 miles in Mississippi; and also upon a part of the Riverside Division, extending from Wilkinski to Coahoma station, on the north, and from Hampton to Rolling-fork on the south,—an aggregate distance of about 88 miles on the Loop or Riverside Division, and also upon the Tallahatchie Branch, extending from Clarksdale to Minter City, a distance of about 89 miles. In March, 1895, the revenue agent filed notice with the railroad commissioners, who by the law are railroad assessors, that the property above described had escaped taxation by reason of not having been assessed for the years 1896 to 1901, inclusive, and named the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company as owners. In April, 1895, the revenue agent filed with said commissioners additional notice, with interrogatories for said owners to answer as follows: "(1) When the main line, Riverside Division, and Tallahatchie Branch were constructed. (2) The cost of construction, amount of donations, amount of stock, amount paid for same, and the earnings, gross and net; the nature and character of affidavits filed, and of the receipts obtained from the sheriffs." Order was made by the railroad commissioners, requiring the appellants to answer. Appellants answered by averring that the railroad assessors had no authority to assess the taxes for the years named; that the commutation law had been accepted for said years, and therefore ad valorem taxes were not necessary to be assessed, and hence the land had not escaped taxation. The objections of appellants to the making of assessments were overruled by the commissioners, and schedules of the property, as required by law, were ordered to be filed by appellants with the commissioners by the first Monday of August, 1895. Appellants declined to answer the interrogatories, and the matters

were set for hearing on the first Monday of September, 1895. On the 27th of August, 1895, appellants filed a bill and obtained an injunction against the railroad commissioners and revenue agent to prevent the assessment of said property. On September 28, 1895, the injunction was dissolved. Appeal was taken to the supreme court, and on December 2, 1895, the decree dissolving the injunction was affirmed. Case No. 8,312, reported in 73 Miss. 648, 19 South. 91. On February 5, 1896, the railroad assessors made an order assessing said property. The assessment remained on file 30 days, open to objections. No objections being filed, the order making the assessment was confirmed by the assessors on March 17, 1896. The appellants appealed from the order making the assessments by the railroad commissioners to the circuit court of Hinds county, Miss., and this appeal was dismissed by the circuit court for lack of jurisdiction. No appeal from the action of the circuit court in dismissing said appeal was taken. On November 19, 1896, the revenue agent filed the bill herein, original No. 1,449. To this bill the Yazoo & Mississippi Valley Railroad Company filed two pleas. One of them (being the pendency of the appeal in the circuit court) was subsequently withdrawn, and not considered. One averred the provisions of sections 3875 to 3886, inclusive, of Code 1892, to be unconstitutional and void, and the act of 1894 authorizing assessments for back taxes, and suits to be instituted thereon, to be unconstitutional and void. The Illinois Central Railroad Company demurred, assigning as causes that the bill showed no liability on them, nor any reason for making them defendants; that the act of 1894 authorizing assessment of back taxes was unconstitutional and void, because in violation of section 14 and section 112 of the constitution of Mississippi (1890), and in violation of the fourteenth amendment of the constitution of the United States. The plea was holden insufficient, and the demurrer overruled. Appeal was taken to the supreme court, and the decree of the lower court affirmed. Reported in 77 Miss. 764, 25 South. 355. In 1898 the revenue agent gave notice to the railroad commissioners that the Natchez, Jackson & Columbus Railroad Company had escaped taxation for lack of assessment for the years 1886 to 1891, inclusive, and named the Yazoo & Mississippi Railroad Company and the Illinois Central Railroad Company as the owners. Notices were given to the alleged owners as required by law, and on August 1, 1898, assessment was made of the property of the Natchez, Jackson & Columbus Railroad Company; the assessment to remain on file for objections. No objections were filed, but on August 4, 1898, the Illinois Central Railroad Company filed a bill in, and obtained an injunction from, the United States circuit court, restraining the commissioners from certifying the as-

essment to the counties, and the revenue agent from suing on the assessment. On February 7, 1899, the restraining order was discharged, and an appeal taken to the United States circuit court of appeals, which appeal was dismissed for lack of jurisdiction on April 25, 1899. On April 28, 1899, the revenue agent filed his bill herein, numbered 1,681 originally, seeking to subject the property of the Natchez, Jackson & Columbus Railroad to the taxes under said assessment. On May 1, 1899, the United States circuit court dismissed the bill of the railroad company, and an appeal was taken therefrom to the United States supreme court. On January 7, 1901, the United States supreme court reversed the decree of the United States circuit court, and remanded the case. 21 Sup. Ct. 251, 45 L. Ed. 410. This reversal of the decree dismissing the bill occurred on a point of pleading, and did not touch the merits of the bill. On 29th of April, 1899, the defendants in the lower court (appellants) filed petition asking removal of cause numbered 1,681 (original) to the federal court, and gave bond for such removal. On May 8, 1899, the court below refused to grant petition for removal, and defendants excepted. On May 8, 1899, by agreement, the two cases, numbered respectively 1,449 and 1,681, were consolidated; it being agreed that such consolidation was only to facilitate the trial and save costs; both parties reserving all rights of claim or defense applicable to either. At the January term, 1900, the consolidated cause was submitted for hearing on bills, answer, exhibits, proofs, pleadings and record, and decree rendered subjecting the property named in each suit to the taxes of 1886 to 1891, inclusive. From this decree, appeal was taken to this court.

The right to remove causes from the state to the federal court only exists where there is contained in the plaintiff's cause of action, as stated, a case arising under the constitution or laws of the United States. Otherwise the federal court has no jurisdiction. It is of no avail that the statement of a case involving a federal question arises out of the pleadings of the defendant, or is stated suggestively by the complainant in his bill. There is no difference in the application of this restrictive condition, whether the jurisdiction be invoked originally in the federal court, or upon an application to remove from the state court. In the case of *State of Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, the court says: "In the first and second bills the only reference to the constitution or laws of the United States is the suggestion that the defendant will contend that the law of the state under which the plaintiffs claim is void because in contravention of the constitution of the United States, and by the settled law of this court, as appears from the decisions above cited, a suggestion by one party that the other will or may set up a claim under the con-

stitution or laws of the United States does not make the case one arising under the constitution or those laws. The only right claimed by the plaintiffs is under the law of the state of Tennessee, and they assert no right whatever under the constitution and laws of the United States. Under the act of August 13, 1888, c. 866, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." In the case at bar the complainant's cause of action is asserted solely under the laws of the state of Mississippi. After completing the statement of his claim under the laws of the state, the complainant suggestively states the defenses interposed by the defendants when the application to have the property assessed was pending before the railroad commissioners. Conceding that these defenses involved a federal question, yet they are not a part of the statement of complainant's claim. This claim was complete in statement, without reference to the defenses which had been or might be interposed by defendants. There was no error in overruling the application to remove.

The force and effect of the decision of the railroad commissioners in determining the liability of the property to taxation and assessing it is determinable in this collateral attack by the jurisdiction of the railroad commissioners, acting as railroad assessors. The office, duties, and powers of the railroad assessors are wholly legislative, and are found in sections 3875 to 3886, inclusive, of the Code of 1892. Railroad assessors is not an office established by the constitution, nor is it an inferior court, established under authority of section 172, Const. Miss. 1890; but it was created under and pursuant to section 112, Const. Miss. 1890, which section, after declaring general rules for assessment of property, provides: "But the legislature may provide for a special mode of valuation and assessment for railroads and railroad and other corporate property. * * * But all such shall be assessed at its true value." Pursuant to this constitutional authorization to provide a "special mode for valuation and assessment of railroads and railroad and other corporate property," sections 3875 to 3886, inclusive, Code 1892, were enacted. Looking to these sections for the jurisdiction of the railroad assessors, it is found that the legislature kept within the constitutional limitations in conferring power upon them, and that power is to assess and value, and is found in sections 3877, 3878, supra. Section 3877 reads as follows: "The members of the railroad commission, are constituted state railroad assessors, and they shall upon the receipt or making and completion of the schedules, provided for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to

taxation in the state, affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, and the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules, necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state." Section 3878 says: "If in any case the railroad assessors have reason to believe, that any railroad company, or person owning or operating a railroad, has rendered a false or fraudulent schedule, and that an assessment predicated thereon will relieve such company or person of a just share of taxation, they shall not, in making the assessment, be bound thereby, but they shall make out a proper schedule as if none had been rendered, first giving such person or company five days' notice to come forward at a time and place to be named, and show cause why such course should not be pursued. Such notice shall be served and returned as a summons from court." These sections are a part of the general revenue law, and confer upon the railroad assessors the duty and powers, as to railroad and other corporate property, that by the general law are conferred upon the tax assessors and boards of supervisors together as to all other species of property. The same duties are to be performed, the same results to be ascertained. In each case the property is to be assessed, and its true value affixed. It is urged by the appellee that the railroad assessors had jurisdiction to determine the liability of railroads to taxation, and, in the exercise of such power, to determine the existence and the constitutionality of any claim of exemption from taxation appearing in the schedules filed, or otherwise presented to them. This contention is based upon this language near the conclusion of section 3875, supra, viz.: "And if any of such property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." And upon this language in section 3877, supra, viz.: "That the railroad assessors shall upon the receipt, or making and completing of the schedules, provided for in the last two sections, assess all railroads * * * liable to taxation." Section 3875, supra, provides for filing of schedules, and specifically enumerates the various items of information required to appear therein; but it does not, in terms, purpose, or effect, purport to confer or define jurisdiction. The noncompliance of the railroad with the requirement of filing schedules in no way affects the power or duties of the railroad assessors. In section 3876, supra, this provision for such failure to comply exists: "In case of failure, neglect or refusal, the commissioners shall make out such schedule from the best information obtainable."

The determination of questions of exemption from taxation, involving the constitu-

tional authorization of the legislature, and of the legislative acts thereunder, pertains to the highest and most important exercise of the judicial functions. The power to exercise these important duties must not rest upon inference. It must be presumed that the legislature would not have intended to confer this power upon the railroad assessors without expressing such intent in clear, unmistakable language; and it must also be presumed that the legislature, in enacting the statute under consideration, intended to enact a law within and to the extent only of the authority conferred upon them in that behalf by section 112 of the constitution of Mississippi, *supra*, which authority was "to provide a special mode of valuation and assessment of railroads, * * * all such property to be assessed at its true value." There is nothing in this language of the constitution indicating any purpose to authorize the legislature to confer any jurisdiction upon the parties or party selected to perform this duty, except such as was necessary to assess and value a certain species of property in the same manner and to the same extent that the officers provided by the constitution, *viz.*, tax assessors and boards of supervisors, should assess and value all other species of property. In both cases the same purposes were to be subserved. There is no special significance to be attached to the words "liable to taxation," in this connection. The same words, in the same revenue law, and referring to the duties of the tax assessor and to those of the boards of supervisors, are used and mean the same in each place. It is only a general term used to distinguish the property to be assessed, as separating it from other property not liable to taxation, whether exempt therefrom by general law or otherwise. The law determines what property is liable to assessment. Its liability under the law is not affected by the act of assessment. Section 3754, Code 1892, provides that the "assessors shall assess the rolls, and all personal property subject to taxation, and shall set down in the assessment rolls * * * each item of personal property liable to taxation." Sections 3772, 3778, *Id.*, authorize the assessor to assess lands not returned or rendered to him, and the value fixed, as in other cases. Section 3774, *Id.*, provides how the land rolls shall be made up, and says, " * * * Land of the United States and other land exempt from taxation shall be set down in separate columns." Section 3788, *Id.*, says, "The boards of supervisors of each county shall hold a meeting at the court house on 1st Monday of August to hear objections to assessment and examine same, * * * and shall determine all exceptions thereto." The manner of assessment of all property, and the powers and duties of all officers charged with the assessment and valuation of property, are one harmonious scheme, with no distinction as to

the sphere of duty or extent of the powers of the officers in its performance. The railroad assessors, in making assessments and in hearing and determining objections thereto, are exercising the same duties, and their judgments in such case are entitled to the same consideration, and have the same degree of conclusiveness, which pertain to the judgments of boards of supervisors in the discharge of their duties of like nature. Their judgments are conclusive "regarding assessments only, as to irregularities, and matters of fact resting wholly in pais, but are not final as to questions of exemption, under either statutory or constitutional provisions." See *Horne v. Green*, 52 Miss. 456; *City of Meridian v. Phillips*, 65 Miss. 361, 4 South. 119; *Same v. Ragsdale*, 67 Miss. 86, 6 South. 619; *Ball v. City of Meridian*, 67 Miss. 93, 6 South. 645. The board of railroad assessors did not have jurisdiction to determine the claim of exemption interposed, and therefore the facts which would be involved in the determination of such exemption (its existence, its being earned, discharged, or terminated) have not been concluded by their finding. Their judgment touching the claim of exemption is void because they were without jurisdiction, as regards it, and to that extent may be attacked collaterally. The court below erred in holding the judgment of the railroad assessors *res adjudicata* as to the exemption claimed. As to all other matters involved in the assessment and valuation of the property, the judgment of the railroad assessors was conclusive.

The decree of the lower court recites that certain legal questions (stating them specifically) entitle the appellee to the relief prayed, and as "to all other issues in the case, deeming them unnecessary and immaterial, declines to consider them." Among the issues presented by the pleadings, and declined to be considered by the court below, are the issues of fact as to who built the road, under what charter it was constructed, and when constructed, and also whether or not the road could have paid a dividend of 8 per cent. on its capital stock out of its earnings remaining after payment of its debts and liabilities during the years for which the taxes are claimed. We are asked by the appellee to consider and determine those facts, and the evidence pertaining thereto which appears in the record, but was declined to be considered by the court below, such declination appearing affirmatively in the decree of the lower court. Appellants object to such evidence being considered by this court, insisting that this court, having only appellate jurisdiction, cannot examine or determine matters of fact shown by the record, affirmatively, to have not been acted upon by the lower court; that such action by this court would be an exercise of original, not appellate, jurisdiction; that this court should restrict its revision to the judgment of the lower court, considered in connection

with those matters alone shown by the record to have been the basis of the judgment.

The interesting and important question presented by this contention has not heretofore been considered by this court, in the exact aspect as now presented. It appears from the recitals of the decrees of the lower court that the cause was heard upon "bills, answer, exhibits, proofs, pleadings, and record." The whole case was submitted for hearing, and was therefore subject to be considered. Ordinarily the presumption would attach that the case, as a whole, was considered, examined, and acted upon by the lower court, and would be clearly governed by the rules frequently applied by this court, holding that "the appeal brings up the whole case, and presents the question whether the decree is right, in whole or in part, upon the entire record"; but it is very ably and forcibly argued by counsel for appellants that as it affirmatively appears by the record in this case that the issues of fact, and the evidence taken and submitted on those issues, were not considered or acted upon by the lower court in rendering the decree, no presumption of action by the lower court can be taken, and therefore any consideration and action by this court upon such issues would be primary and original, and not appellate.

Section 146, Const. Miss. 1890, confers and defines the jurisdiction of this court, which is "such jurisdiction as properly belongs to a court of appeals." This language excludes the grant of original jurisdiction. "*Unius expressio est alterius exclusio*," except as the exercise of jurisdiction quasi original may properly be necessary to the effectual exercise of its appellate powers. In recognition of the probable necessity of the exercise of this implied addition to the power expressly given, the legislature enacted section 4350, Code 1892, which provides that "the supreme court may try and determine all issues of fact which may arise out of any appeal before it, and be necessary to the disposition thereof." This question, in its decision, involves both the power and the practice of this court. The power is conferred alone by the constitution. The practice may be regulated by legislative enactment, within the limits of the power. Where the judgment of the lower court rests solely upon the question of jurisdiction, and there has been no judgment upon the merits, then in such case the only matter presented for revision by this court would be the action of the lower court upon the question of its power to try. There would not have been any trial of the cause upon its merits, either as to the law or the facts. The case of *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287, referred to by counsel for appellants, is a type of this class of cases, as appears from the report of the case: "The court, being advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the

court from which the appeal had been taken." An appellate court reviews and revises the judgment of the lower court. If that judgment be only upon the jurisdiction, then that is the only question to be reviewed. If the judgment of the lower court be upon the merits, or upon both the question of jurisdiction and of the merits, then that judgment, in its entirety, is to be reviewed and revised by the appellate court. In the case at bar it appears from the record that the cause was submitted and heard upon the "bills, answer, exhibits, pleading, evidence, and record," and the judgment of the lower court is that the property is liable to the payment of the taxes claimed, and subjects the property to their payment. It is this judgment that is before us for review. The whole record is before us, and its correctness is the question for our examination. We have no law or rule of practice requiring the trial judge to specify the reasons, nor to segregate the issues he deems material, in rendering his judgment. A judgment upon the merits is based upon the whole case as presented, and is and must be viewed as an entirety. A case may have any number of issues, but a final judgment disposes of the whole case, and of necessity includes in such disposition all issues therein. This legal result cannot be affected or avoided by the recitation in the judgment in the lower court that certain issues were deemed material and decisive, and that other issues were deemed by him to be immaterial and irrelevant, and therefore he did not consider or decide them. The issues presented questions of law and facts. The decree of the lower court would have been a valid and final determination of the matters in controversy, without a recital of the reasons influencing the court in reaching his conclusions in rendering it, or giving therein his opinion of either the law or the facts involved. Whether he reached his conclusions upon his view of the law or of the facts, one or both, was alike immaterial, and did not affect the finality or comprehensiveness of the decree. "*Utile per inutile non vitiatur*." We think the power of this court to revise the judgment of the lower courts includes every matter comprehended by the scope of the judgment complained of, and that is the proper practice. If it is held that this court can only review such issue or issues of law or fact as the court below considered and acted upon in rendering its judgment, then the fact of the consideration and action upon each issue involved in the pleadings, by the lower court, would be an issue before this court, necessarily determinable before it could determine what portion of the record would be reviewable. It might be that the judgment of the lower court was upon an issue deemed by this court to be immaterial, and for that cause held to be erroneous; yet an examination of the whole record might disclose material issues, with evidence showing that the judgment of the lower court, if rendered upon those issues, would

have been correct; yet, if this court is restricted in its review to those issues only held by the lower court to have been material, the case would have to be remanded, and the litigation uselessly and unnecessarily protracted. In *State v. Cannon*, 44 La. Ann. 738, 11 South. 88, the court announces on a rehearing the correct doctrine, in saying: "The court below decides a cause on whatever point it deems material, but it is the province of this court to revise its judgment, not the grounds upon which it was rendered. Its decision requires us to examine the case on all the grounds it presents, if that be necessary to a rightful determination of the case; for the error of the judge, a question for which relief is sought at our hands, may be his failure to take into consideration an objection on which his judgment is silent. Under the principle contended for, there might be as many appeals as points in the case, if he acted on only one at a time, and decided erroneously. It has been the uniform practice of this court, as it is the real intent of the statute, that the decision of the first judge on the merits brings up the whole case. The contrary doctrine would be productive of intolerable expense and delay." We are confirmed in the correctness of our conclusion in this practice by the terms of section 4353, Code 1892, which says: "The supreme court shall hear and determine all cases properly brought before it, * * * and in case the judgment, sentence, or decree of the court below be reversed, the supreme court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary in consequence of its decision," etc. On appeal the appellant is restricted to an examination of the errors contained in his assignment of errors. No such restriction rests upon the appellee; the distinction being "between a party seeking to reverse a judgment, and a party resisting the attempt."

It is urged by counsel for appellants that there is no issue in the pleadings to which the evidence as to what company constructed the road would be referable, in determining the claim of exemption. The gravamen of the bill is the construction of the road, its liability to taxation, its having escaped taxation for the years named, by reason of not being assessed, and its assessment by the railroad commissioners. The answer of defendants admits the construction of the road and its assessment by the railroad commissioners, but denies its liability to taxation, and avers that by reason of the road having been constructed by railroad companies having charters containing exemptions, or the right to appropriate the taxes accruing on the property to debts incurred in its construction until the earnings of the road would enable them to pay a dividend of 8 per cent. on the capital stock, after paying its debts and liabilities, the property was not liable to the taxes assessed; that the road had never been able to pay said dividend out of its earnings; and

that the commutation or privilege tax authorized by law in lieu of the ad valorem taxes had been paid for the years named by the company, shown by affidavits filed with the sheriffs of the several counties in which the road was located, and obtaining their receipts therefor. The defenses are affirmative, and, to be effectual, must be established by proof. Matters of defense, averred in an answer, not responsive to the allegations of the bill, are at issue without replication. No replication to an answer is required in chancery. Section 540, Code 1892.

It is suggested that an examination of the evidence is unnecessary, unless this court should first decide that the chancellor erred either on the point of estoppel, or on the point of violation of the fourteenth amendment to the constitution of the United States. The fact of the construction of the road by the Louisville, New Orleans & Texas Railroad Company, or its constituent companies or company, having under its or their charters exemption or right of appropriation of taxes, is a fact necessary to be considered, preliminary to an application of the legal principles contended for by appellants. If the fact be that the road was constructed by a company or companies having no exemption or right of appropriation in their charters, then no claim of exemption could arise, nor estoppel be asserted.

The legal principles involved in this case are not res adjudicata by reason of any former adjudication of this court. While the parties are the same, and the subject-matter the same, yet the cause of action is wholly different. In the case at bar the cause of action is the taxes for the years 1886 to 1891, inclusive, and they are entirely separate and distinct from the taxes of other years. Some of the same legal questions involved here were presented and decided by this court in cases between the same parties, and invite the application of the principles of stare decisis, but are not res adjudicata. 77 Miss. 265-266, 24 South. 200, 317, 28 South. 956. The contention here rests mainly upon section 21 of the charter of the Mobile & Northern Railroad Company (Laws 1870, p. 268), incorporated into the charters of the Memphis & Vicksburg Railroad Company (Laws 1870, pp. 316-326), the Mississippi Valley & Ship Island Railroad Company (Laws 1871, p. 237, and Laws 1873, p. 562), the Natchez, Jackson & Columbus Railroad Company (Laws 1870, p. 327), the act authorizing consolidation of the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company (Laws 1882, p. 1011), and the act amendatory thereof (Laws 1884, p. 936), and acts of the legislature affecting same, by express reference or necessary implication. Section 21, supra, granted to the various roads above named the right to appropriate the taxes annually accruing thereon to the debts incurred by them, prospectively, in the construction of the

road, or for money borrowed by the company, upon lands or otherwise, to be used in constructing the road. This right of appropriation was to continue for 30 years, unless the earnings of the road (annual) would enable the road to pay a dividend on its capital stock of 8 per cent., after paying its debts and liabilities. This appropriation by the company was to be evidenced by an affidavit made by the president or cashier of the road, filed with the sheriff of the various counties traversed by the road, upon the filing of which affidavit the sheriff was to execute a receipt in full for said taxes for the year. Laws 1870, p. 268. If the legislature, in enacting section 21, *supra*, exceeded the authority granted them by the constitution of Mississippi, or were acting in contravention of the provisions of the constitution, then their act was void, and could not confer rights upon any one. This question was presented thoroughly, and ably discussed, exhaustively considered, and decided by this court, in the case of Railroad Co. v. Adams, reported in 77 Miss. 194, 24 South. 200, 317, 28 South. 956 et seq.; and it was there held that such attempt by the legislature to confer a special exemption upon a special person or corporation would be in violation of section 13, art. 12, of the constitution of Mississippi of 1869, and therefore void. A careful examination of the question there decided confirms us in the correctness of the conclusion then reached, and we adhere to and confirm the same. By the constitution, taxes are imposed upon all property alike, owned by either individuals or corporations, and special exemptions to the one or the other were forbidden by the organic law.

- The distinguished counsel for appellant very ably and forcibly argues that even if the alleged exemption or appropriation of taxes made by said section 21 was void ab initio by reason of the constitution of Mississippi of 1869 being mandatory, or, if not so void, was repealed by subsequent statutes enacted by the legislature, yet the appellants being a new company, coming into existence in October, 1892, and making large investments in the property of the Louisville, New Orleans & Texas Railroad Company, which includes the Natchez, Jackson & Columbus Railroad property, at a time when the alleged exemptions or appropriations of taxes were recognized as valid by the legislative, executive, and judicial departments of the state, there being at the time of the purchase of said property by appellants no claim of taxes upon said property by the state, nor had been such claim or lien upon the property for taxes delinquent for past years, and that appellants were not the owners of the property during the time for which said taxes are said to be delinquent and accrued thereon, therefore, as to said claim for taxes, they are innocent purchasers for a valuable consideration, without notice of any claim for taxes thereon by the state; that they purchased

said property, incurred liabilities, and acquired rights on the faith of the status then existing by reason of such recognition by the departments of the state, and expressly on the faith that there were no outstanding taxes resting on said property; and that the state was therefore now estopped from collecting taxes upon said property for said years. This contention presents an exceedingly interesting and important question,—important to the state and the citizen alike,—and it has received our careful consideration. The power of the legislature, within constitutional limits, to levy taxes for the support of the government, and to provide means for their collection, is limited only by the necessity of the occasion; and it is their duty, under constitutional direction, to see that all property of every person, natural and artificial, shall bear its just and equal proportion of the burdens of government. If any property liable under existing law to taxation has escaped taxation, it was the duty of the legislature to remedy the evil by providing means for its assessment and collection, else property that had been assessed and paid on would be bearing an unequal, and therefore an unjust, proportion of the public burden. No one can justly complain when his property is made to contribute its just and equal proportion, according to its value, toward the burden of government. Each person enjoys the privileges and receives the protection and the benefits resultant from the government, and the duty rests alike upon each to contribute in proportion to his ability to its maintenance. If property is liable to taxation, and has escaped bearing its part of the burden from any cause, it is the essence of justice that such property shall be made to contribute its proportion to the general fund necessary to the maintenance of the government. That property shall be liable in specie to the tax upon itself is eminently just and indispensable, and forms the basis of our system of taxation. The constitutional provisions that “all property shall be taxed in proportion to its value” (section 20, art. 12, Const. Miss. 1869, and section 13, art. 12, Id.) that “the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals,” were declarations of the public will, self-imposing, leaving to the legislature only the duty of providing the means for collection of that which the constitution had imposed. Except as may be authorized by the constitution, the legislature has no power to relieve the property of the burden of taxation thus imposed by the will of the whole people, and any efforts on the part of the legislature to create exemptions or grant rights of appropriations of taxes contrary to the provisions of the constitution are void, and no rights can be predicated on such enactments, where special exemptions to special persons or corporations are attempted. Unless the legislature provides the means for

the assessment and collection of taxes, they remain uncollected, but such failure in no wise relieves the property from the burden imposed by the constitution. It still remains subject to the tax, and upon the discovery of such failure it is the duty of the legislature to remedy the omission by providing means for the assessment and collection of the tax so omitted. Its power to provide such means is coextensive with its duty. This power and its consequent duty are highly salutary and indispensable, and cannot be avoided in its exercise because in some instances the property has changed ownership, and for that reason individual hardship may result. The burden was upon the property, by the highest law of the land, and followed it into whosoever's hands it may go. See *Tallman v. City of Janesville*, 17 Wis. 76; *Cross v. City of Milwaukee*, 19 Wis. 509; *State v. Fullerton*, 143 Mo. 685, 44 S. W. 741; *Canal Co. v. Conner*, 50 Pa. 399; *Railroad Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; *Houston & T. Cent. R. Co. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. Ed. 673. Assessment of back taxes, where the property has changed owners, does not violate any constitutional right guaranteed by either the state or United States constitutions. See *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 528, 16 Sup. Ct. 83, 40 L. Ed. 247; *Weyerhaeuser v. Same*, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583; *Railroad Co. v. Reynolds*, 183 U. S. 475, 22 Sup. Ct. 176, 46 L. Ed. 283; *United States Trust Co. v. New Mexico*, 183 U. S. 539, 22 Sup. Ct. 172, 46 L. Ed. 315. When the legislature, in the exercise of its constitutional powers, has provided for the assessment and collection of back taxes upon property, and has made no provision for excepting from its operation property the ownership of which has changed since the default occurred, this court cannot ingraft exceptions upon such statute. Courts can only decide what is the law, as declared by the constitution or enacted by the legislature. The application of the law cannot vary, however meritorious the particular case may appear. The property in controversy here is liable for the taxes for the years claimed, unless relieved therefrom by the operation of the rule of property as it existed at the time the appellants became owners of it,—so operating as to create an estoppel upon the state. A "rule of property" is a "settled legal principle governing the ownership and devolution of property." This principle can be settled only by the supreme court of the state, and its utterances, in cases pending before it involving the title to property, construing statutes or constitutional provisions, have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was in that case involved, or necessarily considered and determined by the court in the case then pending before it; and such rule of property, when so established, becomes and remains

the settled legal principle governing the acquisition and title to property, to which construction is applicable, so long as such decision remains unreversed by the supreme court giving such construction. If such construction is given upon an issue directly involved in the case, or necessarily considered, and necessitates the application of the judicial mind to the precise question, then immediately the rule of property established thereby becomes the law for similar cases, and is upheld and continued in the future by the doctrine of *stare decisis*. The acquiring of the ownership of property is always accompanied with the vesting of rights under and pursuant to the then existing law as declared by the supreme court of the state. This law so declared remains a rule of property until that law shall be changed by the state supreme court overruling or modifying such prior decision, in which case the rule of property would be changed to correspond with the latest utterance of the supreme court upon the subject. This change in the rule of property would only affect transactions occurring subsequent to such change in the decision of the state supreme court. As to all transactions affecting the ownership or devolution of property, occurring prior to such change in the rule, they would be controlled by the rule of property existing at the time of their occurrence. All rights of property must be governed and protected by the laws existing, and as they existed, at the time of the vesting of the right. This principle, so manifestly in accordance with the plainest principles of justice, receives our fullest approval, and will be applied in all cases coming within its scope. It is binding, in proper cases, upon the state as upon the individual. The state has not one law for the citizen, and a different application of it to itself. It has received the sanction of the highest court of the land in many cases. In *Gelpcke v. City of Dubuque*, 1 Wall. 206, 17 L. Ed. 520, the supreme court of the United States say: "The sound and true rule is that if the contract, when made, was valid by the law of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law. The same rule applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law." The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law, as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications. See, also, *Olcott v. Supervisors*, 16 Wall. 689, 21 L. Ed. 332; *Douglas v. Pike Co.*, 101 U. S. 677, 25 L. Ed. 968; *Suth. St. Const.* § 819.

We have carefully examined all the deci-

sions of this court in which section 21 of the Mobile & Northwestern Railroad Company charter, *ubi supra*, was involved, and are confirmed in the correctness of the conclusion reached by this court in their examination of them in the case of Railroad Co. v. Adams, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, that in none of them, prior to that case, was the constitutionality of said section presented or decided.

The able counsel for appellant, in responding to the questions submitted for reargument at this term, viz.: "(a) Was the precise point whether the twenty-first section of the Mobile & Northwestern charter violated the constitution of 1869 ever raised by the pleadings, and expressly decided by this court, prior to the decision in Railroad Co. v. Adams, 77 Miss. 194, 24 South. 200, 317, 28 South. 956? (b) If not so expressly presented by the pleadings and expressly decided by this court, was there ever a decision by this court prior to Railroad Co. v. Adams, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, which decision could not have been rendered without this court having held that said twenty-first section did not violate the constitution of 1869, and in which, therefore, the decision that said twenty-first section did not violate the constitution of 1869 was necessarily made?"—admits there was no decision expressly made, but insists that the question was necessarily involved both in the pleadings and decision of the following named cases, viz.: Mississippi Mills v. Cook, 56 Miss. 40; McCulloch v. Stone, 64 Miss. 378, 8 South. 236; Railroad Co. v. Thomas, 65 Miss. 553, 5 South. 108; Railway Co. v. Taylor, 68 Miss. 361, 8 South. 675. The principle settled by the Mississippi Mills Case is not applicable to the case at bar. That case decided nothing save that the general exemption granted by the act of 1873 was repealable, and was repealed by the act of 1877. The constitutionality of the grant of exemption involved therein, which was general, not special, was not argued or considered by the court, but seems to have been conceded; and the whole contention then hinged upon the repealability of the statute, not its constitutionality. See Railroad Co. v. Adams, 77 Miss. 194, 24 South. 200, 317, 28 South. 956. And in addition to that the act of 1873, amendatory of the act of 1872, under the provisions of which the Mississippi Mills claimed exemption, was not an act granting a special exemption to a special corporation, but only sought to extend the provisions of a general law to a corporation which, being in operation at the time the general law was passed, was at that time not within its provisions; but, the buildings and machinery of the Mississippi Mills having been destroyed by fire after the passage of the act of 1872, its subsequent building and operation brought it within the terms of the act of 1872, as well as its intention. McCulloch v. Stone was an action of man-

damus to compel the auditor to make deed to lands held by the state for delinquent taxes. These lands were outlying lands owned by the Memphis & Vicksburg Railroad Company, which had been released to the company by the auditor because of the provisions of the act of 1884 (Laws 1884, p. 29), without requiring the payment of the taxes. Incidentally the twenty-first section, *ubi supra*, was referred to, and the court held that it found nothing in the terms of the act which would include outlying lands in the exemption, and held the deed of the auditor, therefore, void. The constitutionality of section 21 was not necessary to be considered, and was not mentioned or decided by the court. Railway Co. v. Thomas involved only the construction of the terms of the charter as to when the exemption therein claimed would begin. The constitutionality of the exemption was not considered or decided. In Railway Co. v. Taylor, 68 Miss. 361, 8 South. 675, the point involved was the liability to taxation of a short spur track, 1½ miles in extent, and a steam digger, for the year 1887, under said section 21, and involved the construction of said section 21, *supra*. Some confusion exists in references therein made, the exception therein named being referred to as being contained in the charter of the Mississippi Valley & Ship Island Railroad. The charter of the Mississippi Valley & Ship Island Railroad, while owned by the projectors of the Louisville, New Orleans & Texas Railroad, did not enter into the consolidation of the various companies by which said road came into existence, but the said charter contained the identical section 21, *supra*, which is contained in the charter of the Memphis & Vicksburg Railroad Company, one of the constituent companies entering into said consolidation. The court held that the consolidated road was the recipient of said exemption or contract of appropriation by chapter 555, Acts 1882, but this case was not decided until January 26, 1891, and in it the constitutionality of the alleged contract of appropriation was not involved or decided, nor was the constitutionality of said act of exemption necessarily involved. In none of the cases, except the Taylor Case, were the terms of section 21, *supra*, necessarily involved in the rendering of the decision, because in each case it was the question of outlying lands, not included in the terms of the section involved. In the Taylor Case the section was involved, and its terms held to include the case presented, but its constitutionality was never involved or decided. The question of *stare decisis*, and its consequent effects, can only be invoked as to the questions directly involved and expressly decided, or which were necessarily considered and determined by the court, and without which such consideration and determination the decision could not have been rendered. In none of the cases decided by

this court prior to the decision of *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, was the constitutionality of said section 21 drawn in question. It is well said by the supreme court of the United States in the case of *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302: "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for their consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts because that point might have been raised and determined in the first instance." A rule of property cannot exist by reason alone of acts of the legislature, however long in existence or often re-enacted, or acted upon by those interested in the acquisition or disposition of property. Nor can it result from the omission of executive officers to perform their duties, or from their acquiescence in the meaning or supposed validity of acts of the legislature. To give such effect would be to disregard the fundamental principle of our government, and practically eliminate from its structure one of its co-ordinate branches,—the judiciary,—by taking from it the power and duty of determining the law. It is one of the highest and most necessary duties of the supreme court to determine the constitutionality of an act of the legislature, when such question is properly presented to it for determination; and this duty cannot be avoided by it in a proper case because results not contemplated by parties may be occasioned thereby. "The original and supreme will organizes the government, and assigns to the different departments their respective powers,—legislative, judicial, and executive. The power of the legislature is limited and defined, and, that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained." A rule of property cannot result except from judicial decision, and the decisions only extend to questions involved and decided by them. Counsel for appellants refer in this connection to the case of *Farrlor v. Security Co.*, 92 Ala. 176, 9 South. 532, 12 L. R. A. 856, and quotes as follows: "Persons contracting are presumed to know the law, but neither they, nor their legal advisers, are presumed to know the law better than the courts, or to know what the law will be at some future

day. Any principle or rule which deprives a person of property acquired by him, or the benefit of a contract entered into by him, in reliance upon strict compliance with the law as interpreted by the court of last resort at the time of the transaction,—and no fault can be imputed to him in the matter of the contract, unless it be a fault not to foresee and provide against future alterations in the construction of the law,—must be radically wrong. Such principle of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the supreme court of the state. We hold the doctrine to be sound and firmly established by the decisions of the supreme court of the United States, and enunciated by many eminent text-writers, that rights of property and the benefits of investments acquired by contract in reliance upon a statute as construed by the supreme court of the state, and which were valid contracts under the statute as thus interpreted when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions."

We have quoted this expression of the principle at length, that we might express our concurrence in it, and we have carefully re-examined the previous decision of this court, to ascertain if it could be applied in the case at bar. But as before stated, in no decision prior to *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, was the constitutionality or the unconstitutionality of said section 21, supra, "interpreted or promulgated" by this court, nor in any of them was the construction of said section necessarily involved, until the *Taylor Case*, in 1891; and this case only interpreted the meaning of the section, not its constitutional validity. The decision of the *Taylor Case* occurred in 1891, subsequent to the acquisition of the property by the appellants, and could not, therefore, be the basis of any investment by them, nor in any sense become a rule of property for prior transactions. In such case no room exists for presumptions. Manifestly no rule of property existed which could operate as an estoppel against the state in this suit. *Railroad Co. v. Adams*, 77 Miss. 282, 24 South. 200, 317, 28 South. 956; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 14 Sup. Ct. 592, 38 L. Ed. 450.

Are the appellants in an attitude authorizing them to invoke the principle of estoppel? Looking to the facts shown by the record, briefly stated, the following conclusions appear: That portion of the railroad designated as the "Main Line," extending from the Louisiana line (state), on the south, to the state line of Tennessee, on the north, was constructed by the owners of the charters of the *Memphis & Vicksburg Railroad Company* and the *New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company*. The same parties also owned the charter of the *Mississippi*

Valley & Ship Island Railroad Company, but as the last-named company did not enter into the consolidation, and as appellants disclaim any right asserted by them in pleadings founded upon its charter, its consideration is thereby eliminated, and only the first two named charters will be considered. The property was acquired by the Yazoo & Mississippi Valley Railroad Company in October, 1892, by consolidation with the Louisville, New Orleans & Texas Railroad Company. The Louisville, New Orleans & Texas Railroad Company was formed on the 12th day of August, 1884, by the consolidation of the Memphis & Vicksburg Railroad Company and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company with other companies not connected with this investigation, they not being Mississippi companies. The Memphis & Vicksburg charter authorized the construction of a line of railroad from Vicksburg, in Warren county, Miss., northward to the Tennessee state line, and contained in its charter section 21, *ubi supra*, authorizing appropriation of taxes to debts incurred in its construction. The New Orleans, Baton Rouge, Vicksburg & Memphis charter authorized the construction of a line of railroad from the Louisiana state line, on the south, to the Tennessee state line, on the north, towards the cities of New Orleans, La., and Memphis, Tenn., respectively, but did not contain any authority to appropriate taxes to its debts. The formation of the Louisville, New Orleans & Texas Railroad Company occurred by consolidation as aforesaid on 12th of August, 1884; the main line being at that time about completed for the running of through trains from Memphis to New Orleans, the first train running through being in October, 1884. The consolidation resulting in the formation of the Louisville, New Orleans & Texas Railroad Company was under and pursuant to the act of the legislature (Laws 1882, p. 1011), and act amendatory thereof (Laws 1884, p. 936), both of which contained section 21, *ubi supra*. In the early part of the year 1882, R. T. Wilson & Co. became the owners of the charter of the Memphis & Vicksburg Company and in the summer of 1882 the same firm became the owners of the charter of the New Orleans, Baton Rouge, Vicksburg & Memphis Company, and the last company organized in August, 1882. In May, 1882, R. T. Wilson & Co. established an office in Vicksburg, Miss., and began the construction of the road. Shortly afterward Mr. C. F. Huntingdon became interested in the enterprise, and R. T. Wilson & Co. and C. F. Huntingdon organized the Financial Improvement Company. On December 20, 1882, the owners of the charters contracted with the Financial Improvement Company, in the name of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, to construct the line of road from the Louisiana state line, on the south, to the Tennessee state line, on the north, and on same day contracted in the name of the Mem-

phis & Vicksburg Railroad Company with W. M. Johnson, a member of the firm of R. T. Wilson & Co., to construct a line of road from Vicksburg, Miss., north to the Tennessee state line. This contract was assigned on same day to the Mississippi Valley Construction Company, who subsequently assigned the same to the Financial Improvement Company. Practically, the line was constructed through the entire state of Mississippi by the Financial Improvement Company under its original contract for the entire line, and from Vicksburg north under its individual contract for that portion of the road, as well as assignee of the contract of W. M. Johnson for same portion of road. No contract appears in the record for that portion of the line south from Vicksburg to the Louisiana state line, except one made by the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company; and, as this company had no charter provision authorizing the appropriation of taxes, manifestly, as to that part of the line, no basis for claim of the road having been constructed by a road claiming charter exemption could exist. The entire line seems to have been constructed as a single business enterprise, with Vicksburg as a central office. No intent appears to have existed in the minds of the owners of both charters to restrict the building of any portion of the line specially to either charter, but rather to build the whole as a unified line,—a continuous enterprise under the authority of both charters. The deeds to the right of way, accounts for construction for purchase of material, and all expenses connected therewith, are made out and paid in the name of either company indiscriminately, and so inextricably intermingled that it is an impossibility to locate any part of the line as having been constructed solely by either one of the companies; some of the deeds to right of way and some accounts being made in the name of the Louisville, New Orleans & Texas Railroad Company some time prior to that road coming into existence. The reason of this failure to have and keep separate accounts during the time the road was being constructed is shown by the testimony of R. T. Wilson, who was the president of the constituent companies at that time, and who was president of the New Orleans & Texas Railroad Company after its organization, who says: "It was the purpose of the parties to consolidate under the act of March 3, 1882, as soon as found practicable and expedient to do so. From the first, the enterprise was carried on as a single business enterprise,—a unified railroad,—under inducements and solely in reliance upon the provisions of said act. The road was built under the charters of the Memphis & Vicksburg and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroads, in Mississippi." Thus it appears that no portion of the road was built alone by the contract with and from the Memphis & Vicksburg Company, and therefore the provisions

of section 21, *supra*, contained in that charter, cannot be considered as any basis of a claim for exemption thereunder.

The only basis remaining to be considered, upon which the appellants' claim for exemption can rest, is the act of March 3, 1882, and the act of 1884, *supra*, amendatory thereof, authorizing consolidation, and which contained section 21, *ubi supra*, applicable by its terms alone to the consolidated company when organized thereunder. The Louisville, New Orleans & Texas Railroad Company, until and as the result of the consolidation of its constituent companies, did not exist, at which time the constituent companies, as such, ceased to exist, and the new company came into existence. This consolidation occurred when the main line was practically completed, and, as the alleged right of appropriation of taxes was prospective in its proposed effects, clearly it could not act retroactively, by applying to a road previously built. As to the branch lines extended by the Louisville, New Orleans & Texas Railroad Company after its organization, the right of appropriation of taxes claimed must fail for two reasons: (1) For lack of legislative authority under the constitution to make such grant; (2) the evidence does not show clearly the amount expended in their construction, nor that the earnings of the road was not sufficient at the time of their construction to have paid 8 per cent. dividend on the capital stock, as provided in the act relied on, on the occurrence of which ability to pay such dividend the right of appropriation ceased. The party pleading exemption from taxation has imposed upon him the burden of clearly showing his right to the immunity claimed,—not alone to its having existed, but also as to its continuation to the time for which the taxes are claimed to be due,—and if either of such facts may be fairly to remain in doubt, from the evidence, the claim must be denied. *Greenville Ice & Coal Co. v. City of Greenville*, 69 Miss. 91, 10 South. 574; *Desty, Tax'n*, p. 135.

In addition to preceding reasons given why the exemption claimed by reason of charter provisions of the constituent companies cannot avail appellants, an examination of the statutes passed subsequent to their enactment shows that such provisions were repealed prior to the acquisition of those charters by R. T. Wilson & Co., and prior to any expense being incurred thereunder. In 1875 (Laws 1875, p. 66) the legislature passed an act entitled "An act to regulate railroad taxation," section 1 of which provides "that every railroad company, whose line is in whole or in part in this state, shall pay on the 31st day of December, in each and every year, a privilege tax as follows." Section 2 provides for report of length of road by a proper officer, and a penalty for failure to make report. Section 3 provides for damages for failure to pay

the tax, and provides means for collecting such delinquent tax. Section 4 provides "that all acts and parts of acts, under which taxes may be collected from railroad companies, otherwise than as provided in this act, are hereby repealed." In 1878 (Laws 1878, p. 87) the legislature passed an act entitled "An act supplementary and amendatory of" above act of 1875. This act used the same language quoted above in section 1 of the act amended, and increased the amount of the privilege tax per mile, and provided "that this act shall not apply to the West Feliciana Railroad." In 1880 the Code of 1880 was adopted, and by sections 597 to 608, inclusive, therein, each railroad company owning and operating a road in this state is required to pay taxes, with this proviso: "That no railroad company shall be subject to taxation, while the same is in process of construction, but if any part of any road shall be finished, and used for profit, the part so finished shall be taxed, although the whole road may not be finished." In neither the act of 1875, 1878, nor 1880, are charters containing exemption from taxation specially mentioned, but the language used in each, by necessary implication, repeals such exemption provisions previously enacted. Repeals by implication are not favored, and only result where the language used in the repealing statute, considered in its usual and general meaning and acceptance, evinces a purpose of the legislature irreconcilable with the law as enacted by the law repealed. The purpose of the later act is a potent factor in determining the meaning of the language employed, and must be considered in reaching a right result. The entire law must be considered together, and force and effect given to all of its parts, considered as a whole. The statutes declaring each and every railroad in the state liable to taxation, and taxing them, are irreconcilable with the previous statutes exempting them from taxation, continuing in force, and necessarily operate as a repeal of the previous law in conflict with them. Thus prior to the enactment of the statute of 1882 (Laws 1882, p. 1011) authorizing the consolidation of the constituent companies, the immunity from taxation granted them by the provisions of their charters had been repealed; and it follows that the language of section 1 of said act of 1882, providing "that the company so formed by such consolidation should have, enjoy, and possess all the rights, grants and immunities now possessed by such companies," did not have the effect of granting or conveying any immunity from taxation, for that immunity was not then possessed by the constituent companies, having been previously lost by repeal. In 1884 (Laws 1884, pp. 29-31), sections 607, 608, Code 1880, were amended, and the amendment contained a proviso as follows: "That the provisions of this act shall not have the effect to tax any of the

lands of the Memphis and Vicksburg Railroad Company, until the 1st day of February, 1886," and that the Natchez, Jackson & Columbus Railroad Company should pay a privilege tax of \$40 per mile "after the expiration of exemption as provided in its charter and acts amendatory thereof." In neither of the extracts above quoted was there any intent to create or confer exemptions, but they were legislative recognition of exemptions; but they were only legislative recognitions of exemptions supposed to exist, and expressive of the purpose of the act as to them, which purpose could only be of effect in event of such existence, in which event the language and intent concur that they were not to be affected thereby. In March, 1886 (Laws 1886, p. 23) the above-named act of 1884 was amended. Section 6 of the amendatory act provides "that the act entitled 'An act to amend section 607-608 of Code of 1880, in relation to privilege tax on railroads,' approved March 13th, 1884, be so amended, as to fix the amount of privilege tax, to be paid by the several railroad companies, mentioned and referred to in said act, at sums twenty-five per centum greater respectively than the sums mentioned in said act, and hereafter said railroad companies shall pay privilege taxes respectively twenty-five per centum greater per mile, as fixed in said act." The effect and purpose of this amendatory act of 1886 was to increase the privilege tax 25 per cent. greater than provided in the act of which it was amendatory. No other provision of the act of 1884 was affected thereby. In 1888 (Laws 1888, p. 49) an act was passed providing for "the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof." Section 1 provides that "every railroad, which has failed to pay the taxes for which the same was liable, for any year for which it was so liable, such railroad not being exempt by law or its charters from taxation for said years, shall be assessed." The act of 1890 (Laws 1890, p. 13) manifests the same legislative purpose to refrain from interfering with exemption contained in railroad charters, as appears in the act of 1880. In none of them, quoted above, is there any language used indicating a purpose of the legislature to create, revive, or confer exemptions. In 1878 (Laws 1878, p. 233) an act entitled "An act supplemental to the acts of incorporation of certain railroad companies," approved August 8, 1870, was passed, amending the charter of the Natchez, Jackson & Columbus Railroad Company so as to include therein section 21, *ubi supra*, but this act was repealed by Code 1880, §§ 597-608, *supra*. As to the state, the Illinois Central Railroad Company does not occupy the attitude of an innocent purchaser for a valuable consideration, without notice, either in law or equity, because (1) the grant proposing exemption from taxation, contained in the charter

of the Memphis & Vicksburg Railroad Company, had been repealed before any work was begun thereunder, and a similar grant to the Natchez, Jackson & Columbus Railroad had been repealed long before any interest therein had been acquired by the appellants, and the proposal of exemption contained in the act of 1882 and the act of 1884, amendatory thereof, authorizing the consolidation of the companies therein named, was wholly prospective, and, even if it had been a valid grant, could not be claimed by a company coming into existence after the road was built; (2) the grant of exemption being forbidden by the constitution in such cases, and there not having been any decision of the state supreme court holding the grant valid, no rule of property affecting this property in controversy existed, out of which alone an equity could arise. Estoppel against the state could not occur under such circumstances. Rights which the legislature, by reason of constitutional inhibition, could not confer, cannot result from or be founded upon the invalid act. That which cannot be done directly cannot thus be accomplished indirectly. At the time the Yazoo & Mississippi Valley Railroad acquired the property in controversy, and at the time the Illinois Central Railroad Company became interested therein, the constitutionality of said section 21 was an open question, and the rule of caveat emptor applied in full force. In *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 691, 16 Sup. Ct. 719, 40 L. Ed. 849, the court says: "In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted power, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it, and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the commonwealth is not bound to respect investments made under a misapprehension of the law." The property at that time was charged with the liability to the taxes, now claimed, and the fact that at that time the property had not been assessed for taxation in no wise relieved it of the burden and of the duty of paying them.

The judgment of the lower court is affirmed.

GALHOON, J., having been of counsel in the lower court, took no part in this decision.

MILLER v. STATE.

(Supreme Court of Mississippi. Nov. 17, 1902.)
CRIMINAL LAW—AFFIDAVIT BEFORE MAGISTRATE—SUFFICIENCY.

1. Under Const. § 169, providing that all prosecutions shall be carried on in the name of

the state, and all indictments shall conclude "against the peace and dignity of the state," an affidavit before a magistrate, emitting the phrase quoted, is bad.

Appeal from circuit court, Coahoma county; Sam C. Cook, Judge.

M. Miller was convicted of crime, and appeals. Reversed.

D. A. Scott, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

GALHOON, J. The original affidavit is an attempt, in one paragraph, to charge both a sale and a solicitation of orders for sale, but, as matter of law, it charges neither. The district attorney, seeing the defects, got leave and filed an "amended affidavit," which confines the charge to the solicitation, but inadvertently omits to conclude with the words required by the constitution, "against the peace and dignity of the state," which are indispensable. Const. § 169; State v. Morgan, 79 Miss. 659, 81 South. 338; Love v. State (Miss.) 8 South. 465. Because of this omission, the prosecution is a nullity, as these cases hold. The amendment purports to be an "amended affidavit," and must stand or fall by itself. It does not merely amend on leave had to add to or take from or interpolate words in the original. It is quite plainly an independent document,—a substitute for the old one. Another amendment may show an unlawful solicitation, and, in a separate count, an unlawful sale, if that also be relied on, so as to convict on either or both, if the proof warrants. West v. State, 70 Miss. 509, 12 South. 903.

Reversed and remanded.

BROWN v. STATE.

(Supreme Court of Mississippi. Nov. 17. 1902.)
PUBLIC DRUNKENNESS—RESISTING ARREST—AMENDMENT OF CHARGE.

1. Under the provision of Code 1892, § 1438, making amendable in the circuit court a charge defective as tried before the magistrate, the charge before the magistrate, being merely of resisting an officer, may be amended in the circuit court, by specifying defendant's drunkenness in a public place in the presence of two or more persons.

2. Where one is drunk in a private place, and there acts so as to annoy the proprietor, in consequence of which an officer is sent for, who takes him into the street, where he resists arrest, he may be convicted of resisting an officer in arresting him while drunk in a public place in the presence of two or more persons.

Appeal from circuit court, Tishomingo county; E. O. Sykes, Judge.

"To be officially reported."

W. S. Brown was convicted of resisting arrest, and appeals. Affirmed.

Candler & Sawyer, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

TERRAL, J. The appellant was convicted in the circuit court of resisting an officer in arresting him while drunk in a public place in the presence of two or more persons. He was drunk in the Thorn Building, a sample room of Leatherwood, situated upon a street of the town of Iuka, and which was entered by glass doors which permitted a look into the interior of the building from the street. Brown was in this building, and was acting to the annoyance of the owner, who, in consequence of his misconduct, sent for the town marshal, Schruggs, who found the appellant in the sample room, which was closed, and who opened and entered the sample room and arrested Brown, who was armed and drunk therein, and carried him out of the sample room upon the streets of Iuka, where the resistance was made of which he was convicted. In the justice court, Brown was tried upon a charge of resisting Officer Schruggs, but the charge there did not specify his being drunk in a public place in the presence of two or more persons. This part of the charge was first made in the circuit court. It is objected (1) that the amendment of the affidavit was unlawful; (2) that Brown was guilty of no crime, and should have been discharged.

1. The charge against Brown, as tried before the magistrate, was defective; but by the express language of section 1438, Code 1892, it was amendable in the circuit court. Coulter v. State, 75 Miss. 356, 22 South. 872.

2. It is said that Brown should not have been convicted, because, being in the Thorn Building, he was in a private place, and was brought against his will by Officer Schruggs upon the street of Iuka, and that he ought not to suffer by being convicted of being drunk upon the streets in the presence of two or more persons, when he was not there of his own accord, but was carried there by the officer. Ordinarily that would be a good defense, but it cannot avail the appellant under the circumstances of this case. It was in consequence of his civil trespass and wrong while in the Thorn Building that a necessity arose of removing him from that building, and whatever was done of necessity by the owner of the Thorn Building, or by others at his direction, was as if voluntarily done by Brown; and his being publicly drunk in the presence of two or more persons, arising from his own misconduct, was as much a crime in him as if he had gone there of his own accord. It was in consequence of his own wrong that he was necessarily carried upon the streets of Iuka, and he cannot plead the necessary acts of their lawfully carrying him there in justification of his further wrong. "Frustra legis auxilium quaerit qui in legem committit."

Affirmed.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 601.

GULF & S. I. R. CO. v. TOWN OF SEMINARY.

(Supreme Court of Mississippi. Nov. 17, 1902.)

TOWNS—USE OF NAME—RIGHT OF ACTION.

1. A town cannot maintain a suit against a railroad for giving its name to a station near it, any cause of action for the inconvenience and confusion arising therefrom belonging to passengers and shippers.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

"To be officially reported."

Suit by the town of Seminary against the Gulf & Ship Island Railroad Company. A demurrer to the bill was overruled, and defendant appeals. Reversed.

Appellee filed this bill in this case against appellant in the chancery court of Hinds county, in which it alleged that it was a municipal corporation under the laws of the state of Mississippi, under the name "Seminary"; that it had been such for a number of years; that appellant established a depot about a half mile north of said town of Seminary, and named it "Seminary," and that defendant sold tickets to travelers to Seminary, and put off those desiring to stop at Seminary (complainant) at this station, and that goods bought by merchants to be shipped to said town of Seminary were put off by defendant at the station, to the great annoyance and damage of the town of Seminary and the people generally. The bill prayed for an injunction restraining the defendant company from designating and applying the name of "Seminary" to any other town along its line than complainant.

McWillie & Thompson, for appellant.
Watkins & Easterling, for appellee.

TERRAL, J. That the Gulf & Ship Island Railroad Company should have established on its line of road two stations named "Seminary" is shameful; but what legal concern this is to the town of Seminary, we fail to perceive. The injury complained of is that a person desiring to visit the town of Seminary is sold a ticket to Seminary, and is put off at the station of that name which is a half mile north of the Seminary which is in its immediate vicinity, and thereby such person suffers inconvenience and loss in getting to the town of Seminary. A second injury is alleged to be that, when a merchant in the town of Seminary contracts with the

railroad company for the shipment of goods to him, such goods are put off at the Seminary station most distant from him, to his inconvenience and loss. That these are actionable grievances to the merchant and traveler injured thereby, we are strongly inclined to believe; but how does either of these wrongs constitute a legal wrong to the town of Seminary, as a public political corporation of the state of Mississippi? If appellant should call its depot here in the city of Jackson by the name of "Seminary," and thus have three depots of that name on its line of road, such conduct would be highly injurious to all persons affected thereby; but what power conferred upon the town of Seminary gives it the right of action in such case? A right of action lies only in favor of a person who is injured and suffers loss by the act complained of. Facilities of travel and of commerce are greatly useful, and wrongful obstructions of either may be grounds of action, but of action only by those whose legal rights are infringed, and who suffer loss therefrom. The appellee mistakes the fact when it supposes that the name "Seminary" designates itself, and can legally only designate itself, in such sense as that nothing else can legally bear that name. In truth, its name is not "Seminary," but "The Town of Seminary." It gets its name, as well as its powers, from its incorporation as the "Town of Seminary." It acquired no civil right from its previous incorporation as the "Village of Seminary," or from its old incorporation as a school under the name of "Zion Seminary." Whatever rights a municipality of its grade may have under our Code it has, and no others. That the Gulf & Ship Island Railroad should have frequent and convenient stations along the line of its road is a necessity of its business; that these stations should be named, and named by itself, is equally certain; and that the stations should be named to facilitate, rather than confuse, the public dealing with it, seems to us highly important. But the town of Seminary, as a legal person created by law, has only the power conferred upon it by law, and none known to us can authorize it to bring suits for the grievances set out in this bill. The grievances set out are not grievances of the town of Seminary as a political corporation. The rights invaded are not rights of the municipality. The bill is not maintainable.

Reversed and remanded.

SCHWARTZ v. LIEBER.

(Supreme Court of Mississippi. Nov. 17, 1902.)

DEED AS MORTGAGE—PAROL EVIDENCE.

1. By the express provision of Code 1892, § 4233, a conveyance being absolute on its face, and the grantor having parted with possession of the property, it cannot be declared a mortgage on the parol evidence of the grantor alone.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

"To be officially reported."

Suit by Mrs. R. G. Lieber against S. Schwartz. Decree for plaintiff, and defendant appeals. Reversed.

Green & Green, for appellant. Brame & Brame, for appellee.

TERRAL, J. In this case it is sought to have a conveyance of real estate absolute on its face declared to be a mortgage. The case was before us at the October term, 1901, of this court, upon a demurrer to the bill, which alleged such to be its purpose. 79 Miss. 257, 30 South. 649. The bill was ambiguous, in that it did not distinctly allege that Schwartz, the alienee, took possession of the property upon the execution of the conveyance. Upon the demurrer we inclined to the view that answer and proof were necessary to determine that question. The bill also alleged that Schwartz, though he took a deed to the property absolute on its face, had retained and held the evidence of such debt, the precise sum of which was mentioned in the deed, and the demurrer admitted that statement; and that circumstance, if true, we thought needed some explanation. When the answer came in, however, it distinctly alleged that Schwartz took immediate possession of the property on its conveyance to him, and it positively denied any purpose that the conveyance should operate as a mortgage merely. It also clearly appears from the answer and the evidence in the case that Schwartz never held any evidence of debt against Lieber, and the absolute deed, when taken in connection with the evidence in the case, disclosed the fact that the debt was acquitted and discharged by the conveyance itself. Upon the case, therefore, as now presented, the effort is in the face of the statute (section 4233, Code 1892) to have a conveyance absolute on its face, and where the grantor parted with the possession of the property, declared to be a mortgage, upon the parol evidence of the grantor only. The statute is emphatic that parol evidence shall not constitute such proof in such case. If Schwartz, in his evidence, had admitted that the absolute deed was intended as a security only, that itself would have been adequate proof for decreeing it a mortgage, and, independent of all other proof, would have supported the bill. When the case was before us upon demurrer, the allegation in the bill

that the debt of Lieber to Schwartz was held by Schwartz as a subsisting and continuing obligation against Lieber, and which was admitted by the demurrer, inclined us to think that, taking that to be true, it would, when applied to Schwartz's letter to Lieber, support the construction contended for by Lieber,—that they evidenced a mortgage. The facts disclosed at the hearing of the case, however, leave Lieber nothing to stand on in respect to that contention.

Reversed, and case dismissed, at costs of appellee.

WALKER v. STATE.

(Supreme Court of Florida. Sept. 23, 1902.)

BREAKING AND ENTERING—EVIDENCE.

1. The fact that an accused, charged with breaking and entering with intent to steal, stole nothing, does not affect his guilt, if he broke and entered with intent to steal.

2. Section 5, c. 4405, Laws 1895, which provides that on the trial of a charge of breaking and entering, or entering without breaking, a dwelling house, with intent to commit a misdemeanor or with intent to commit a felony, proof of the entering of such dwelling house in the nighttime, stealthily, without consent of the owner or any occupant thereof, shall be prima facie evidence of entering with intent to commit a misdemeanor, in the absence of proof of intent to commit any specific crime, has no application to a case where the entry proven occurred in the daytime.

3. Evidence examined, and found to support the verdict for breaking and entering a dwelling house with intent to steal property of more than the value of \$20.

(Syllabus by the Court.)

Error to criminal court of record, Hillsborough county; William S. Graham, Judge.

George Walker was convicted of breaking and entering a dwelling house, and brings error. Affirmed.

Solon B. Turman and G. E. Mabry, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. The plaintiff in error was charged by information filed in the criminal court of record for Hillsborough county with the offense of breaking and entering the dwelling house of one John J. Holloman, with intent to steal the goods and chattels of Holloman of more than the value of \$20. Trial was had in March, 1902, and a verdict rendered finding defendant guilty as charged. From the sentence imposed, this writ of error is taken, and the only error assigned relates to the ruling denying defendant's motion for a new trial. This motion was based upon the ground that the verdict was contrary to the law and the evidence.

The defendant offered no testimony. From the testimony introduced by the state, it appears that on March 7, 1902, while the occupants of Holloman's dwelling house were absent, between 7 and 11:30 o'clock a. m., the house was broken into, and a window on the west side raised: and scratches were

¶ 1. See Mortgages, vol. 35, Cent. Dig. §§ 108, 110.

found on the window sill, as if made by tacks in a shoe. The bureau and washstand drawers were rummaged, and the bedclothes turned up and disturbed, as if some one was looking for money or something. Holloman's pants were lying on the bed, his coat on a rocking-chair, and his vest on the floor, though they were left hanging up that morning. Nothing was missed or stolen from the house. The furniture and clothing in the house were worth about \$150, and there were between \$7 and \$8 in money in the kitchen, which was not disturbed. The tracks—one a man's, and the other a woman's—were found leading from the front gate to the west side of the house. Defendant, who lived about one-fourth mile southeast of Holloman's, was seen by Minnie Whitten, Holloman's next-door neighbor, to enter Holloman's front gate and pass around the house. This occurred at about 11 o'clock a. m. About 15 minutes afterward, defendant returned, and as he came from around the house he saw Minnie Whitten, and jumped back behind the corner of the house. He then came on down the street by Minnie Whitten's house, passing it about 100 yards, and stopped. Minnie Whitten called her husband's attention to defendant, and Whitten walked out on his front porch. Defendant called to him, and inquired where one John Brown lived; returning in front of Whitten's house. Whitten nodded his head in the direction of John Brown's house, which was located about one-quarter mile northeast, and defendant asked if he meant that house, pointing to the Holloman house. Whitten told him "No," and defendant said he had been to that house (the Holloman house), and found no one at home. Whitten then showed defendant John Brown's house, the top of which was in sight, and he went off in that direction. Whitten testified that defendant must have known where John Brown lived, because he had lived in that neighborhood a number of years. A number of people passed Whitten's house daily, and a number passed on the day in question, but no one else was seen to enter the yard except defendant, though it was possible others may have done so. About half an hour after defendant left Whitten's it was discovered that Holloman's house had been broken into. Holloman's house was situated in Hillsborough county, just north of Ybor City.

Plaintiff in error contends that the evidence is not sufficient to sustain a verdict against him for breaking and entering with intent to steal property of any value, and that the evidence will not support the finding that the intent was to steal property of more than \$20 in value.

I. The evidence establishes beyond question the fact that Holloman's house was broken and entered at the time charged, and while no witness saw the defendant in the house, or attempting to effect an entrance,

we think the jury were justified in finding that he, and no other, was guilty of such breaking and entry. He was seen going into the yard and around the house shortly before the crime was discovered; he remained on the premises around the house about 15 minutes,—long enough to have committed the crime; he endeavored to hide himself behind the corner of the house when on his return he perceived that another person was aware of his presence on the premises; he endeavored to avert any suspicion that might be aroused from his presence on the premises by inquiries as to the residence of Brown; and he evidently designed to impress Whitten with the idea that he entered Holloman's premises believing it to be Brown's residence, or in search of information as to Brown's residence, when, as Whitten states, he must have known that Brown resided some distance northeast of that house. These clumsy attempts to deceive and to conceal himself from observation tend to show a guilty consciousness of wrongdoing, and, without further comment on the evidence, we hold it sufficient to prove that defendant broke and entered the house. *Com. v. Shedd*, 140 Mass. 451, 5 N. E. 254.

II. Many authorities hold that where a dwelling house is broken and entered in the nighttime, and the evidence does not disclose some other motive for such breaking and entry, the jury may infer or draw a presumption of fact that the breaking and entry were with intent to commit larceny. *State v. Worthen*, 111 Iowa, 267, 82 N. W. 910; *Steadman v. State*, 81 Ga. 736, 8 S. E. 420; *People v. Soto*, 53 Cal. 415; *State v. McBryde*, 97 N. C. 393, 1 S. E. 925. As the breaking and entry in the present case occurred in the daytime, we shall not undertake to apply the rule announced in those authorities, nor to say whether it is applicable to a breaking and entry in the daytime, as we think the facts in evidence show a specific intent to steal, without resorting to such presumption, even if applicable to the present case. The evidence shows that the bureau and washstand drawers were rummaged, bedclothes turned up and disturbed, and Holloman's wearing apparel taken from where it was hanging and scattered over the room. The jury could, from the circumstances and the breaking and entry, infer that the party was in search of valuables, and that his object was to steal them. *Com. v. Shedd*, supra; *Burrows v. State*, 84 Ind. 529; *Woodward v. State*, 54 Ga. 100. The fact that defendant stole nothing does not affect his guilt, if his intention was to steal. *State v. Beal*, 37 Ohio St. 108, 41 Am. Rep. 490.

It only remains to consider whether the jury were authorized to find that defendant intended to steal property of a value exceeding \$20, for, if the defendant intended to steal property of less value, he should have been found guilty of a less offense, as in the

one case he would be liable to punishment for breaking and entering with intent to commit a felony, and in the other only for breaking and entering with intent to commit a misdemeanor. We are referred to the statute which provides that, "in the trial on a charge of breaking and entering or entering without breaking a dwelling-house with intent to commit a misdemeanor or with intent to commit a felony, proof of the entering of such dwelling-house in the night time, stealthily, without consent of the owner or any occupant thereof, shall be prima facie evidence of entering with intent to commit a misdemeanor, in the absence of proof of intent to commit any specific crime." Section 5, c. 4405, Laws 1895. This statute has no application to the present case, for the reason that the entry proven was not in the nighttime, but in the daytime. The statute, therefore, does not in this case raise a presumption that defendant intended to steal property of less value than \$20, nor that he intended to commit a misdemeanor. The jury were required to determine from the evidence, without the aid of the presumption created by that statute, the value of the property intended to be stolen. The conduct of the defendant while in the house evidenced a design to steal all the money or other valuables which he evidently thought he could find in the bureau and washstand drawers, under the bedclothes, or in the wearing apparel of Holloman, and authorized the jury to find that he intended to steal property exceeding in value \$20. The fact that he found none, or less than he might have supposed he would find, could not alter the original intent, nor make his act less criminal than it would have been had he found all he supposed he would find. *Harvick v. State*, 49 Ark. 514, 6 S. W. 19; *Clifton v. State*, 26 Fla. 523, 7 South. 863.

The judgment is affirmed.

LOWE v. STATE.

(Supreme Court of Florida. Sept. 24, 1902.)

LARCENY—CONSENT BY OWNER—TRIAL—DEMURRER TO EVIDENCE—HARMLESS ERROR.

1. Where defendant in a criminal case interposes a demurrer to the state's evidence, which is in parol and almost wholly circumstantial, and no part of the testimony is reduced to writing, no specific facts are admitted upon the record, and the state attorney does not join in such demurrer, the court should decline to consider it; but if the court does consider and overrule it, and defendant is afterwards permitted to interpose evidence in his defense, the error in overruling, instead of declining to consider, the demurrer, is without injury, and will constitute no ground for reversing the judgment of conviction entered upon the verdict of the jury.

2. A taking by the voluntary consent of the owner, or his authorized servant or agent, even though with a felonious intent, does not constitute larceny.

3. Where the criminal design to steal origi-

nates with the accused, and the owner of the property stolen does not, in person or by an agent or servant, suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through an agent or servant, exposes the property, or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not, in law, amount to a consent to the taking, even though the agent or servant of such owner by his instructions appears to co-operate in the execution of the crime.

4. Evidence examined, and found insufficient to support the verdict.

(Syllabus by the Court.)

Error to circuit court, De Soto county; Joseph B. Wall, Judge.

Allen Lowe was convicted of larceny, and brings error. Affirmed.

Stevens & Phillips, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. Plaintiff in error was at the fall term, 1899, of the circuit court of De Soto county, indicted for the larceny of a cow, the property of one Durrance. At the fall term, 1901, a trial was had, resulting in a verdict against the defendant. From the sentence imposed he has taken writ of error to the present term of this court, and assigns as error the rulings of the court upon his demurrer to evidence and motion for a new trial, each of which were overruled, and exceptions noted.

1. The demurrer was interposed at the close of the state's testimony, which was in parol, and almost wholly circumstantial. It nowhere appears that the state attorney joined in or argued the demurrer. No part of the testimony was reduced to writing until long after the trial of the case, and then only by being incorporated in the bill of exceptions. The demurrer was general, nothing was reduced to writing, no specific facts were admitted upon the record, and there was no joinder in demurrer. Under these circumstances, the court should have declined to consider the demurrer; but, as the defendant was afterwards permitted to introduce evidence in his defense, no injury resulted to him from the action of the court in overruling the demurrer, which should not have been considered at all. *Holland v. State*, 39 Fla. 178, 22 South. 298.

2. The motion for a new trial was based upon various grounds, questioning the sufficiency of the evidence to support the verdict, the propriety of certain charges given, the refusal to give certain instructions requested, and certain rulings upon the admissibility of testimony. The only grounds of the motion argued in the briefs filed here are those relating to the sufficiency of the evidence to support the verdict, and therefore, in accordance with the practice prevailing in this court, we shall express no opinion upon the

¶ 3. See Larceny, vol. 32, Cent. Dig. § 33.

questions presented by those grounds of the motion which have not been argued.

The court has carefully considered the evidence as exhibited in the bill of exceptions, and, while the writer is of opinion that it is sufficient to sustain the verdict, the other members of the court are of a different opinion, and hold that the circuit court ought to have granted the motion for a new trial because of the insufficiency of the evidence to support the verdict. As a new trial is awarded, it is deemed proper to withhold any comments on the evidence.

Some testimony was given at the trial which the defendant contends proves that Durrance, through certain agents, consented to and arranged for the taking of his property by defendant (if it was taken by him), and therefore no larceny was committed. The authorities are abundant, and the law unquestioned, that a taking by the voluntary consent of the owner, or his authorized servant or agent, even though with a felonious intent, does not constitute larceny. But where the criminal design originates with the accused, and the owner does not, in person or by an agent or servant, suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through a servant or agent, exposes the property, or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not amount to a consent in law, even though the agent or servant of such owner by his instructions appears to co-operate in the execution of the crime. 1 Bish. New Cr. Law, § 262; *Alexander v. State*, 12 Tex. 540; *Dodge v. Brittain*, Meigs, 84. See, also, note to *Connor v. People* (Colo. Sup.) 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295.

This statement of the law is deemed sufficient to guide the court below upon another trial, without the expression of an opinion as to whether the testimony alluded to was sufficient to prove Durrance's consent to the taking of his property.

For the error found, the judgment of conviction is reversed, and a new trial awarded.

(108 La.)

CHARTER OAK STOVE & RANGE CO.
et al. v. RICE et al. (No. 14,455.)*

(Supreme Court of Louisiana. June 23, 1902.)

APPEAL—DISMISSAL—DEFECTIVE TRANSCRIPT.

1. Where the certificate of the clerk shows that the transcript has been made up under specific instructions from the appellant, and, notwithstanding the protest of the appellee, contains only such matter as the appellant has

directed him to include, the appeal will be dismissed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by the Charter Oak Stove & Range Company and others against Henry Rice & Son and others. From a judgment dismissing their opposition to the account of the receiver, the Thomas Evans Company and others appeal. Dismissed.

Philip Gensler, Jr., and Walter Scott Lewis, for appellants. Dinkelspiel & Hart, for appellee receiver.

MONROE, J. The receiver for Henry Rice & Son, appellee herein, moves to dismiss the appeal taken by the Thomas Evans Company and others from a judgment dismissing their oppositions to the receiver's final account. The grounds alleged are: (1) That the appeal was taken by petition at a term of the court subsequent to that at which the judgment was rendered, and that no citations were asked for or issued; and (2) that the transcript was made up under specific instructions from the counsel for the appellants, and is incomplete, in that it fails to include portions of the record and evidence necessary to a proper consideration and decision of the case.

Premitting the first ground, the second is obviously well taken. The certificate attached to the transcript reads: "I, William B. Murphy, deputy clerk, * * * do hereby certify that the foregoing fifty-four pages do contain a true, correct, and complete transcript of all that portion of the proceedings had, documents filed, and evidence adduced upon the trial of the oppositions * * * required to be included therein, as per letter of instructions of Messrs. Merrick & Lewis, attorneys for appellants, to the clerk of the court, filed May 8, 1902, and copied in said transcript, * * * and, further, that a letter from Messrs. Dinkelspiel & Hart, attorneys for George Fuchs, receiver, appellee, * * * protesting against his (clerk's) certifying to any transcript in this case, unless it is the full transcript, was filed May 8, 1902, and is copied in said transcript." The letter from the appellants' counsel to which this certificate refers gives specific instructions as to what should be included in the transcript. This court is therefore confronted with the proposition that it shall undertake to determine a case on appeal upon so much of the pleadings and evidence as the appellants have thought proper to bring up. If, however, this proposition should be adopted as a rule of practice, and the appellants should be left in all cases to select at discretion the material of which the transcripts of appeal are to be composed, the appellees are likely to fare badly. In the instant case the transcript contains no evidence that may have been offered in support of the account,

*Rehearing denied November 17, 1902.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 2776.

nor does it contain the opposition of the state tax collector, which was maintained by the judgment appealed from. And counsel for the appellee say in their brief: "The opposition of the Thomas Evans Company, which was the only one filed before the court ordered a partial distribution, was leveled principally at an item on the account to the credit of A. Baldwin & Co., Limited. To prove up this item, the record was absolutely essential; showing why the credit was allowed to this company, and how it was arrived at. And so, to prove up the claims of the ordinary creditors on the account, the previous action of the court, recognizing their claims, was necessary. As to the notary's fees and appraisers' fees, the inventory and appraisal were necessary. As to the auctioneer's charges, the orders of court, the procès verbal of sales, and the auctioneer's bills were necessary. As to the receiver's fees, and other charges, other proceedings where same had been incidentally passed upon were necessary," etc. There is no satisfactory answer to be made to this, nor do the authorities relied on by counsel for appellants meet or refer to the proposition here involved. They deal exclusively with rulings as to the admissibility and sufficiency of evidence, and do not pretend to hold that an appellee on whose behalf evidence has been admitted can be denied the benefit thereof on appeal, or that it is within the discretion of an appellant to have a case decided in this court upon a transcript made up of material selected exclusively by him.

It is therefore ordered, adjudged, and decreed that this appeal be dismissed at the cost of the appellants.

(108 La.)

Succession of MARKS. (No. 14,521.)*

(Supreme Court of Louisiana, June 23, 1902.)

APPEAL BY EXECUTOR—DISTRIBUTION OF ESTATE.

1. Where a final account of executors shows an amount ready for distribution, and pending oppositions cannot have the effect of reducing the same, and the time has passed for the filing of further oppositions, the executors have no sufficient interest to appeal from an order directing distribution to creditors, and remainder to heirs, of the amount ready for distribution.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Ferdinand Marks. From an order on accounting by the executors on rule obtained by the forced heirs, the executors appeal. Dismissed.

See 32 South. 401.

Dinkelspiel & Hart, for appellants. Boatner, Dodds & Boatner and Howe, Spencer & Cocke, for appellees.

*Rehearing denied November 17, 1902.

¶ 1. See Executors and Administrators, vol. 22, Cent. Dig. § 1294.

NICHOLLS, C. J. On February 3, 1902, August Heidenhelm and Eli Wise, testamentary executors, filed their final account, showing total receipts to be \$34,681.62, and total disbursements \$16,436.76. This showed the sum of \$18,244.80 in funds and assets to be distributed to the heirs. Two oppositions were filed. Whereupon, after the legal delays, the executors, on February 18, 1902, took a judgment homologating the account so far as not opposed. This had the effect of cutting off further oppositions, and left to be adjudicated only the issues raised by the two oppositions pending. One of these oppositions is by the city of New Orleans, claiming taxes to the amount of \$220, with 10 per cent. per annum interest on \$110 from July 26, 1899, and same rate of interest on \$110 from July 15, 1900. The other opposition is by A. F. and J. B. Marks, forced heirs of the deceased, and its purpose is to add to the distributive amount shown by the account, not to diminish the same. On April 2, 1902, these forced heirs took a rule on the executors to show cause why, pending the litigation arising on the oppositions aforesaid, they should not distribute the funds and assets which their final account showed to be on hand for that purpose. This rule was made absolute, and the executors were ordered, after reserving \$1,000 to satisfy any costs which may be hereinafter incurred, to distribute among the creditors the sums due them, and the remainder among the heirs. From this judgment the executors took an order of appeal, and this appeal the appellees move to dismiss.

The motion must prevail. Where a final account of executors shows an amount ready for distribution, and pending oppositions cannot have the effect of reducing the same, and the time has passed for the filing of further oppositions, the executors have no sufficient interest to appeal from the order directing distribution. Appeal dismissed.

(108 La.)

SOUTHWESTERN TEL. CO. v. KANSAS CITY, S. & G. RY. CO. (No. 14,059.)*

(Supreme Court of Louisiana, May 26, 1902.)

EXPROPRIATION—FOREIGN CORPORATION—POWERS—TELEGRAPH COMPANY.

1. In an action brought by a foreign corporation to expropriate property in this state, under Act No. 124 of 1890, a denial, in general and specific terms, of the right to the relief prayed for, is sufficient to put at issue the capacity of the plaintiff to enter this state for the purpose of carrying on its business; and when it appears from its charter, offered by the plaintiff, that no such right exists, the action will be dismissed.

2. Where a corporation is established under the law of another state for the purpose of constructing and maintaining telegraph and telephone lines in certain named counties in that state, such corporation is without authority to extend its operations beyond the limits of the counties designated, and does not come

*Rehearing denied November 17, 1902.

within the meaning of Act No. 124 of 1890, which is intended to apply to foreign corporations that are authorized, so far as they can be, by the states creating them, to carry on their business elsewhere.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by the Southwestern Telephone Company against the Kansas City, Shreveport & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Alexander & Wilkinson and Lathrop, Morrow, Fox & Moore, for appellant. Holbert & Barret, for appellee.

MONROE, J. Plaintiff alleges that it is a corporation organized under the laws of the state of Texas; that it has complied with the law of Louisiana relative to foreign corporations transacting business in this state, and is preparing to build a telegraph and telephone line from Beaumont, Tex., by way of Shreveport, La., to the state of Arkansas, with a branch line to Lake Charles, La.; that the most direct route for said main and branch lines is along the defendant's railroad, from the Sabine river to Arkansas, and from Quincy, La., to Lake Charles; and that, not being able to agree with the defendant as to the value of the same, it is necessary to expropriate a right of way for its poles, wires, etc. And there is a prayer for a jury, and for judgment accordingly. The defendant files a general denial and a special denial of the right of the plaintiff to expropriate as prayed, and alleges that the proposed construction would interfere with it in the operation of its railway, and that, if the expropriation is decreed, the plaintiff should be required to pay \$30 a mile as the value of the property, and \$10 a mile as damages, and should be required to establish its poles, wires, etc., in the manner and upon the side of the track least injurious to the owner of the same. The case was tried upon the issues thus presented, and there was a verdict for plaintiff "for right of way for 248 miles," for which the defendant was allowed \$5 a mile, without further specification. Upon this verdict there was judgment entered, designating the points between which the right of way was granted, and entering into other necessary particulars. And from this judgment the defendant has appealed.

In a supplemental brief filed in this court, it is suggested by defendant's counsel that the plaintiff's charter gives it the right to operate only in certain named counties in the state of Texas, and hence that it is without power to carry on business or to expropriate property elsewhere. To this, counsel for plaintiff reply that the suggestion is in the nature of an objection to the capacity of the plaintiff to bring this suit, and that it comes too late. The question presented,

however, goes beyond that, and rests upon the proposition that by the evidence offered in support of its demand the plaintiff has shown that it is not entitled to the relief sought, since it thereby appears that it is without legal capacity to come or to operate its lines, and a fortiori is not entitled to expropriate property, within the state of Louisiana; and the issues involved in this proposition are raised by the original pleadings. Thus, conceding that the plaintiff's corporate existence and its compliance with the law of this state relative to foreign corporations should, in the absence of specific challenge, be presumed, it would still be necessary, in the face of even a general denial, or if the case were before the court for confirmation of a default, to establish by proof that it is within the category of corporations which, under the law creating them, and under the law of this state, are authorized to operate and to exercise the power of eminent domain here, since there are many corporations established under the law of Texas and of other states and countries which are lawfully created, and might comply with our law relative to foreign corporations, but which do not fall within that category. The mere failure of the plaintiff to make such proof would therefore be a failure to make out its case; and affirmative proof of a contrary character would, of course, be equally fatal.

Considering the question presented, then, upon its merits, it is axiomatic in the jurisprudence of this country that the comity, agreeably to which a corporation created by one state or nation is permitted to conduct its business within the territory of another, does not extend so far as to permit the exercise by the foreign corporation of powers that are in contravention of the public policy of the state in which such business is conducted, or that are in derogation of common right. And as the power of eminent domain is of the latter class, it follows that it cannot be exercised by a foreign corporation as a matter of comity, but only by virtue of an express grant of authority from the state in which it is exercised. Recognizing this fact, the general assembly in 1890 passed an act (No. 124 of that session) which confers upon corporations "chartered or formed under the laws of this, or any other, state, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph, or telephone," etc., the right to establish lines in this state, and for that purpose to expropriate property. It can readily be understood, however, that this statute can have no application to a case where, by the law creating it, a corporation established by another state, or by the United States, is prohibited, whether in express terms or by implication, from operating in Louisiana. It is for the government creating a corporation to determine primarily, and within the limits of its own authority, what

powers shall be exercised by such corporation, and where it shall exercise them. The authority of a state does not extend beyond its own boundaries, and hence no corporation created by such state can, by virtue of its authority, exist or transact business beyond those limits. If a state, in creating a corporation, imposes no territorial restriction upon its operations, the question whether it can lawfully operate in other states depends upon the comity existing between such states and the state of its creation, or, in the cases previously mentioned, upon specific legislation in the other states. If, upon the other hand, a state, in creating a corporation, imposes territorial restrictions upon it, those restrictions are not affected by the laws of other states, enacted for the benefit of foreign corporations not so restricted. It was, no doubt, competent for the state of Texas to have established a corporation with general authority to construct and maintain telegraph and telephone lines, without limitation or specification as to territory. And such a corporation could have claimed the privilege of operating in Louisiana, because its creator had authorized it to operate wherever it might be allowed, and because, being so authorized by its creator, it has the permission of the state of Louisiana. But it was equally competent for the state of Texas to have established a corporation for the purpose of operating in one of its own counties, wards, or municipalities, and to have conferred upon it authority to operate only within the territory designated; and the corporation so created could have operated nowhere else, for the reasons that, existing only within the limits of the law creating it, it could have had no capacity to violate that law, and that neither the comity nor the laws of other states upon the subject of foreign corporations could have been invoked in its behalf, since it would be inadmissible to suppose that the other states would undertake, either by comity or statute, to regulate a Texas corporation in a manner at variance with the law of its creation. The plaintiff's charter, offered in evidence on its behalf, provides, to quote the language, that "the purpose for which this company is formed is for the erection, maintenance, and operation of telegraph and telephone lines in Jefferson, Hardin, Orange, Newton, Jasper, San Augustin, Sabine, Liberty, and Shelby counties, and for the purchase and sale of such goods, wares and merchandise as may be used for said business." According to its own showing, therefore, plaintiff must confine its operations within the 9 named (out of, probably, 250) counties in the state of Texas; and, according to the same rule of construction by which this conclusion is reached, it can operate nowhere else, since the enumeration of the counties, to operate within which it is created, excludes all other places, as well as the remaining counties in Texas. And to hold that the Louisiana statute of 1880 has the

effect of conferring upon the plaintiff authority to erect, maintain, and operate telegraph and telephone lines in Louisiana would be to hold that the state of Louisiana has undertaken to remove a competent restriction placed by the state of Texas upon a corporation created solely by its authority. The main proposition (i. e., that it is a condition precedent to the right of a corporation created by one state to operate in another that it shall be so authorized, or at least that it shall not be prohibited, by the law of its creation) is elementary in this branch of jurisprudence, and lies at the foundation of the decision in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274, in which Chief Justice Marshall said: "The charter of the Bank of Augusta authorizes it, in general terms, to deal with bills of exchange, and consequently gives it the power to purchase foreign bills, as well as inland bills,—in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. * * * The purchase of the bill in question was therefore the exercise of one of the powers which the bank possessed under its charter, and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its jurisdiction. * * * The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts," etc. Forty years later the same august tribunal, speaking through another chief justice, said: "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence." *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Upon the subject of the right of a corporation created for the purpose of carrying on business within particular limits to extend its operations, even by indirect methods, beyond the limits designated in its charter, this court has said: "If a corporation, like the New Orleans Gaslight Company, formed to manufacture and sell gas within certain limits of the city of New Orleans, is permitted to acquire a controlling interest in the stock of another gas company, authorized to make and sell gas in another part of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it, in effect, is equivalent to engaging in a business other than that authorized by its charter, and this is in direct violation of the fundamental law." *State v. Newman*, 51 La. Ann. 838, 25 South. 408, 72 Am. St. Rep. 476. It need only be remarked, in addition, that the provisions of our fundamental law which are thus referred to make no exception in favor of foreign corporations, but declare that "no corporation shall engage in any business other than that expressly authorized in its charter or incidental thereto." Const. art. 205. The fact that the plaintiff corporation was established

for the purpose of carrying on business within certain specified counties in the state of Texas is irreconcilable with any theory of authorization, express or implied, to conduct such business in Louisiana; and the act of 1880 which is relied on as conferring that authority, for the reasons stated, has no application.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that the demand of the plaintiff be rejected, at its cost in both courts.

(108 La.)

JOHNSON v. HOSMER et al. (No. 14,398.)

(Supreme Court of Louisiana. June 30, 1902.)

APPEAL—DISMISSAL—JURISDICTIONAL AMOUNT.

1. An appeal will be dismissed where, by eliminating a duplicated item of damages, the demand is reduced to an amount below the lower limit of the jurisdiction of this court, or where the claim for damages is manifestly inflated for the purpose of bringing the demand within the jurisdiction of this court.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Tammany; James M. Thompson, Judge.

Action by Emilie Johnson against Laura Hosmer and others. Judgment for defendants, and plaintiff appeals. Dismissed.

Harvey E. Ellis (Benjamin Rice Forman, of counsel), for appellant. Benjamin Moore Miller and Scott Lea Williams, for appellees.

PROVOSTY, J. Plaintiff sues to recover damages alleged to have been suffered by her in consequence of a certain injunction and sequestration suit brought against her by the defendants. She alleges the damages suffered to have been the following:

For attorney's fees for dissolving said writ, and in said cause.....	\$ 100
For damages due for the libelous, slanderous, and injurious allegations and statements set out in the aforesaid petition of Miss Laura Hosmer and Frank W. Hosmer in the said cause..	1,000
Damages for the illegal, unjustifiable, unwarranted issuance of the said writs of sequestration and injunction against petitioner	500
Damages for mental worry, annoyance, trouble, loss of sleep, and physical depression caused by aforesaid suits, and writs therein issued.....	500
Total	\$2,100

The plaintiff does not claim any part of these damages for injury to her property. She expressly alleges that she has had neither the ownership nor the possession of the property with reference to which the writs of injunction and sequestration were sued out. She points to her dissociation with the property as proof of the want of probable cause for bringing against her the suit complained

of. The issuance of the writs, therefore, is not alleged to have injured her property, but only herself. Now, she claims, in the third item of damages, \$500 for the damages caused to her by the wrongful issuance of the writs, and, in the first and fourth items, \$100 and \$500 for attorney's fees for dissolving the writs, and for mental worry, annoyance, trouble, loss of sleep, and physical depression caused by aforesaid suits, and writs therein issued. It is not possible to view these items, 1 and 4, in any other light than as specifications of the damages going to make up the \$500 claimed in item 3. Evidently she claims the same thing twice, and, as a consequence, this court has not jurisdiction of the appeal. The elimination of either item will reduce the amount claimed below the lower limit of the jurisdiction of this court. In the case of *Buddig v. Baldwin*, 38 La. Ann. 394, this court said: "The real amount in dispute, exclusive of interest, whenever the same can be legally ascertained from the pleadings and documents annexed, and not the allegations of parties, is to be the test of our jurisdiction, and shall be our rule in determining all such questions." Furthermore, in looking into the evidence, we find that the amount of the damages for the issuance of the writs has been exaggerated, presumably for the purpose of bringing the case within the jurisdiction of this court. In such case it has been the invariable rule of this court to dismiss the appeal. *Pinckney v. Wolf*, 41 La. Ann. 306, 6 South. 27; *City of New Orleans v. Scalzo*, 41 La. Ann. 1141, 8 South. 538; *Block v. Kearney*, 48 La. Ann. 381, 8 South. 916; *Curter v. Addison*, 44 La. Ann. 425, 10 South. 772; *Lea v. Orleans*, 46 La. Ann. 1444, 16 South. 456; *Wolf v. Stewart*, 48 La. Ann. 1431, 20 South. 908; *Lever v. Sharpe*, 52 La. Ann. 599, 20 South. 64; *Norwood v. Windy*, 104 La. 645, 29 South. 311.

It is therefore ordered, adjudged, and decreed that this appeal be dismissed at the cost of the appellant in both courts.

(108 La.)

SUGAR et al. v. CITY OF MONROE et al. (No. 14,320).*

(Supreme Court of Louisiana. June 16, 1902.)

APPEAL—JURISDICTION—SCHOOLHOUSE—ERECT—BONDS—CHANGE OF PURPOSE.

1. Citizens who have voted to tax themselves for a specific work of public improvement, the value of which is fixed at \$20,000, have a standing in court to complain that the property acquired is not being used for the purpose contemplated, and this court in such a case has jurisdiction of the appeal.

2. Where a vote has been taken upon a proposition to impose a tax to build a schoolhouse, and has been favorably acted on, and a building has been constructed with the proceeds of bonds predicated upon such tax, it would be a breach of faith to allow such building to be converted into a theater, or to be used for the purpose of giving theatrical performances, as a business,

*Rehearing denied November 17, 1902.

whether in combination with its use for school purposes or otherwise. It is, however, within the discretion of the municipal authorities having control of the property to make such casual and incidental use of it as may not be inconsistent with or prejudicial to the main purpose for which it was acquired and changed conditions in the future may justify its use for some other purpose.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; Luther Egbert Hall, Judge.

Action by Isadore Sugar and others against the city of Monroe and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Hudson, Potts & Bernstein (E. Tyler Lamkin, of counsel), for appellants. Harry H. Russell, City Atty., and Stubbs & Russell, for appellee city of Monroe. William Francis Millsaps, for appellees Stewart & Co.

MONROE, J. The plaintiffs, as citizens and taxpayers, and as owners and licensees of an opera house, in the city of Monroe, bring this suit to restrain the corporate authorities and Tom Stewart & Co. from using as a theater a school building belonging to the corporation. The facts disclosed by the evidence are that in October, 1898, the mayor and council submitted to the qualified taxpayers of Monroe a proposition to raise, by means of an issue of bonds predicated upon a 5-mill tax, the sum of \$155,000 for the construction of certain specified public improvements, including a school building, to which \$20,000 of said amount was to be appropriated; and the proposition was favorably acted upon at an election called for its consideration. To the \$20,000 thus raised, the city added nearly \$50,000, drawn from other public revenues, and the aggregate amount was expended in the construction and equipment of a fine building, intended and now used for the purposes of a high school, and which, among other advantages, is provided with an auditorium capable of accommodating over 1,000 persons. Whether those under whose directions this building was designed originally contemplated making use of the auditorium as a public theater does not appear, but it is quite certain that no intimation of such a purpose was conveyed to the taxpayers to whom the proposition mentioned was submitted. Since the completion of the building, the city authorities have undertaken, under cover of a pretended lease to the janitor, to use the auditorium as a theater, in which the giving of theatrical, operatic, minstrel, and other performances is carried on as a business; and it is this action of which plaintiffs complain, both as taxpayers and as proprietors of a theater which they pay state and city licenses for the privilege of conducting. The so-called lease is a flimsy contrivance, which deserves but little notice. The firm of Tom Stewart & Co. had no existence when it was signed,

and, as we think, has no existence now. Tom Stewart had been employed by the plaintiffs as propertyman at their theater, and was paid by them \$2.50 for his services during each performance. He was subsequently employed by the city or the school board as janitor of the new high-school building, and his wages were fixed at \$45 per month, and either at that time or later, under the name of Tom Stewart & Co., was assigned the role of lessee of the auditorium. The entire management of the auditorium for theatrical purposes has, however, been in the hands of a gentleman who is a member and chairman of the finance committee of the city council, mayor pro tem. of the city, and member and chairman of the entertainment committee of the school board, and who also figures on the letter heads of Tom Stewart & Co. as "manager." It is he who makes all the contracts with the minstrel, vaudeville, and other troupes that are engaged to give entertainments; and it is by his direction that the expense of operating the auditorium as a theater is paid, by the checks of the city treasurer, drawn against an account kept in the name of that officer with the fiscal agent of the city. Tom Stewart conducts none of the correspondence with the theatrical agent through whom the troupes are engaged, makes no contracts for exhibitions, keeps no accounts, knows nothing of the business except what he is told, and, in addition to his wages as janitor, receives \$3 for each performance, for his services as propertyman. The state license for the theater so conducted is paid as the other expenses are paid, and no city license is exacted. It is said that these payments have been made in the way of advances to Tom Stewart & Co., and that they have not been made from the funds of the city, but from the proceeds of the entertainments given at the auditorium, which are intended, after paying expenses, to be used for the establishment of a library. Tom Stewart is, however, shown to be without means or financial standing, so that making advances to him is merely putting money into the business; and as the money advanced is derived from the use of a building owned by the city, and is paid out on the checks of the city treasurer, the distinction suggested between the city funds and the library fund is of no practical significance. It is also said that the auditorium is used as a theater only when not in use for school purposes, that the one use is not inconsistent with the other, and that it is competent for and within the discretion of the city authorities thus to administer the city property intrusted to their charge. It appears that the building in question is a large three-story brick edifice, and that the auditorium occupies one side, extending through from the first to the third floor, and separated from the classrooms and other apartments used for school purposes, on the first and second floors, by the main corridor; the entire third

floor being used for the purposes last mentioned. After the institution of this suit, an arrangement was made by which those connected with the theater are enabled to obtain access to the stage by means of an entrance upon that side of the building, and a screen has been erected in the corridor, so that patrons or others who are expected to enter the theater through the main entrance are masked from those occupying rooms on the other side. It also appears that there is a heavy brick wall separating the auditorium from the corridor, and that, when the doors leading through are closed, sounds in the one place are not much heard in the other. The fact most relied on, however, is that the building is used as a theater only at night, or upon Saturdays or other holidays, when not in use for school purposes; and some testimony was taken, to which we will refer hereafter, with a view to determining whether such use is inconsistent with or prejudicial to that for which the building was constructed. There is also testimony tending to show that the cost of insurance is increased by reason of the use of the building for theatrical purposes.

On the Motion to Dismiss.

A motion is made to dismiss the appeal on the ground that the plaintiffs have disclosed no such pecuniary interest as to vest this court with jurisdiction. Upon the facts disclosed, we are confronted with the propositions: (1) That the city of Monroe is engaged in the business of conducting a theater. (2) That in doing so it pays no license to itself, whilst it exacts a license from the plaintiff and from all other persons engaged in the same business. (3) That it is using as a theater a public building worth nearly \$70,000, especially dedicated by those at whose expense, in part it was erected, to school purposes.

Conceding, arguendo, that upon the first two propositions, considered apart from the other, the plaintiffs have not established a pecuniary interest sufficient under our law to give this court jurisdiction, nevertheless, upon the third, which involves the question whether the municipal authorities are diverting or making an illegal use of the building in question, any taxpayer has the right to come into court, and, quoad the amount, the jurisdiction is determined by the value of the property or of the interest therein represented by the money specially voted for a school building; the case not being materially different from what it would have been if the mayor and council had originally proposed to devote the \$20,000 raised for that purpose to the construction of a theater, and had been enjoined from so doing. *Handy v. City of New Orleans*, 39 La. Ann. 107, 1 South. 593; *Conery v. Waterworks Co.*, Id. 770, 2 South. 555; *State v. City of New Orleans*, 50 La. Ann. 880, 24 South. 666; *City Item Co-operative Printing Co. v. City of New Orleans*, 51 La. Ann. 713,

25 South. 313; *Dfm. Mun. Corp.* §§ 914-937. The motion to dismiss the appeal is therefore denied.

On the Merits.

The charter of the city of Monroe was not offered in evidence, but it is not pretended that it confers or could confer authority upon that municipality to engage in the business of conducting a theater; and apart from the fact that, as a municipal corporation, it has no legal capacity to engage in such business, it is manifestly unjust for it to do so in competition with a taxpayer from whom it exacts a license which it does not itself pay. But passing from these questions, we find that this business, objectionable for the reasons stated, is carried on in a building constructed, in part, with money especially dedicated to the erection of a schoolhouse. It may very well be questioned whether the citizens who voted to tax themselves for the latter purpose would have consented to do so for the purpose of establishing a combination schoolhouse and theater. There are many excellent people who disapprove of theaters entirely, and there are others who disapprove of a combination which brings little boys and girls attending school in such daily juxtaposition with flaring posters and theatrical movement, as must result from having the school and the theater in the same building. And it would be a breach of faith to permit the money voted by either of these classes of citizens for the one purpose to be used for the other.

The proposition upon which the learned counsel for the defendants rely may be fairly stated in the following excerpt from the brief filed by them, which includes an expression from the supreme court of Massachusetts in what is assumed to be an analogous case, to wit: "In the case of *Worden v. New Bedford*, 41 Am. Rep. 185, it was contended that a city or town has no power to let public buildings for private uses. The supreme court of Massachusetts said: 'The ground is untenable. The city could not erect buildings for business or speculative purposes, but, having a city hall, built in good faith, and used for municipal purposes, it has the right to allow it to be used, incidentally, for other purposes, either gratuitously, or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns.' " We find no reason to dissent from the views thus expressed, and have little doubt that they were appropriate to the case decided. It does not appear, however, that the building there in question had been erected wholly or in part with the proceeds of a tax levied under a provision of the constitution of the state which specifically controlled its destination. Nor does it appear that the "incidental" use of the property which was sanctioned was inconsistent with or prejudicial to the purpose to subserve which the building had been constructed. Whereas, in the case before us,

\$20,000 of the money used was specifically voted for a school building, and it can hardly be said that the use which the defendants propose to make of the building, as constructed, is "incidental," since the idea is to keep it filled with theatrical attractions as long as the season lasts, merely regulating the performance so as not actually to prevent the school exercises from being conducted; there being also strong evidence in the record to the effect that this method of administering the building is highly detrimental to the purpose for which it was erected. Upon this latter point, we quote the language of the distinguished president of the State Normal School at Natchitoches, examined as a witness in this case, to wit: "I have had twenty-five years' experience in teaching. * * * The State Normal School of Louisiana has an assembly hall or auditorium in the same building as the classrooms. To lease this assembly hall to any private person or corporation for the purpose of a public theater or opera house would have a disastrous effect upon the conduct, discipline, and influence of the institution. The reasons for above statement * * * are as follows: (a) The room is needed at all times for school purposes; is used for morning exercises, general announcements, school lectures, calisthenic drill, and chorus practice; and is a study hall for all students who are not in recitation. Outside of school hours it is used for piano and school practice, class meetings, Y. M. C. A. meetings, club meetings, gymnastic drill, receptions and social gatherings of students and teachers, and union meetings of the literary societies. To lease this room to outside parties would deprive the school of all these uses for it. (b) The presence in the building of persons who are not familiar with the requirements of the school, and not subject to its control, would interfere with discipline and interrupt class work. (c) Some of the persons connected with traveling theater companies are objectionable in character and conduct. (d) Some of the persons who would attend a public theater here are of disorderly habits, defacing furniture, marring the walls, soiling the floors, and meddling with or injuring apparatus or other movable property. (e) A school building stands for the sole purpose of training young people intellectually, morally, and socially. It should be the student's temple of correct taste, right conduct, and pure ethics. Whatever is morbid or unwholesome should be kept out of the schoolhouse. To use part of the school building for a public theater is objectionable for the same reason that it would be objectionable to use part of it for a hospital or a saloon or a jail; that is to say, such a use degrades the building by associating school work with the morbid aspects of life. * * * I have seen the Monroe High-School Building. I have never been inside the building since it was completed and occupied. I do not know all the conditions that exist in the building, and I cannot, therefore, give a positive

statement of the effect in this instance. But I do not hesitate to say that the leasing of any part of any school building for use as a theater would have a harmful effect on the school conducted in the building. * * * I am a great admirer of the theater, and attend every theater that I have a chance to attend when either a play of merit or an actor of ability is presented." The opinions of the principal of the Ouachita High School, and of a prominent citizen of Monroe, who was for some years a teacher, are to the same effect. Upon the other hand, the principal of the Monroe High School gives a qualified approval of the use of the building for theatrical purposes. Thus, being asked whether he was willing to swear that it had no harmful effect upon the city school, he answered: "I can safely say that it has not, up to date, had any harmful effect. I haven't noticed any. I can't say what will take place in the future, but I haven't noticed any." And the mayor and mayor pro tem. seem to be of the same opinion. Considering the case in the light of this testimony, the least that we can say is that, whereas we know that the qualified voters of the city of Monroe voted to tax themselves for the purpose of erecting a schoolhouse, we have no assurance that they would have so voted if they had been informed that the building to be erected would be used as a theater as well, and that we should not consider that they were fairly treated if the property for which they are still paying, year by year, should be permitted to be used for a purpose not intended by them, and of which, in all probability, some, if not a majority, of them would disapprove. In expressing this conclusion, we do not wish to be understood as going to the extreme of holding that the city authorities may not make such casual and incidental use of the building in question, not inconsistent with or prejudicial to the main purpose for which it was erected, as they may deem advisable, nor as holding that changed conditions in the future may not justify them in devoting it to some other purpose. The question here presented is whether they have the legal right at this time to make use of it, or any part of it, for the purpose of maintaining a theater therein, or of giving theatrical performances, as a business; and this question we decide in the negative.

It is therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiffs and against the defendants the city of Monroe and Tom Stewart & Co., decreeing fictitious and simulated the pretended contract of lease between said parties, and perpetually enjoining and restraining them, or either of them, from further operating or pretending to operate thereunder. It is further ordered and adjudged that said defendants pay the costs in both courts.

BLANCHARD, J., takes no part.

(108 La.)

STATE v. AMERICAN SUGAR REFINING CO. (No. 14,353.)*

(Supreme Court of Louisiana. June 16, 1902.)
JUDGMENT—RES JUDICATA—LICENSE—SUGAR REFINERS—EXEMPTIONS—QUESTION OF LAW.

1. In order that there should be *res judicata*, the thing demanded and the cause of action must be the same, and they are not the same in two suits for the licenses of different years.

2. In a suit under a statute imposing a license on refiners of sugar, *eo nomine*, the defense being that a refiner of sugar is a manufacturer, and as such exempt from license taxation, and that as a consequence the statute imposing the license is inconsistent with the constitution, and there being no question as to what constitutes a refiner of sugar, the process of refining sugar being the same in all refineries, the sole matter involved is the ascertainment of the meaning of the word "manufacturer," as used by the constitution; that is to say, a matter of interpretation of the constitution,—a question purely of law.

3. A sugar refiner is a manufacturer, and as such exempt from license taxation under the constitution.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by the state of Louisiana against the American Sugar Refining Company. Judgment for plaintiff, and defendant appeals. Reversed.

Carroll & Carroll and Foster, Milling, Godchaux & Sanders, for appellant. Hugh C. Cage, for the State.

PROVOSTY, J. This is a suit by the state of Louisiana, through its tax collector, to recover of the defendant, the American Sugar Refining Company, a license tax of \$6,250 for each of the years 1900 and 1901, under section 2, Act No. 171 of 1898. The allegation is that defendant is engaged in the business of refining sugar in the city of New Orleans, and that its gross receipts from said business for each of the said years exceeded \$2,500,000, and that defendant owes the said license. For answer, the defendant pleaded that its business of refining sugar was a manufacturing business, and that defendant, being a manufacturer, was exempt from license taxation by the terms of article 229 of the constitution of the state. To this the plaintiff filed a formal plea of *res adjudicata*, based on a former suit wherein the licenses for 1898 and previous years had been claimed, and the same defense of exemption from taxation had been urged. That suit was based on section 9 of Act No. 150 of 1890, and the present suit is based on section 2 of Act No. 171 of 1898; but these two laws are virtually the same, the latter being substantially a re-enactment of the former. The process used by defendant in its business of refining sugar, as shown on the trial of the former suit, has not changed. Two questions, therefore, are presented for decision: First, the preliminary question of *res judica-*

ta; and, in case that question is decided adversely to plaintiff, then, second, whether defendant is a manufacturer.

The law of *res judicata* is stated with great simplicity and precision by article 2286, Civ. Code, as follows: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same qualities." This formula was borrowed by our Code from the Code Napoleon (article 1351); by the Code Napoleon from Pothier, Obligations, No. 889; and by Pothier from the Roman jurists. It brings out with great distinctness the salient feature of the law of *res judicata*, namely, the identity that must exist as to thing demanded, cause of action, and persons in the two suits. "*Quæ nisi omnia concurrant alia res est*," say the Roman jurists. Cod. L. 12, L. 13, L. 14, ff. "De Except. Rei Jud." "*Ce n'est que du concours simultané de tous les éléments que peut résulter l'autorité de la chose jugée*." En l'absence de l'un d'entre eux, on ne saurait, sans violer la loi, écarter une instance nouvelle par l'exception de la chose jugée," says Dalloz, No. 103, Repertoire de Legislation, vo. "Chose Jugée," voicing the unanimous sentiment of the courts and writers of France. And to the same effect are our own decisions. "The exception of the thing adjudged is *stricti juris*, and, if there should be any doubt as to the identity of the things claimed, or of the persons claiming them, it cannot be maintained." *West v. His Creditors*, 3 La. Ann. 529. "The plea of *res adjudicata* is without force, unless the object demanded in the former suit was precisely the same as that demanded in the action pending." *Edwards v. Ballard*, 14 La. Ann. 362. "The only test as to the effect of a decree is its finality as to the matters embraced in it, and its having the requisites of article 2285 (2286) of the Civil Code." *Kellam v. Rippey*, 3 La. Ann. 203. "The authority of *res adjudicata* takes place only with respect to what was the object of the judgment." *Succession of Durnford*, 1 La. Ann. 92. See, also, *First Presbyterian Church v. City of New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224; *Slocumb v. De Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740; *State v. Jumel*, 30 La. Ann. 861; *Carre v. City of New Orleans*, 41 La. Ann. 996, 6 South. 893; *Plicque v. Perret*, 19 La. 327; and enumerable other cases. Our court has never wavered, that we know of, in the rigid exaction of the three unities.

The learned counsel who has fought the battle of the state in this matter with such commendable zeal and such signal ability does not himself doubt the necessity of the three unities, but insists that they are met with in the case. Says he: "The rule seems uni-

*Rehearing denied November 17, 1902.

versal that where any question is litigated between the parties, affirmed on one side, denied on the other, and finally determined by the judgment of a court of competent jurisdiction, that particular question or matter is forever at rest between the respective parties and their privies. Suppose that a mortgage note for \$10,000 were given, with interest at six per cent, payable annually, for ten years, and that a suit was brought for the first year's installment of interest, and payment was resisted on the ground that the note was obtained by fraud and there was no consideration therefor, and that this defense was overruled by the court and declared to be ill-founded, and the court should find and declare that the note was obtained in good faith and that full consideration was given therefor, and render judgment accordingly, and then, the following year, suit was brought to recover the second year's interest, and the same identical defense was set up; can it be possible that any one would for a moment contend that the plea of *res adjudicata* would not avail plaintiff? There can be no doubt of it. The doctrine of *res judicata* and the provisions of our Code are intended to apply to just such cases. In the present case the contention is that *res judicata* does not apply, because the license sued for is that of a subsequent year. The parties are the same, the cause of action is the same, the demand is the same, and the defense is the identical one that was pleaded in the former suit. The defendant alleges as its sole defense that it is a manufacturer, and therefore exempt from license taxation. The state denies that it is a manufacturer; alleges that it is not a manufacturer, and that it is liable to license taxation. This issue was distinctly asserted, distinctly denied, hotly and strenuously litigated and argued, and positively and absolutely decided in favor of the state and against the defendant. As between the state and this defendant, this question is forever at rest, and can never again be litigated between them."

The learned counsel is right in saying that the defense is the same and that the parties are the same, but he is wrong in saying that the thing demanded and the cause of action are the same. The thing demanded in the first suit was a certain sum of money, which has been paid, and which is neither being demanded a second time, nor sought to be recovered back. The cause of action in a suit for the recovery of a license is the indebtedness of the defendant, springing from the joint operation of the statute imposing the license and of the act of the defendant in carrying on the licensed business. In two suits for the recovery of the licenses of different years, the statute imposing the license may be said to be the same in the two suits; but the act of the defendant by which the debt for the license is incurred is each year a separate, independent act, similar to, but not

the same as, the act by which the debt of the license of the preceding year was incurred. At the beginning of each year it is entirely optional with the defendant to do business and incur the debt of the license of the year, or not to do business and not incur the debt of the license,—just as much so as it is optional with a man not to commit assault and battery, or not to trespass or do any other act from the joint operation of which and of the law a debt will arise. In the latter class of cases, equally as in the case of a debt for a license, the debt or cause of action comes into existence by the joint operation of the law and of the act of the defendant. In successive suits for cases of this kind one of the causes generative of the cause of action, namely, the law, is the same; but the other generative cause, namely, the act of the defendant, is different, and *res judicata* does not obtain.

It is undeniable that the issue as to whether or not defendant is a manufacturer does occur in both cases, but this issue, as we shall show presently, involves only a question of law, and there can be no objection to litigating a second time a question of law, provided the litigation is in connection with different facts; and we have shown that the act of the defendant in carrying on business in the years 1900 and 1901 was a separate and independent act from the similar act of carrying on business in the preceding years, and that the debts or causes of action arising from the different acts were separate and distinct causes of action. In the cases supposed, of repeated assault and batteries and trespasses under circumstances precisely similar, if in every succeeding case the same defense of the unconstitutionality of the law imposing a legal obligation in such cases were set up, *res judicata* would not obtain. The same legal question would be mooted between the same parties, but in connection with facts distinct, separate, and independent, though closely similar.

The basic principle of *res judicata* is found in the necessity that a time should come when the litigation shall cease, in order that the decree of the court may be carried out. This is what the law concerns itself with, that the object of the judgment shall not remain eternally in suspense, but be delivered into the quiet and undisturbed possession of the successful litigant. This is what the Code means when it says that "The authority of the thing adjudged takes place only with respect to what was the object of the judgment." The law by virtue of which the object of the judgment is delivered is no part of the object of the judgment. It is only one of the reasons for judgment, and *res judicata* does not take place with respect to the reasons for judgment, but "only with respect to what was the object of the judgment." *Res judicata* deals, if we may so express ourselves, with the decree of the court, as contradistinguished from the judg-

ment of the court. To give it a wider scope than this is to confound it with *stare decisis*. The office and function and utility of *res judicata* is not to settle law questions, but to lend stability to a decree in order that such decree may have effect. If the second suit leaves the successful litigant in the first suit in the undisturbed possession of the thing decreed to be delivered in the first suit, there is no ground for *res judicata*. The thing demanded is not then the same. This is well illustrated by the case of *State v. Jumel*, 30 La. Ann. 861. There an officer brought suit for that part of his salary accrued up to the time of filing suit, and brought subsequently a second suit for that part of the salary accrued thereafter, and was met in both suits with the defense that the office had been abolished and that no salary was due. The court held that the part of the salary sought to be recovered in the first suit was not included in the demand of the second suit, and that there was not identity of thing demanded. The illustration adduced by counsel, of two suits on the several installments of interest on a note, supposes an impossible case. The interest is but the accessory of the note, and cannot form the basis of a demand independently of the note. Both suits would therefore have to be on the note. The cause of action would be the same in both suits, namely, the debt on the note. Immediate payment of the capital would not be demanded, but its recognition as a debt would necessarily constitute the main demand of the suit. Interest would follow as a mere consequence. The only issue that could be raised in the first suit distinctively in connection with the first installment of interest would be payment, or nonaccretion of the interest for want of lapse of the required time, and the adjudication of these issues would not be *res judicata* of the same issues when raised in connection with the second installment of interest. That the first installment of interest had been paid or had not yet accrued when sued for would furnish no ground for argument *pro* or *con* the second installment of interest when it, in its turn, came to be sued for.

We said we would show that the issue as to whether defendant is a manufacturer is not an issue of fact, but of pure law. It will conduce to the clearness of the discussion if we change the form in which counsel has stated this issue. It is not as to whether defendant is a manufacturer, but as to whether a refiner of sugar is exempt, or not, from license taxation. The statute, in imposing the license, has used a specific term of definite meaning, applicable to defendant's class and to no other class, namely, the term "refiner of sugar"; and the constitution, on the other hand, in granting the exemption from taxation, has used a generic term of indeterminate meaning, namely, the term "manufacturer," which may or may not be applicable to defendant's class. Hence the

controversy. Defendant claims that the statute is inconsistent with the constitution, and plaintiff insists that it is not. The controversy involves a comparison between the meanings of the specific term, "sugar refiner," and of the generic term, "manufacturer," made use of by the statute and the constitution, respectively. There would be no controversy if only the constitution had used a term of unmistakable meaning,—if, for instance, in granting the exemption, it had, after the example of the statute, used specific terms. Refiners of sugar would then have been unmistakably either included in or excluded from the exemption, and there would have been no controversy. From all this it is plain that the issue is as to the consistency of the statute with the constitution, and that the determination of that issue depends upon the proper construction to be placed on the verbiage of the constitution. In the formula made use of by the counsel, namely, whether defendant is a manufacturer, there is implied that the inquiry involves not alone the ascertainment of what the word "manufacturer" means, but also the ascertainment of what defendant is. Of course, the latter branch of the inquiry would involve a question of pure fact. But the learned counsel does not purpose to imply that there is any difference of opinion as to defendant's being a refiner of sugar, nor as to what constitutes a refiner of sugar. The issue must therefore be stated so as to leave out the implication of uncertainty concerning what defendant is, and the formula made use of by us excludes this implication. Except in this respect, it changes in no wise the issue as stated by counsel. In other words, we know that defendant is a refiner of sugar, and we know what constitutes a refiner of sugar; but we do not know exactly what the word "manufacturer," used by the constitution, means, and the matter involved is the ascertainment of the meaning of this word,—that is to say, of the constitution. The matter involved is the interpretation of the constitution,—a matter of pure law.

To illustrate his contention that the issue in question involves a question of fact, the learned counsel representing the state adduces the following: "Suppose the law had imposed a license tax of two dollars upon each and every horse in the state, but that the constitution had exempted from license every thoroughbred stallion. When this license was resisted by a taxpayer, on the allegation that his horse was a thoroughbred stallion, met by the contention on the part of the state that the animal in question was a common gelding, would the issue raised, and to be determined by the court, be one of fact or of law? The question answers itself. Proof would have to be administered, and thereon the court would have to determine, as a matter of fact, that the animal was a thoroughbred stallion, or that he was not an animal of that description. And however

the court should decide, would not the judgment be *res judicata* as between the taxpayer and the state in a subsequent suit for the tax of a subsequent year? Plainly it would." This illustration would be apposite, if in our case, as in it, the point to be ascertained was the characteristics of the object taxed, or if in it, as in our case, the issue involved nothing more than a comparison between the popular meanings of two terms,—as, for instance, between the popular meanings of the terms "common gelding" and "thoroughbred stallion."

There is not in the case of *Heroman v. Institute*, 34 La. Ann. 806, anything conflicting with what we have said in this opinion. In that case a lot of ground belonging to the *Heroman* minors was seized and sold under executory process, and, after the sale, was sold by the purchaser to the same minors and their mother; they giving their notes for the purchase price, secured by mortgage on the property. Afterwards suit was instituted on the notes, and the minors and the mother made defense that the notes were without consideration and null because the original sale under executory process was null, and, as a consequence, they themselves were the owners of the property at the time that they purchased it and gave their notes for it. There was judgment rejecting this defense and enforcing the notes. To satisfy the judgment, the property was sold. Then the minors brought suit to recover the property on the same grounds urged in defense to the notes, namely, the nullity of the original sale under the executory process. The court found that this issue had been passed on in the defense to the notes, and was therefore *res judicata*. The decision was on rehearing, and Justice Poche, who had been the organ of the court in the original decision, dissented, and Justice Levy, who had concurred in the original decision, took no part in the rehearing on account of absence. The case is a close one, but may doubtless be justified on the theory that the notes stood for the property in the hands of the vendor, and that to demand their nullity was to demand the nullity of the title of the vendor. The effect of the judgment in both cases would have been the same; that is, to give the property to the *Heroman* minors. In *McNeely v. Hyde*, 48 La. Ann. 1083, 15 South. 167, the matter involved was the validity of a Spanish grant which had been already passed on in a suit between the authors of the parties to the suit. It was the old demand over again. In *Sewell v. Scott*, 35 La. Ann. 553, the matter involved in the two suits was identically the same,—the right of one of the parties to a certain trademark. In the case of *City of New Orleans v. Citizens' Bank of New Orleans*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202, the court conceded that two suits for the taxes of different years contained different demands, but held that the authority of the

thing adjudged took place nevertheless. The conclusion is in conflict with the provision of the Code by which the thing demanded and the cause of action (that is, the demand) must be the same, and something must be wrong with the reasoning of the court by which the conclusion is reached. Right or wrong, this court would be bound by the Code; but on the authority of pure reason the Code is presumably right. The decided weight of authority is on its side. In our humble opinion, the fallacy in the reasoning of the court consists in erroneously supposing that difference of demand in the two suits is compatible with identity of circumstances and conditions in the two suits. The demand of a suit not only is a circumstance and condition in the suit, but is a controlling circumstance and condition. If it is different in the two suits, the question cannot be said to come up in the two suits under identical circumstances and conditions. The pertinent part of the reasoning of the court is as follows: "In considering the question, we separate at once these two conflicting contentions, and examine first the proposition that, because a tax of one year is a different demand from the tax of a subsequent year, therefore *res judicata* as to one can never apply as to the other. * * * The proposition that, because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books, and enforced by many decisions of this court." The court is perfectly right in saying that "the estoppel resulting from the thing adjudged * * * exists * * * when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by judgment between the parties or their privies." But the court, in our humble opinion, is in error in supposing that it is possible for the question to come up under identical circumstances and conditions in two suits whereof the demands are different. Unless the same thing is being demanded, and on the same ground, and the demand is being resisted on the same ground of defense, there are not "identical circumstances and conditions" in the two suits. There may be close similarity. The demands for taxes for different years may be as near alike as two peas, but they are not identical. The identity would be in the defense, but

the defense is only a reason for judgment, and forms no part of the judgment. A different judgment might be rendered on it in the second suit, and the full validity, force, and effect of the judgment in the first suit remain unimpaired. The thing adjudged takes place only with respect to what forms the object of the judgment; and where the defendant contents himself with resisting the demand of the plaintiff, no matter on what ground, the object of the judgment continues to be the demand of the plaintiff. That particular demand, whether allowed or rejected, can never again be urged, but the fact of its allowance or rejection, no matter on what ground, cannot preclude the bringing forward of another and distinct demand, no matter how closely similar. If I break my neighbor's fence, and to his suit for damages I plead the nonexistence of any law subjecting me to pecuniary liability in such a case, and the day after being cast in the suit I break the fence again under circumstances exactly similar, and another suit ensues, there will be as close identity between the two suits as between two suits for the taxes of different years; but we imagine no one would think of applying the law of res judicata to the second suit. If, however, in the first suit, instead of confining myself to denial of plaintiff's claim, I set up an independent right, justifying my conduct, as that I am owner of the fence in question, or that I have by contract the right to break said fence, then, as a matter of course, as to this defense, if again set up in the second suit, there would be res judicata; but the reason would be that, while urged as a defense, this claim of right would in reality be a demand brought by way of reconvention. I should, *pro hac vice*, have ceased to be defendant and become plaintiff; and the necessary feature of identity of demand in the two suits would be presented. Exactly when and under what circumstances the defense to a suit passes from the stage of negation, and enters upon that of affirmation, so as to constitute a new demand injected into the suit by way of reconvention, it is not always easy to tell. Whether the decision of this Citizens' Bank Case can be justified, even on the ground that in enforcement of its charter contract the bank had set up a counter demand, we doubt very much. In the case of *Bank v. Lander* (C. C.) 109 Fed. 21, the case is sought to be distinguished on that ground from the cases at common law—having largely the preponderance of authority on their side—holding that a suit for taxes of one year is no bar to a suit for taxes of another year. But the case, if reconciled to principle on that ground, ceases to be applicable to the facts of the instant case. Here is no attempt to demand anything of, or to enforce anything against, the state; but a mere passive resistance, a denial of the existence of the law on which the claim of the plaintiff is predicated, a challenge of

the constitutionality of a law, and nothing more.

Extract from the brief of counsel for defendant: "If that former decision is res judicata as to defendant in this suit, it is, of course, res judicata for all time to come, for the plea of res judicata is a complete bar. Now, if to-morrow this court were, in a suit between other parties, to reverse the law of the 51st Annual case, and hold that a sugar refiner is a manufacturer, and that the act taxing sugar refiners for a license is unconstitutional, as being contrary to article 229 of the constitution, what would be the situation? All other sugar refiners would be exempt, yet this defendant would be annually liable for a tax under an adjudged unconstitutional law, without possibility of relief from any court, for res judicata would forbid this particular sugar refiner to say that the law is unconstitutional! The tax must be paid, though the law itself cease to exist! Still assuming that, in the supposed case between other parties, this court shall reverse the point of law decided in the former suit in the 51st Annual, and hold that a sugar refiner is a manufacturer, let us examine the effect upon this defendant. Such a decision would either not relieve defendant of future taxes, or would relieve it of such taxes. (1) If the decision in the 51st Annual be res judicata as between the state and this defendant, then the supposed contrary decision in the suit between other parties would not in the slightest degree affect the relations between the state and this defendant, and the plea of res judicata would be as valid in favor of the state and against this defendant in any future suit involving the same abstract question of law as it is in the case at bar. We would then have the absurd condition of the state continuing to collect a license tax from this defendant under an unconstitutional law. The tax against this particular sugar refiner would continue even after the very foundation upon which is based the state's right to claim the tax had been swept away and utterly destroyed! Nor would the courts have power to relieve, for, if the judgment in the 51st Annual be res judicata now, it will continue to be such for all time to come. (2) On the other hand, if the contrary decision in the supposed suit between other parties would have the effect of relieving this defendant from payment of license taxes to the state for future years thereafter, then it is plain that res judicata does not apply to this suit; for, if such principle do apply, no decision in a suit between other parties could possibly affect the force of the plea as between the parties to the suit which is claimed as the bar. Choose, then, either horn of the above dilemma, and we are brought to the same inevitable conclusion that the decision in the 51st Annual case on the abstract proposition of law there announced is not res judicata in the case at bar. For in the first case, if the estoppel be ap-

plied, the result would shock the conscience and be grossly contrary to every principle of right, justice, and equality; and, in the second case, the conclusion is necessarily that the former decision is not *res judicata*, because it is capable of being affected by a subsequent contrary decision in a suit between other parties. This by no means impossible actual result of upholding such a plea in this case shows plainly that it would be radical error to apply it here. The prior decision was a question arising under a general law applicable to all alike, and no abstract law point there decided can ever be more binding on the parties than on others."

We conclude that the plea of *res judicata* is not well founded, and we pass to the second question in the suit,—as to whether a sugar refiner is a manufacturer.

The constitution provides as follows: "Art. 229. The general assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations, and callings. All persons, associations of persons and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural, and mining pursuits, and manufacturers other than those of distilled, alcoholic or malt liquors, tobacco, cigars, and cotton seed oil. No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes. This restriction shall not apply to dealers in distilled, alcoholic or malt liquors. The general assembly shall have authority to provide that municipalities levying license taxes equal in amount to those levied by police juries for parochial purposes, shall be exempted from the payment of such parochial licenses."

The process used by defendant is undisputed. It is as follows: The raw sugars, cane and beet, upon being received, are first melted in vessels specially constructed and adapted for that purpose, called "melters." The raw sugars, whatever the grade, are subjected to this process, and without it there can be no refining. The melted sugar is pumped to the topmost floor of the refinery, to other vessels, called "blow-ups." Here suitable chemical reagents are introduced into the liquid, the effect of which is to coagulate the impurities in the mass, and, by such coagulation, render more effective the succeeding process of filtering through bags. In these blow-ups the liquid is brought to the proper density and degree of temperature by the introduction of steam sufficient to accomplish the purpose. From the blow-ups the liquid is passed into bag filters, entering at the open-end and filtering through the folded cloth. The result of this first filtration is to remove from the liquid mass much of the dirt and foreign matter,—the insoluble mechanical impurities. These filter bags are

from time to time washed and pressed in the "scum press"; the result being to save the sugar adhering to them and in the dirt, and to remove the dirt from the bags, so that they may be again used. The record shows that the defendant company procures of this refuse as much as 12 to 15 tons a day in the refining operations of its New Orleans refinery. After the bag filtration, the clarified and partially filtered liquid is next filtered through boneblack filters. These are large metal retorts, almost filled with powdered animal boneblack, which decolorizes and purifies by taking up from the liquid mass the salts and impurities, soluble and free, which have resisted the process of bag filtration. From the boneblack filters, the sugar solution comes clear as crystal. The by-process of renovating or revivifying the boneblack—an expensive item in the refining process—is accomplished by burning out as much as possible of the impurities and foreign matter which the boneblack has taken up. This is done in the kilns designed for that purpose. Notwithstanding this revivifying process, the boneblack gradually becomes ineffective for filtering purposes, and fresh boneblack must be added from time to time to keep the mass up to the required standard.

The next direct step in refining proper is the recrystallization of the now purified solution. From the boneblack filters the liquid is passed into closed copper vessels or pans, and is there boiled in a vacuum, in the vessels which are known as "vacuum pans" or "finishing pans." In the boiling, the grain of the sugar is formed from the liquid mass, and is built up by the sugar boiler in charge of the operation by the exercise of most expert skill and judgment, until it has reached the size, large or small, which is proper for the particular kind of refined product designed to be produced, as the different kinds of ultimate product turned out require different sized crystals. When the grain has been built up to the desired size, the entire contents of the finishing pan are liberated and passed into the centrifugal machines, which is technically called "making a strike." This mixed mass of grained and ungrained sugar is called "magma." The centrifugal machine is cylindrical in shape, and the magma is introduced within it. The machine is then revolved rapidly,—perhaps a thousand revolutions a minute,—and the liquid of the magma is forced by centrifugal action through the screen-like lining of the machine, and separated from the grained sugar which is left within the machine. The liquid so thrown off is carried back and again subjected to the boiling process in the vacuum pan until all the sugar in it which can be economically crystallized out has been obtained from it. The remaining uncrystallizable liquid, which contains too much of impurity to justify the saving of the sugar in it, comes out commercially as molasses. Going back to the grained sugar left in the centrifugal, we find a mass of

absolutely white grained sugar, not yet, however, thoroughly dried. Thereafter the treatment differs according to the ultimate products to be produced. These products are, in this refinery, four in number: (1) "Cube sugar" is made by taking the sugar as it comes from the centrifugal machine and pressing it in molds by hot-air pressure in the cube machine. The cubes are thereafter further dried in ovens, which process completes the extraction of moisture, and they are then ready for packing as a finished product. (2) "Confectioners' A sugar" is a kind designed to supply a particular trade and use. The grain of this product is designedly formed larger in the finishing pan than the grain for other products, the process up to and including the centrifuging being otherwise the same. After machining in the centrifugal, this product is ready for the market. The percentage of moisture is greater than in the other final products, as no further drying process is applied; otherwise its purity is the same as in the other products. (3) "Granulated sugar" is made by passing the grained sugar from the centrifugal into a revolving drum or cylinder, called a "granulator," into which hot air is introduced. The result is the removal of all moisture and the polishing of the grain by friction, thereby giving it a bright and sparkling appearance. The granulator is also provided with a sifting appliance, whereby uniformity in the size of grain of the final product is attained. (4) "Powdered sugar" is used particularly for crystallizing fruits, table use, etc. The granulated sugar is introduced into the pulverizing machine, which consists of a series of discs. These are revolved with great rapidity, with the result of reducing the crystals to a fine, dust-like powder. (5) To these products may be added the "molasses" produced from the liquid thrown off by the centrifugal machine, and hereinbefore mentioned. (6) To these products may be added again the scum or filth, for which no commercial use has yet been found. The quantity of this refuse varies with the quality of the raw material, reaching as high as 15 tons a day, as above stated. Another by-process of some magnitude which enters largely into the economy of refining is the process of evaporating the "sweet water,"—the washings from the bag filters, containing more or less sugar in solution. The apparatus is called a "Lily Evaporator," and accomplishes the result of economically evaporating the surplus water from the liquid, whereby the latter is brought to the proper degree of density for being put through the successive refining steps of clarification, bag filtration, boneblack filtration, crystallization in the vacuum pan, machining in the centrifugal, and then according to the particular kind of product desired to be produced. The raw sugars, whatever their grade or test, are necessarily subjected to the same process. The melting of the sugar, its purification in liquid form, and subsequent recrystallization, are the essentials of all refining

operations, and have ever been so, though different methods of detail in the accomplishment of the final result have been in the past, and are now, practiced. The process in general use to-day is more complicated than that formerly used, and a better result is obtained, but the underlying principles are the same. The final refined product of to-day contains less than one-tenth of 1 per cent. (.001) of impurities. The extended uses to which the refined product is put are detailed in the record, and are matter of common and judicial knowledge. Most of the product is obtained from raw sugars unfit for use in the crude state. The process here detailed is, in all its essentials, the same that is used by all sugar refineries, and in fact that has ever been used; these essentials being the melting of the sugar, its purification in the liquid form, and its subsequent recrystallization. Of the \$20,451,933.39 of sugar produced by defendant from January 1, 1900, to December 31, 1900, only \$2,216,989.58 was so produced from sugar fit for consumption. The rest was from sugar of so low a grade as not to be fit for use in the crude state. Of one of these, the "raw Cuban sugar," the witness Witherspoon says: "That is Exhibit Sample No. 11, and sugar in that condition never goes into consumption. In fact, if you would extract the cork here and smell it, the smell would bear out that statement. You can take and open that bottle, and it will perfume the whole room." But whatever the grade of the sugar, the process is the same. No refining is possible, except by reducing to a liquid form, and purifying in that form and recrystallizing into sugar. The defendant uses extensive and complicated machinery, of which views and photographs are brought up as part of the record; employs 500 to 600 laborers, skilled and unskilled; uses about 75,000 tons of coal a year. Its refinery has about 700,000 square feet of space. Defendant pays state and city taxes on a property assessment of \$2,650,500. Thus it is seen that defendant employs vast and varied machinery, with skilled and unskilled labor, and that the refining processes necessarily require many changes in the form and quality of the raw material used in producing the refined article.

On a former occasion, in the case pleaded as *res judicata*, reported in 51 La. Ann., at page 562, 25 South. 447, we were called upon to consider whether these varied processes, carried on on this large scale, and bringing about the many changes in the material operated upon, constituted a manufacturing process, and made defendant a manufacturer, within the meaning of the provision of the constitution exempting manufacturers from taxation, and we came to the conclusion that it did not. On that occasion we gave our views in an elaborate opinion, which, as we thought, fully justified our conclusion. These views are substantially summed up in the following excerpt from the opinion in that case: "The result of the evidence, as ap-

plied to the authorities, in our opinion, is that the process of refining sugar and molasses, as it is explained by the defendant's superintendent, is not a manufacturing process, and that defendant is not a manufacturer, in the general and common acceptation of that term. At its incipency, the defendant purchases on the market or from planters a supply of sugar in a completely manufactured state, and by skillful manipulations, through the instrumentality of vast, elaborate, and complicated machinery, and by an application thereto of steam power and great air pressure, same is first melted, then cleansed of its impurities, then bleached and improved in color, then dried, granulated, and brought into sugar again, in exactly the same state it was when these manipulations were commenced, though greatly improved in purity and beauty of appearance, and rendered more merchantable. By this process sugar is refined in grain, improved in quality, and bettered for commercial use; but it remains sugar still, like the cotton and the shells. It is given no new name, use, shape, or combination. It is the selfsame, identical raw material, just as when first manufactured from the cane and marketed by the planter. Tax exemptions are strictly construed, and cannot be sustained except under clear proof. Doubt is fatal to the claim." The view we then took was that the refining processes are practically the same as a washing or scouring of the raw material, whereby the dirt and impurities are removed, and that the case was analogous to those wherein the process of cleaning muddy cotton and the process of cleaning and polishing shells had been held not to be manufacturing. Having changed the views then so elaborately expressed, and thereby placed ourselves in the awkward attitude of overruling ourselves, it behooves us to give good reasons for our present opinion, and we proceed to do so. Brevity and condensation are out of the question. We shall, however, endeavor to supply their place, as far as circumstances will permit, by distributing the matter of the discussion under appropriate heads.

Review of the Court's Former Opinion.

The fundamental error of the former opinion lies, we think, in the assumption that the raw material used by the defendant is in "a completely manufactured state," and that this material is given "no new name, use, shape, or combination," but "remains sugar still, like the cotton and the shells." In the first place, only a small portion of the raw material used by defendant can be said to be "sugar." The bulk of it is, in a crude state, not fit for use; and a great part is a substance disagreeable to taste, foul of smell, and repulsive in appearance. In the next place, whatever may be the grade of the raw material, back it must go to the liquid state,—the same state in which it was when extracted from the cane or beet, except in re-

spect to containing a larger percentage of saccharine matter, and a smaller percentage of foreign substances,—a difference merely of degree. Since the raw material, whatever it may be, must be brought back to this liquid state,—really a step backward in the process of manufacture,—not the material as procured by the refiner; but this liquid, would seem to be the raw material operated on. But even assuming that the raw material is the article in the state in which it is procured by the manufacturer, it is given a new name, since the refined product has its distinctive commercial names "Cube," "Granulated," "Powdered," "Confectioners' A," each of which is distinctive from the other and from the raw material. If one were to ask in a store for "a pound of sugar," he would scarcely get it, without specifying the distinctive name of the article he wished, no more than he would get his tobacco unless he specified the kind,—fine-cut, granulated, plug-cut, or plug. It is given a new use, since the bulk of it is converted from an article unfit for consumption into the refined sugar of modern commerce, and the part of it that was fit for consumption in its original state is converted into a different article of commerce, and virtually of use. It is given a new shape, since the old grain is dissolved and a new and different grain is formed, and part of the product is finally brought to a powder, and part molded into cubes. It is given a new combination, since in the crude state it was in combination with molasses and impurities, and in the refined state it is almost chemically pure. The proportion of these compounds cannot be ascertained from the record, but their volume is not so insignificant as might be supposed; of the impurities alone, 25,000 to 30,000 pounds being thrown off daily in the defendant's refinery.

If the raw material were customarily procured by the refiner in a liquid state, there would be no question, we apprehend, but that the refiner, who buys the liquid solution of sugar, and turns out the refined product, is a manufacturer. How, then, is he the less a manufacturer when he buys the raw material in a state one step removed from a liquid, one step further away from the final product, and has to put it through the additional process of melting in order to reduce it to a proper form to begin the refining process upon? It will not be denied that the making of raw sugar from the extracted juice of the cane or the beet is a manufacture. If such juice were wholly freed of its impurities by processes similar to those used by defendant or otherwise, so that the first crystallization would be a refined product, such refined product also would unquestionably be a manufactured article. If, instead of taking the cane juice or beet juice as the raw material to be purified and crystallized into sugar, the refiner begins his operations on a liquid solution of raw sugar as the raw material to be refined and crystallized, is he any the less a

manufacturer than he who manufactures the sugar from the other liquid raw material,—the juice of the cane or of the beet? Many manufactured products, as the authorities hereinafter cited show, and as a matter of common knowledge, are produced with but slight changes of form of the raw material, and with but little hand labor or machinery. To illustrate by analogy, the producer of steel is unquestionably a manufacturer. He may buy the pig iron in a completely manufactured state, melt it, subject it to his particular steel-making process, and obtain steel, his manufactured product. Or he may have his own blast furnace, and run the molten product of the blast furnace directly to his converter, without going through the intermediate, and to him unnecessary, step of producing the pigs. In either case, equally, he is a manufacturer of steel. The remelting of the pig iron in the first case is actually a backward step, but a necessary one, to get to the point of beginning the steel-making process. So with sugar refining. It is as impossible to produce the refined product from the raw sugar, without the latter being liquified, purified in the liquid state, and recrystallized into the final product, as it is to make steel from crude pig iron without liquifying the iron and subjecting it in that state to the processes necessary to produce the steel. And the sugar refiner who produces the refined product from the liquified raw sugar, whether that raw material had ever before been crystallized or not, is as logically and as certainly a manufacturer as the producer of steel from the crude molten iron, whether that iron had ever before been crystallized into pigs or not. If one should import for remanufacture india-rubber shoes of crude manufacture, as was done by the importer in *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914, and should melt them down and manufacture out of this material other and different india-rubber shoes, the latter would without question be manufactured articles, notwithstanding the material from which they were made had been at some prior time otherwise manufactured. So where a sugar refiner takes the raw product, of crude manufacture, melts it down, and makes out of it a new product, this new product is as much a manufactured article, made by the refiner's process, as was the original crude article. The raw material in such case completely loses its identity in the process of remanufacture, and an absolutely new and different article is formed.

Meaning of the Word "Manufacture."

"A manufacturer is not one who creates out of nothing, for that would surpass human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process." *City of New Orleans v. Le Blanc*, 34 La. Ann.

597. "A manufacturer is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process." *City of New Orleans v. Ernst*, 35 La. Ann. 746. "The word 'manufacture' means the making of anything by hand or artifice. *Railroad Co. v. Fulgham*, 91 Ala. 555, 8 South. 803. Mr. Worcester's Dictionary defines 'manufacture' as the 'process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery.' The definition that the word is given by the *Century Dictionary* is as follows: 'The production of articles for use from raw or prepared materials by giving these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.' According to the above definitions of the word 'manufacture,' we are constrained to consider and declare an electric light company a manufacturing corporation, to all intents and purposes. It is no answer to this argument to say that electricity exists in a state of nature, and that a corporation engaged in the electric light business collects or gathers such electricity. This does not fully or exactly express the process by which such corporations are able to make, sell, and deliver something useful and valuable. The electricity that exists in nature is of a very different quality from that produced by means of machinery. The business in which an electric light company is engaged makes it necessary to invest large capital in the plant, and there is purchased and consumed coal and other materials to produce steam in order to furnish the power for the operation of the machinery. Then there is supplied and operated a complicated system of machinery, like that commonly used in manufacturing establishments, such as boilers, engines, dynamos, shafting, belting, etc., and then, by means of wires, cables, and lamps, the mysterious power generated by the machinery used from the materials furnished is transmitted, and lights the streets and private houses. But the electric currents that produce these results cannot be said to be 'the free gifts of nature, gathered from the air or the clouds.' It is the product of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations." *Beggs v. Illuminating Co.*, 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94. "Nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, * * * are now commonly designated as manufactured." *Carlin v. Assurance Co.*, 57 Md. 526, 40 Am. Rep. 440. "If the question whether a corporation engaged in the business of fur-

nishing electricity for lighting public and private places, or for power, is a manufacturing company, was made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a power or as an agent in nature, it would doubtless be difficult, and perhaps impossible, to show that the process which relator calls 'manufacturing' produces anything that in a certain sense, and in some form, did not exist before. That, however, is true of most, if not all, manufacturing operations. The application of labor and skill to materials that exist in the natural state gives to them a new quality or characteristic, and adapts them to new uses; and the process by which this result is brought about is called 'manufacturing,' whether the change is accomplished by manual labor or by means of machinery. But we think that these considerations are by no means conclusive in determining the true scope and meaning of the terms, 'manufacturing corporations,' as they are used in the statute. The true inquiry would seem to be whether a corporation organized as this is, and carrying on the business that this does, and in the manner shown, would not be considered, in common language, as engaged in some manufacturing process, or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element of force." *People v. Wemple*, 129 N. Y. 553, 29 N. E. 810, 14 L. R. A. 708. "The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus logs are first manufactured to boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, windows, sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name." *Tide Water Oil Co. v. U. S.*, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139.

In holding the publisher of a newspaper to be a manufacturer, this court said: "All manufacturers combine, in greater or less

degree, the products of intellectual and mechanical labor, and in very many the intellectual element confers upon the article produced its peculiar and greatest value. Such is conspicuously the case with a newspaper; but since the making of newspapers is a business; since the newspaper, when made, is a new and distinct article of commerce; since the process of making it requires machinery and manual labor and physical raw material,—as this record shows, much the larger part of its cost,—we can see no sound reason why such a business does not fall within the letter and spirit of the constitutional exemption as that of a manufacturer. While we admit that newspaper publishing does not fall within the common usage of the term 'manufacturer,' the constitution (article 207) attaches a broad meaning to the word, by embracing within it the occupations of stationers, boat builders, chocolate makers, etc., which are not ordinarily considered as manufacturers, any more than newspapers and book publishers. We are satisfied that the legislature took the same view of the subject, and this re-enforces our own opinion." *State v. Dupré*, 42 La. Ann. 561, 564, 565, 7 South. 727, 728. And finally: "Manufactures. The term 'manufactures' is now distinctively employed to describe the processes and products of productive industries, or of industries engaged in fitting crude materials and natural growths for the higher uses of man in society. Primarily these changes of natural forms were made by the hand of the artificer or hand worker, and hence they were called 'manufactures,' but in recent times machinery has by far the largest place in effecting these changes of form. Wood, iron, and other materials are shaped and changed by machinery; and wool, cotton, silk, and flax assume all their forms of adaptation to final use almost solely through the agency of machinery. It would not now be practicable to express this fact in the form of the definition afforded by a single descriptive word, however, and 'manufactures' will remain as the expression for all the products reformed, shaped, fashioned, and combined in order to adapt them to the uses of man in society." 29 Am. Supp. Enc. Brit. (9th Ed.) p. 307.

Analogy to Other Industries Held to be Manufactures.

Tobacco. The manufacture of tobacco furnishes a striking analogy. There is no question about chewing and smoking tobacco and snuff being manufactured articles. The United States Revised Statutes and the Louisiana constitutions of 1879 (article 206) and 1898 (article 229) call them manufactures. The process of manufacture converts the raw material—leaf tobacco—into the manufactured articles, by removing stems and dirt, improving the color, drying or moistening, perhaps sweetening some kinds, and compressing, granulating, fine-cutting, or pul-

verizing, according to the use for which intended. The parallel with sugar refining is complete. The substance of the manufactured tobacco is still tobacco. It is called by no new name, and is used for the same purposes as the leaf tobacco, though rendered more fit for those uses. The process of manufacturing tobacco accomplishes the same result as the refining of sugar, though it is much simpler, requires less machinery, and the raw material never loses its original identity. A fortiori, then, is the refining of sugar a manufacture.

Sawmilling. The cutting of rough lumber from logs is manufacturing. *State v. A. W. Wilbert's Sons Lumber & Shingle Co.*, 51 La. Ann. 1223, 26 South. 106. Sawn lumber is still, in substance, wood, and the logs may be put to the same use as the lumber, though not as fit therefor. Weatherboards, flooring, etc., are, in turn, manufactured articles. See cases cited in *A. W. Wilbert's Sons Lumber & Shingle Co. Case*, supra. They are manufactured from the rough lumber, their substance is still wood, and they are put to no uses to which the rough lumber could not be put, though made more fit for such uses.

Dyeing and bleaching of cloth is manufacturing. *Johnson v. Bleaching Co.*, 15 Gray, 218, 218.

Salt. The production of salt by process of evaporation is a manufacture. *East Saginaw Salt Mfg. Co. v. City of East Saginaw*, 13 Wall. 376, 20 L. Ed. 611; *Salt Co. v. Wilkinson*, Fed. Cas. No. 12,269; *Salt Co. v. Guthrie*, 35 Ohio St. 666.

Kindling Wood. The splitting, drying, and bundling of kindling wood is a manufacture. *People v. Roberts* (Sup.) 47 N. Y. Supp. 1122.

Oil refining has been held to be a manufacturing process. "Among the purposes for which the defendants incorporated themselves were 'refining oil, coal, and other minerals, and preparing them for use.' They were therefore strictly a manufacturing corporation." *Hawes v. Petroleum Co.*, 101 Mass. 385, 396.

Pork packing is manufacturing. *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103.

Staves, rough split by hand, are manufactured articles. *U. S. v. Hathaway*, 4 Wall. 404, 408, 18 L. Ed. 395.

Split timber, to be used in making shovel handles, is a manufactured product. *U. S. v. Quimby*, 4 Wall. 408, 18 L. Ed. 397.

Canning factories, which prepare fruits and vegetables for future use without changing the identity of the raw material, are manufacturing, by the very term used to designate them.

Rattan. The rind split from rattan, as well as the reeds left after such splitting, are manufactured articles. *Foppes v. Magone* (C. C.) 40 Fed. 570.

Refined bauxite, produced from crude bauxite by a refining process of heating, and consequent expulsion of other chemicals, is a

manufactured article. In *re Irwin* (C. C.) 62 Fed. 150.

Ivory. Elephants' tusks sawed into pieces of various lengths, when such sawing requires skill and judgment, with a view of separating the ivory into different grades, adapted to different uses, are manufactured articles. In *re Gerdau* (C. C.) 54 Fed. 143.

Bones. Crude bones, crushed and screened, become thereby manufactures of bones. In *re Gardner* (C. C.) 72 Fed. 494.

Rice millers, who simply hull, clean, and polish rice, are manufacturers. *City of New Orleans v. Ernst*, 35 La. Ann. 746.

Authority—Popular and Scientific.

The meaning of the word "manufacture," as used in the constitution, is broader, rather than narrower, than its common meaning. *State v. Dupré*, supra. It is proper, therefore, to see how the word has been used by those skilled in the use of words. Definition is the statement of the meaning commonly given to a word by those of respectable authority who make use of it. Has this word "manufacturer," then, been used by authorities to denote and include the industry and process of sugar refining? The following citations give the answer:

"Sugar Baker. A manufacturer or refiner of sugar." Worcester. Dict., "Sugar Baker." As it is a matter of common knowledge that the sugar baker was the primitive sugar refiner, dealing only with crude sugar as his raw material, the above definition is peculiarly pertinent as conveying the statement that a sugar refiner was a manufacturer, even when using the comparatively few implements and simple process formerly employed in eradicating the impurities from crude sugars.

"Sugarhouse. A house or building for preparing sugar from cane juice or for refining sugar; a manufactory of sugar." Id., "Sugarhouse."

"Sugarhouse. A building in which sugar is made or refined; a sugar manufactory." Webster. Dict., "Sugarhouse."

"Sugar Refining. * * * At present it is an important branch of manufacture in most of the principal commercial cities of the United States and Europe." 15 Am. Enc. p. 446. "The manufacture of loaf sugar is chiefly carried on in London; of crystals, in Bristol and Manchester; of crushed sugar, in Liverpool, Greenock, and Glasgow." 3 Ure, Dict. Arts, Manufactures & Mines, p. 943.

"Manufacture of Crystals. The use of centrifugal action for the separation of liquids and solids has been adopted in the arts for many years." * * * Id. p. 948.

"Crushed Sugar. This process closely resembles the manufacture of loaf sugar, but the raw sugar used is generally of an inferior quality." Id. p. 948.

"Manufactures of United Kingdom Exported. Refined sugar and candy, 1,119,542 cwt." Id. (Supp.) p. 847.

"The refining of sugar is the leading manufacture in the city of New York. No other employs so much capital or yields so large a product." * * * 3 Bish. Hist. Am. Mfrs. (1868) p. 150; 2 Bish. Hist. Am. Mfrs. p. 593. "Refined sugar and chocolate were among the extensive and prosperous domestic manufactures." 2 Bish. Hist. Am. Mfrs. p. 41.

"Annals of Manufactures. * * * The quantity of refined sugars sent out of the refineries during the year [1800] was 3,349,896 pounds, and the gross amount of duties thereon was \$86,998." Id. p. 83. "The manufacture of refined sugar in the Eastern and Middle states kept pace with the increase of population." * * * (As to year 1816.) Id. p. 220.

"Kentucky Factories. A large sugar refinery was put in operation in May [1813] at Louisville, Ky." Id. p. 247.

Sugar refining is classified as one of the manufactures of New York and Brooklyn. Id. p. 585.

"Looking at the manufacture of sugar in a broad way, it may be said to divide itself first into the production of crude sugar from the cane and from beet, the materials alone employed upon the largest scale, and treated by methods careful and economical enough to deserve consideration as scientific industries, while these methods necessarily differ with the different character of the two materials. Then, as a large proportion of the crude sugar so obtained is, in other hands, and often in other countries, carried through an elaborate process of purification, sugar refining becomes a distinct branch of the manufacture, as in a comparatively simple way it has been from time immemorial, in India, practiced there by one caste receiving the supply of 'goor,' or crude, moist sugar, from another." U. S. International Exhibition 1876, vol. 4, "Reports and Awards," pp. 18, 19 (Report of Dr. J. W. Mallet). "Refined manufactured from raw sugar." "Statistics," Id. p. 82. "The sugar so made [i. e., loaf sugar] is almost absolutely pure. As a rule, there is not more than 0.1 to 0.3 per cent. of impurity (including moisture) in it; and, whether the raw sugar used in its manufacture be 'beet' or 'cane,' it is equally pure." British Manufacturing Industries (Bevan, 1876) p. 128. The factory returns of Great Britain and Ireland classify sugar refineries as factories. Id., "Industrial Classes and Industrial Statistics," p. 196.

Lock & Newlands, in their elaborate treatise, "Sugar, a Handbook for Planters and Refiners" (London, 1888), at pages 611 and 654, designate sugar refining as a manufacture.

"The immediate product of the first boiling of the cane juice is known as 'gurrh' or 'rab,' according as the sugar is boiled down to a hard mass, or allowed to remain in a semiliquid condition. Both gurrh and rab contain some uncrystallized sirup. Gurrh, as a

rule, is intended for home consumption, and is comparatively seldom used in the manufacture of refined sugar." (Sketch of early refining in India.) 7 Johnson, Universal Cyc. p. 207.

"Manufacture of Refined Sugar." (Title of article describing process of refining raw sugars). 2 Tomlinson, Cyc. Useful Arts & Mfrs. p. 785.

"The improvements introduced into the processes of sugar refining allow loaf sugar to be now sold at a price so little exceeding that of raw sugar that the manufacture has lately vastly increased." Knight, Cyc. Industry, p. 1628.

"A considerable quantity of the imports [i. e., of raw sugar] is converted into refined sugar, a manufacture which forms an important branch of industry in Britain." * * * Waterson, Cyc. Commerce, p. 639.

"Ninety establishments are especially engaged in refining the first product extracted from beet root, or from the sugar cane. About 180,000 tons of raw sugar are received annually from the colonies, French and foreign, by these refining establishments, which employ 3,400 workers. The yearly value of the manufacture amounts to 140 millions of francs." 9 Enc. Brit., "France," (9th Ed.) p. 521.

"The manufactures of Egypt have been in a declining state for several centuries. Mehemet Ali tried to promote them by establishing large manufactures of cotton, silk, and woolen goods, tarbooses, etc., and, especially in Upper Egypt, sugar refineries." 7 Enc. Brit. p. 786.

"But to return to the subject of sugar refining. In commencing the study of this manufacturing operation, it will be useful to consider the theoretical indications to be followed out." Debow, Review (Reprint, 1856), "The Southern States—Sugar," p. 239. "Instead of the deep charcoal cistern, some manufacturers employ shallow tanks of iron or lead." Id. p. 241. "If, instead of loaves, the manufacturer desired to obtain the material known as 'crushed lump,' the contents of the molds would never be stoved at all." * * * Id. p. 246. "There is a considerable affection prevalent among refiners of considering their manufacture absolutely perfect." Id. p. 247.

"The largest single manufacturing industry in New Orleans is that of sugar refining. * * * The American Sugar Refining Company's plant in New Orleans is one of the largest manufacturing establishments in the country, and the third sugar refinery in size." Rightor, Hist. New Orleans, p. 528.

The Eleventh Census of the United States (1890) classifies sugar and molasses refining under the title, "Manufacturing Industries," part 1, p. 108, and elsewhere. In the same (Eleventh Census, 1890), part 11 of Manufacturing Industries, p. xxxvi, "Sugar and Molasses Refining" is classified as the principal manufacturing industry, by gross value of

product, in the several cities of Philadelphia, Brooklyn, San Francisco, and New Orleans.

"Refining. The process of purifying copper, gold, tin, lead, and some other metals. It is the last operation connected with smelting. The term is also applied to the purification, on a manufacturing scale, of niter, common salt, sugar, and other bodies." The American Educator (Phila. 1897) "Refining." To same effect is 2 Zell, Enc. & Dict., "Refining."

"Proportional impositions on foreign refined sugar, and proper drawbacks on exportation, ought, of course, to indemnify the manufacturers of this article among ourselves." Alexander Hamilton's Works, vol. 3, p. 51. "Of these [i. e., manufacturing establishments], it may not be improper to enumerate the most considerable: (1) * * * (9) Refined sugars. * * * Besides manufactories of these articles, which are carried on as regular trades, and have attained to a considerable degree of maturity, there is a vast scene of household manufacturing." Id. p. 233. "Refined sugars and chocolate are among the number of extensive and prosperous domestic manufactures. Drawbacks of the duties upon the materials of which they are respectively made, in cases of exportation, would have a beneficial influence upon the manufacture." Id. p. 280.

"Leading Classes of Manufactures. * * * The more important classes here, as in Europe, are textile fabrics of wool, cotton, and silk; iron and steel, and manufactures of iron and steel; clothing and articles worn; * * * sugar refined, confectionery, etc." 29 Am. Supp. Enc. Brit. (9th Ed.) p. 309, "Manufactures." "For the fiscal year ending June 30, 1885, the value of manufactures exported was \$243,838,731, the leading items being as follows: Agricultural implements, \$2,561,602; * * * sugar refined, \$16,071,767." * * * Id. pp. 311, 312. "Brooklyn has more manufacturing establishments than any other city in the United States, except New York and Philadelphia. * * * The great increase of sugar and petroleum refining, ropes and cordage, hats, etc., etc., since 1880, makes the total product in 1883 over \$250,000,000." 26 Am. Supp. Enc. Brit. (9th Ed.) p. 749. "The chief manufactures are cotton seed oil, production, \$3,739,000; lumber, \$1,767,000; rice cleaning, \$1,573,281; foundry and machine shops, \$1,554,485; and sugar refining, \$1,483,000." 29 Am. Supp. Enc. Brit. (9th Ed.) p. 274, "Louisiana." "A very large amount of manufacturing is carried on in Boston. * * * The leading manufactures in the list were the following: Boots and shoes, * * * sugar refining." 26 Am. Supp. Enc. Brit. (9th Ed.) p. 609, "Boston."

"Refined Sugar. * * * The art of refining has been carried to greater perfection in this country than in Europe, and so manifestly that no imported article can equal the fine granulated sugars of the domestic manufacturer. The business has spread with the de-

mand for the improved sugars. The increase of the manufacture has also been aided by the federal government, which allows a drawback upon refined sugar exported equal to the duty on the equivalent raw sugar imported. * * * Some years since, the bounty or drawback upon refined sugar amounted to more than the duty on the raw article, and was therefore equivalent to an additional bounty on the manufacture." One Hundred Years' Progress of the United States, p. 392.

"Chemical Manufactures. Those arts which involve the question of chemical affinities, and consequently a change in the constitution of their subject-matter, may be distributed into three groups, according to the kingdom of nature to which they belong,—the mineral, the vegetable, and the animal. * * * Class 11. The chemical manufactures of vegetable substances. Order 1. The art of extracting and refining sugar." Ure's Philosophy of Manufactures, pp. 63, 65.

"Among the earlier firms engaged in the sugar-refining industry, the more prominent were those of R. L. & A. Stuart and the Havemeyers. * * * The house of Havemeyer was founded in New York in 1805 by A. & D. Havemeyer, in a little building in Vandam street, twenty-five by forty feet; four or five employes, with the proprietors, being sufficient to manufacture and deliver the product." One Hundred Years of American Commerce ("American Sugar") pp. 259, 260. "Not less than 800,000 tons of coal are annually consumed in the manufacture of refined sugar." Id. p. 260.

"Drawback or Bounty on the Exportation of Refined Sugar. * * * It was long suspected, and the fact seems to have been sufficiently established, that the drawback formerly allowed on the exportation of refined sugar was greater than the duty charged on the raw sugar used in its manufacture." McCulloh, Commercial Dict., "Sugar," p. 1347 (London, 1882).

In discussing the export drawback on articles manufactured from imported materials, Senator Thomas H. Benton said: "The particular application of this clause, as explained and enforced at the time, was to sugar and molasses, and the refined sugars and the rum manufactured from them. As the laws then stood, and according to the principle of all drawbacks, the exporters of these refined sugars and rum were allowed to draw back from the treasury precisely as much money as had been paid into the treasury on the importation of the article out of which the exported article was manufactured. This was the principle, and this was the law; and so rigidly was this insisted upon by the manufacturing and exporting interest, that only four years before the compromise act, namely, in 1829, the drawback on refined sugars was raised from four to five cents a pound." * * * 2 Benton, Thirty Years' View, pp. 190, 191. "These are facts to pause at and

think upon. They imply that the sugar refiners manufactured more sugar than was imported into the United States for each of these three years,—that they not only manufactured, but exported, in a refined state, more than was imported into the United States. * * * Id. p. 191. "The consumers of brown sugar will suffer in the same manner; for the manufacturers will monopolize it and refine it, and have their five cents drawback, either at home or abroad. Add to all this, it will be well if enterprising dealers shall not impose domestic sugars upon the manufacturers, and thus convert the home crop into an article entitled to drawback. Such are the mischiefs of the act of 1833 in relation to this article. They are great already, and still greater are yet to come. As early as 1837 the whole amount of the sugar revenue, and \$861.71 besides, was delivered over to some twenty-odd manufacturers of refined sugars." Id. p. 192.

Authority--Legislative and Judicial.

Legislative and judicial interpretation bear out the conclusion that sugar refining is a manufacture. In *Coxe v. Pennington*, 1 Wash. C. C. 65, Fed. Cas. No. 3,311, Washington, Circuit Justice, said: "The question, then, is whether, upon refined sugars, not sent out of the house where they were manufactured, on or before the 3d of June, the duties had accrued and then remained outstanding? * * * The sugar refiner is to report his house and the implements employed in his manufactory." In the same case, on writ of error: "Sugar refined, but not sold and sent out of the manufactory, before the 1st of July, 1802, is not liable to any duty upon being sent out after that day." *Pennington v. Coxe*, 2 Cranch, 33, 2 L. Ed. 199. This was a feigned issue between Tench Coxe, a citizen of the state of Pennsylvania, and Edward Pennington, a citizen of the state of New York, to try the question whether sugar actually refined, but not sold and sent out of the manufactory, before the 1st of July, 1802, is liable to any duty to the United States upon being sent out after that day. Id. This case involved consideration of the effect of the act of congress of April 6, 1802, repealing the internal revenue duty on refined sugar imposed by act of June 5, 1794. Chief Justice Marshall delivered the opinion of the court, saying in part: "* * * The fifth section [i. e., of the act of June 5, 1794], after making several regulations requiring the refiner of sugar to report the building and utensils to be employed in the manufacture, * * * proceeds to enact that he shall," etc. Id., page 51, 2 Cranch, 2 L. Ed. 199. And again: "The object of the act imposing the duty being revenue, and not to discourage manufactures, it is reasonable to suppose that the attention of the legislature would be devoted to the article in that state in which it was designed to be productive of revenue." Id., page 54, 2

Cranch, 2 L. Ed. 199. Again: "If A. becomes the debtor by the mere act of refining, then he remains the debtor until he shall be legally discharged. Suppose him to part with his manufactory and his capital stock, there being at the time of transfer a quantity of refined sugars in the building, which pass with it to the purchaser." Id., page 54, 2 Cranch, 2 L. Ed. 199. Again: "With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed on expense, and never on labor." Id., page 62, 2 Cranch, 2 L. Ed. 199. Again: "The refiner who is in a different place, the retailer of sugars, must be considered as selling them from the manufactory when he sends them out of it to his retail store." Id., page 63, 2 Cranch, 2 L. Ed. 199.

Act June 5, 1794 (1 Stat. 384 et seq.):

"An act laying certain duties upon snuff and refined sugar:

"Sec. 7. And be it further enacted that every refiner of sugar shall make oath * * * that the accounts, which have been by him or her rendered, or the quantities of refined sugar by him or her sent out of the house or building, where the same shall have been manufactured, or procured, or cause so to be sent out, have been just and true."

"Sec. 10. And be it further enacted that all snuff and refined sugar which shall have been manufactured or made within the United States in manner aforesaid shall," etc. (be seized if tax not paid).

"Sec. 14. And be it further enacted that from and after the 30th day of September next, no drawback of the duties upon any manufactured tobacco or snuff or refined sugar, which shall have been imported into the United States * * * shall be allowed. * * *"

"Sec. 20. And be it further enacted that it shall be lawful to export, directly from any manufactory of snuff or of refined sugar, to any foreign port or place, any snuff or refined sugar which shall have been manufactured at such manufactory, after the 30th day of September next, free from duty." * * *

Act July 24, 1813 (3 Stat. 35):

"An act laying duties on sugar refined within the United States."

"Sec. 3." (Same as section 7 of act of June 5, 1794, above quoted.)

"Sec. 6. And be it further enacted that all refined sugar which shall have been manufactured or made within the United States," etc. (shall be seized under certain conditions).

Act Aug. 30, 1842 (5 Stat. 563):

"Sec. 14. And be it further enacted that on and after the day this law goes into effect there shall be allowed a drawback on foreign sugar refined in the United States, and ex-

imported therefrom, equal in amount to the duty paid on foreign sugar from which it shall be manufactured, to be ascertained," etc. (under regulations to be prescribed).

Act March 3, 1863 (12 Stat. 716):

"Sugar refiners shall pay one and one-half of one per cent. on the gross amount of the sales of all the products of their manufacturingories. * * *

Referring to the proviso of St. March 3, 1875, c. 127, § 3 (18 Stat. 339), which amends section 3019, Rev. St. U. S., Gould and Tucker, in their Notes on the Revised Statutes, say (volume 1, p. 636): "The proviso applies to all refined sugars manufactured from imported sugars, notwithstanding the other provisions of the chapter in which it is found."

14 Op. Attys. Gen. 578: "Drawback on Refined Sugars. Thus construed, that proviso unquestionably applies to all refined sugars manufactured from imported sugars, irrespective of the other provisions contained in said act of March 3, 1875." This opinion was in answer to the following from the secretary of the treasury: "Does the increase in the amount to be retained from the drawback allowance on refined sugars, enacted by section 3 of the act of March 3, 1875, apply to all exportations of refined sugars manufactured from imported sugars, when such exportations are made subsequently to the passage of the act, or only to exportations of refined sugars manufactured from crude sugars paying the increased rate of duty prescribed by the act itself?" Id. The attorney general reached the conclusion that the proviso applied to all refined sugars exported, saying in conclusion: "It [i.e., the proviso] is an amendment of section 3019 of the Revised Statutes, and must be construed in connection with that section, and not in connection with the act of March 3, 1875; and, so construed, it operates as an exception or proviso in the former statute, and the two, in effect, enact that ten per centum on the amount of all drawbacks allowed by the statute shall be retained for the use of the United States, provided that of the drawback on refined sugars only one per centum of the amount so allowed shall be retained. So construed, there can be no question that the provision applies to all refined sugars manufactured from imported sugars, without reference to the act of 1875." Id. p. 580. The interpretation of the United States treasury department is also pertinent: "To Collectors and Other Officers of the Customs: The department being advised that manufacturers of condensed milk, confectionery, and other articles made wholly or in part from sugar, have on hand considerable quantities of refined sugar manufactured before March 1, 1891, from duty-paid raw sugar, which was purchased by them with the intention of being used in the manufacture of such articles for exportation with benefit of drawback, circular No. 69 of May 7, 1891, discontinuing allowances of drawback on sugar used in the

manufacture of such articles, is hereby rescinded. * * * U. S. Treasury Decision No. 11,170, vol. 1 (1891) p. 553. "When imported raw cane and beet sugars are blended or mixed in the process of manufacturing refined sugars and sirups, the manufacturer's declaration must show separately the respective quantities of the different kinds and grades of the sugars so mixed. * * * For a fraction of a degree of test of the raw sugar used in the manufacture of either refined sugar or sirup, the allowance of quantity of material shall be fixed by a proportionate division of the difference between the schedule allowances for the degrees next above and below such fraction." U. S. Treasury Decision No. 17,325 (1896) p. 608. "For fractional tests of the raw cane sugar used in the manufacture of either refined sugar or sirup, the allowances of quantity of material shall be computed in proportion to the schedule allowance for the degrees used above or below such fractional test." U. S. Treasury Decision No. 10,738 (1896) pp. 64-66. "Sugars and sirups, refined, made wholly from imported raw sugars; base allowance on quantities of material used in the manufacture of each, respectively, as indicated in the following schedules and specifications." Id. p. 660. " * * * When imported raw cane and beet sugars are blended or mixed in the process of manufacturing refined sugars and sirups, the manufacturer's declaration must show," etc. Id. p. 663; U. S. Treasury Decision No. 17,355 (1896) pp. 660, 663.

Peculiarly pertinent is the following decision of the board of United States general appraisers, holding that raw sugar loses its identity in the process of refining, and that the refined sugar is the product of the country in which the refining is done, and not of the country where the sugar was made. This decision makes it plain that the refined sugar, being a new product, is necessarily a product manufactured from the raw materials used. "Protest 15,415,18a, from New York, covers sugar refined in Great Britain. The sugar is of a high grade, and it is impossible to determine, by laboratory or other tests, whether its original source was cane or beets. The board is of the opinion that the identity of raw sugar is destroyed in the process of refining, and that the resulting product is the product of the country in which the refining is done, and not of the country from which the raw sugar was obtained. We find that the sugar in question is the product of Great Britain, and, as that country pays no bounties on the exportation of sugar, the protests are sustained." U. S. General Appraisers' Decision No. 1,884, reported in Treasury Decisions, vol. 11 (1892) pp. 1326, 1327.

In *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, 5 L. R. A. 386, it is said: "A manufacturing corporation which, with other corporations and individuals, enters into and gives control of

the business to a trust association. * * * will be dissolved." 54 Hun, 354. "In an action brought by the state to vacate the charter of a manufacturing corporation organized under the general manufacturing act (chapter 40 of the Laws of 1848), it appeared that the corporation, while engaged in the business of refining and selling sugar, sirups, and molasses, entered into a combination with certain other corporations and individuals engaged in the like manufacture. * * * " Id. "The judgment from which this appeal has been brought dissolved the defendant as a corporation previously formed and existing under the laws of this state. It was organized under chapter 40 of the Laws of 1848 as a manufacturing corporation, and its business was generally that of refining and selling sugar, sirup, and molasses. It was incorporated for this object in February, 1865, and continued to carry on the business until the close of the year 1887. Before that time, but in that year, a plan was formed and adopted for the formation of what was called the Sugar Refineries Company, to go into effect on the 1st of October, 1887. Its general object was to bring together the parties and corporations engaged in the manufacture, refining, and sale of sugar. * * * " Pages 356, 357, 54 Hun, and page 406, 7 N. Y. Supp., and 5 L. R. A. 386. The court uses the term "manufacturers" in reference to the above business (Id., page 384, 54 Hun, and page 414, 7 N. Y. Supp., 5 L. R. A. 386), and the expressions "manufacture of refined sugar" (Id., page 385, 54 Hun, and page 414, 7 N. Y. Supp., 5 L. R. A. 386), and usefulness as a "manufacturing competitor" (Id., page 385, 54 Hun, and page 414, 7 N. Y. Supp., 5 L. R. A. 386), and further says: "Instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, it had become a party to a combination in part, at least, designed to create a monopoly, and exact from the public prices which could not otherwise be obtained." Id., page 386, 54 Hun, and page 415, 7 N. Y. Supp., 5 L. R. A. 386.

In U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, we find: "The American Sugar Refining Company, a corporation existing under the laws of the state of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business. Held, that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the provisions of the act of July 2, 1890." Chief Justice Fuller delivered the opinion of the court, and from the opinion we extract the following: "By the purchase of the stock of the four Philadelphia refineries with shares of its own

stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States." Id., page 9, 156 U. S., and page 252, 15 Sup. Ct., 39 L. Ed. 325. "The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established, the monopoly can be directly suppressed under the act of congress in the mode attempted by this bill." Id., page 11, 156 U. S., and page 253, 15 Sup. Ct., 39 L. Ed. 325. "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life. * * * " Id., page 12, 156 U. S., and page 253, 15 Sup. Ct., 39 L. Ed. 325. "The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce." Id., page 17, 156 U. S., and page 255, 15 Sup. Ct., 39 L. Ed. 325. And in numerous other places the Chief Justice refers to the business as being a manufacturing business. Mr. Justice Harlan dissented in the E. C. Knight Co. Case, and, in the course of his dissent, said: "In its consideration of the important constitutional question presented, this court assumes on the record before us that the result of the transaction disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life." Id., page 18, 156 U. S., and page 256, 15 Sup. Ct., 39 L. Ed. 325. "It has been argued that the combination between corporations of different states, or between the stockholders of such corporation, with the object and effect of controlling not simply the manufacture, but the price, of refined sugar through the whole of the United States,—which is the case now before us,—cannot be held to be in restraint of 'commerce among the states,' and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be manufactured in the several states." Id., page 33, 156 U. S., and page 262, 15 Sup. Ct., 39 L. Ed. 325. In other portions of his dissent, Justice Harlan repeatedly uses the word "manufacture" in reference to the business under consideration. It is unnecessary to quote at length. The quotations above amply show that the court accepted without question the conclusion that the business was a manufacturing business, and it is to be observed that the case actually hinged upon the fact that sugar refining was a manufacturing business. In subsequent judicial references to the above decision in U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 326, 17 Sup. Ct. 540, 41 L. Ed. 1007, U. S. v. Addyston Pipe & Steel Co. (C. C.) 78 Fed. 712, 721, Id., 29 C. C. A. 141, 85 Fed. 271, 296, 297, 54 U. S. App. 723, 46 L. R. A. 122, and in Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 238-240, 20 Sup. Ct. 96, 44 L. Ed. 136, repeated use has been made of the words "manufacturer" and "manufacture"

in reference to the sugar refiner and his product. Like use of the expression is made by Prof. E. W. Huffcut in his recent article, "Federal Control of Corporations": "As was held in the *E. C. Knight Co. Case*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the anti-trust law does not extend to a corporation for the manufacture of sugar, because manufacture is not trade or commerce. Congress, therefore, could not suppress a monopoly for the manufacture of sugar, because manufacture is not trade or commerce." 34 Am. Law Rev. 191.

The report of a recent lecture in this city by Dr. von Halle, the distinguished German political economist, states that the eminent lecturer said, regarding the present cost of refined sugar, that the refiner "paid far lower prices than formerly for raw sugar out of which is manufactured the refined product." N. O. Times-Democrat, Feb. 13, 1901.

Mr. William J. Bryan in his recent so-called "Anti-Trust Letter," published in the daily press, in criticism of the late president, says: "He does not refer to the Sugar Trust Case, which nullified the law of 1890 so far as manufacturing monopolies are concerned. In that case the court drew a distinction between a monopoly in manufacture and a monopoly in interstate commerce, and held that the law did not prohibit a monopoly in manufacture. * * * The language used by the court in condemnation of federal interference with manufacturing conducted within a state is so strong that Justice Harlan assumes that the court would hold unconstitutional any amendment of the present law aimed at monopoly in manufacture." N. O. Times-Democrat, Jan. 11, 1900. Referring to the same case (U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325), Mr. Alfred Russell says: "The latest monopoly which has been sustained is that of the sugar trust, where the court held that the law of congress commonly called the 'Sherman Anti-Trust Act,' and entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' does not forbid a combination formed between manufacturing companies for buying up shares of all competing companies, nor, by controlling the output of the commodity which these corporations manufacture, to control the market as to that commodity throughout the Union. The court said that the matter of manufacture was subject only to the police power of the state. The dissenting opinion of Mr. Justice Harlan declared that the trust was a conspiracy against interstate commerce throughout the Union, and that the control of local manufacturing was simply a means to an end." Russell, *Police Powers of State*, pp. 179, 180. So, also, the refining of sugar is referred to as a manufacture by Prof. Tiedeman in his *State and Federal Control of Persons and Property*, vol. 11, pp. 1063, 1064.

Mr. Justice Peckham used the following

expression in the *Addyston Pipe Case*: "Such enterprises may be of the same nature as the manufacturing of refined sugar; that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell. * * * *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 248, 247, 20 Sup. Ct. 96, 109, 44 L. Ed. 136. In commenting upon the same case (U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325), Mr. Eddy, in his recent work on *Combinations*, says: "The supreme court of the United States has had occasion to pass directly upon the anti-trust act: (1) In a case involving a corporate combination of manufacturers, the object of which was to control the manufacture of sugar." Eddy, *Combinations*, p. 915, § 816. "Corporate Combinations of Manufacturers—Sugar Refineries. It is not contrary to the provisions of the act for a corporation engaged in the manufacture and sale of a staple article to purchase the plants of competitors situated and doing business in different states, with the object of controlling the manufacture and the sale of the particular commodity. * * * In order to secure complete control of the price of sugar in the United States, the American Sugar Refining Company entered into negotiations whereby it secured the control of the capital stock of the four corporations named, thereby securing a monopoly in the manufacture and sale of refined sugars." Id. p. 918, § 818.

So, again, in the *American Law Review*: "On the other hand, in the *Sugar Trust Case* the court, one judge dissenting, refused to extend the so-called 'Federal Anti-Trust Law' to a combination of corporations whose plants were situated in different states, engaged in refining sugar for sale, which combination had the effect of creating an almost absolute monopoly of interstate commerce in that commodity, which effect was the very object of the combination, the court stumbling upon the proposition that they were engaged primarily in manufacturing, and only incidentally in selling." 34 Am. Law Rev. 929.

In reporting the recent decision of the United States supreme court in *American Sugar Refining Co. v. Louisiana*, the editor of the *Lawyers' Co-operative Edition*, while erroneously stating the point decided, gives a good illustration of how the ordinary mind chooses the word "manufacturer" to denote a sugar refiner. He says: "A manufacturer engaged in the business of refining sugar is not denied the equal protection of the laws because of the discrimination made by Const. La. 1879, art. 206, imposing a license tax upon manufacturers engaged in such business, but exempting from the tax those who refine the products of their own plantations." *American Sugar Refining Co. v. Louisiana*, 21 Sup. Ct. 43, 45 L. Ed. 102. "On writ of error to the supreme court of Louisiana to review a decision sustaining the constitution-

ality of a license tax on manufacturers engaged in the business of refining sugar." Id. And referring to the same decision, the Central Law Journal of January 11, 1901 (volume 52, No. 2, p. 24), says: "In American Sugar Refining Co. v. Louisiana, 21 Sup. Ct. 43, 45 L. Ed. 102, it was held that a manufacturer engaged in the business of refining sugar is not denied the equal protection of the laws because of a discrimination made by the Louisiana constitution of 1879 (article 206), imposing a license tax upon the manufacturers engaged in such business, and exempting from the tax those who refine the products of their own plantations." In Union Sugar Refinery v. Matthiesson, 3 Cliff. 639, Fed. Cas. No. 14,399, the question was as to the infringement of a certain patent relating to the cleansing and purifying of sugar in the process of refining. Mr. Justice Clifford, in charging the jury, twice used the word "manufacture" to denote the process of refining sugar. 24 Fed. Cas. 693, 696.

Lastly, the Civil Code of Louisiana (article 468): "* * * The utensils necessary for working cotton and saw-mills, taffia distilleries, sugar refineries and other manufactures."

It would draw out this opinion to a most unconscionable length, and be exceedingly laborious, and would really serve no useful purpose, to point out specially the application of the foregoing references to the facts of this case. With a view to avoiding that necessity, our plan has been to bring forward the citations in such way that their application to the facts of the case might readily suggest itself as we went along. The conclusion from them is irresistible, we think, that sugar refining on a commercial scale is manufacturing. Courts and writers seem to have had no hesitancy at all in applying the word "manufacture" to sugar refining. In fact, they seem to have been unable to express themselves on the subject of sugar refining without making use of the word "manufacture." It is such use that fixes the popular meaning of a word, and the word, as used in the constitution, has to be construed according to its popular meaning. This court has so said on several occasions, and Civ. Code, art. 14, is express to the effect that "the words of a law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular meaning of the words." If it be contended that the cases and statutes cited, although they use the terms "manufacture," "manufactured," "manufacturer," and "factory" in reference to the process, product, producer, and establishment, respectively, are not of authoritative force, because the question of manufacture vel non was not presented, it may be answered that they assumed the conclusion as one which could not

be controverted. In the case of State v. A. W. Wilbert's Sons Lumber & Shingle Co., 51 La. Ann. 1223, 26 South. 106, in support of the conclusion that a sawmill is a manufactory, the court said: "But it is worthy of notice that in Improvement Co. v. Browne, supra (45 La. Ann. 459, 12 South. 485), saw-mills and planing mills were mentioned specifically as 'manufactories.'" In its opinion in the former case, the court said that defendant "is not a manufacturer in the sense of article 206 of the constitution of 1879." Necessarily the court held defendant not to be a manufacturer in any sense. For if a manufacturer in any sense, defendant is exempt from license tax, as there is no room for limiting or restricting the language of the constitution, nor was there in the opinion rendered any purpose to do so. The constitution exempts all manufacturers except those specially excepted. As said in A. W. Wilbert's Sons Lumber & Shingle Co.'s Case, 51 La. Ann. 1223, 1231, 26 South. 106, 109: "Under the former [article 229 of the constitution of 1898], all manufacturers, eo nomine, and all persons engaged in mechanical pursuits, are exempted from license taxation, other than those excepted." And in Weckerling's Case, 38 La. Ann. 37: "We have heretofore held that the constitution clearly exempts from license tax all manufacturers not excepted." Also in Washburn's Case, 43 La. Ann. 226, 9 South. 37: "It will be observed that all manufacturers are, in terms, excepted, unless they are included within the express reservation of that article [206]." So in the Ernst Case, 35 La. Ann. 746, 747: "The constitution clearly exempts all manufacturers not excepted. The excepted ones are those who manufacture alcoholic or malt liquors, tobacco and cigars, and cotton seed oil. As the defendants do not come within the exclusion, it is manifest that the license claimed cannot be recovered."

While courts are not generally concerned with the policy or impolicy of laws, but only with their legality, construction, and enforcement, yet the motive which prompted the lawmaker is properly to be considered by courts in construing a particular law. It is well known that prior to 1879 industrial pursuits had so languished in this state that the wage earners were threatened almost with starvation. It was recognized that the prosperity of a community lies in its power to produce. The constitution of 1879 (article 207), in furtherance of this principle, wholly exempted from property and license taxation certain specified manufacturing industries, and (article 206) wholly exempted from license taxation all manufacturers other than a limited few which it was not the policy of the state to foster. The industry of sugar refining, requiring, as it does, the employment of much labor, skilled and unskilled, the purchase of fuel and supplies, the importation from abroad of raw material for economical operation, many changes of

form in the process and the production of a new article of commerce, comes directly within the motive and purpose of the exemption. The industry seems to have been always and constantly classified as a manufacturing industry, and the definitions of the word "manufacturer" are amply broad to include this particular industry. It surely fits the raw material for the uses of man in civilized life, and in doing so uses elaborate machinery and chemical processes, involving numerous changes of form in the material worked upon. It is worthy of note that high authority has held the refined sugar to be a new product,—a product of the country where the refining is done, and not of the country where the raw material is produced. The same authority holds that the raw sugar, in undergoing the process of refining, completely loses its original identity. This is true as well of the highest grades of raw sugar as of the lowest. No refining, we again repeat, is possible, except by reducing to a liquid form, purifying in that form, and recrystallizing into sugar. The result can be accomplished by no other method. We cannot escape the conclusion that the purification of the raw beet sugars,—disagreeable to taste, foul of smell, repulsive in appearance, as they are, and used for no purpose in the crude state,—in the manner disclosed by this record, necessarily constitutes a manufacturing process. No element of manufacture is lacking. What was not fit for use is rendered fit for use by an elaborate, diversified method of treatment, and an entirely new article is produced; and what is true of these sugars is also true of all those that go through the same process. Our conclusion is that defendant is a manufacturer, and is exempt from license taxation.

Protracted and laborious the task of the consideration of this case has been, but not so arid as might appear, thanks to the masterly presentation of the case on both sides, both in the oral arguments and in the briefs. Counsel are the helpers of the court, and their assistance is but the performance of a duty; still, when their work has been so liberally done, a word of appreciation and of acknowledgment may not be unfitting or unwelcome from the court.

It is ordered, adjudged, and decreed that the judgment of the lower court be set aside, and that this suit be dismissed.

(108 La.)

TEBAULT v. CITY OF NEW ORLEANS.
(No. 13,930.)

(Supreme Court of Louisiana. April 14, 1902.)

TAX—VALIDITY—ASSESSMENT—APPEAL—
JURISDICTION.

1. An assessment concerns the means employed to enforce the payment of legal and constitutional taxes, but the fact that the assessment is illegal, or that there is no assessment, does not affect the legality or constitutionality

of the tax. Hence, where the assessment alone is attacked, and the amount in dispute is less than that required to give jurisdiction to this court, the appeal will be dismissed.

On Rehearing.

2. This court has heretofore held that an attack on the assessment of property for taxation is not equivalent to an attack upon the tax based on the assessment.

3. An assessment may be irregular, and yet the tax legal.

4. Where the tax is illegal because of the absolute want of power of the tax department to impose a tax at all, the attack upon the tax may be combined with a tax upon the assessment; but, where the attack is made upon the assessment only, it will not suffice as relates to the jurisdiction on appeal. It does not appear in the attack upon the assessment, that the attack is also especially directed against the tax itself.

5. The jurisdiction on appeal is limited to cases in which the constitutionality or illegality "of any tax is at issue, whatever may be the amount," and it is not to be inferred that an attack upon the assessment carries with it an attack upon the tax.

6. There is at least doubt as to the extent of the attack, which resolves itself against the appeal in a case requiring that it shall be made to appear that the attack is directed against the tax. The doubt was fatal to the appeal.

Blanchard, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by W. G. Tebault against the city of New Orleans. Judgment for plaintiff, and defendant appeals. Dismissed.

Henry Garland Dupré, Asst. City Atty., for appellant. William J. Waguespack, for appellee.

MONROE, J. Plaintiff enjoined the city of New Orleans from selling certain real estate belonging to him for its tax of 1896 on the grounds that before he purchased the property the tax had been canceled by judicial decree, and he acquired it free from all taxes; that the property was sold in the succession of Fasnacht for over \$7,000, and that the city appeared by way of opposition and obtained judgment for the amount of said tax, being \$120, with interest, and recognizing the same as entitled to first privilege on the said proceeds, and that no appeal was taken from said judgment; "that the assessment under which this pretended claim is made is illegal, null, and void, and contrary to the constitution of the state of Louisiana; that there is no law that authorizes such an assessment, and that, if such there be, the same is contrary to the constitution of the state of Louisiana; that said assessment is illegal, null, and void, in this: that it is not made in the name of the owner of the property, that the proper legal notices were not served upon petitioner, nor any notice served, as directed by law, that the description in said assessment upon the assessment rolls and the description in the said advertisement for sale are insufficient,

and not such as are required by law." The city, after a general denial, especially denies the illegality of the assessment, and further denies that the plaintiff has complied with the law regulating suits concerning reassessments. The attack upon the assessment concerns the means employed to enforce the payment of what, for aught that is alleged, is a perfectly legal and constitutional tax. An assessment may be illegal for a variety of reasons, or there may be no assessment at all, but in neither case is the validity or constitutionality of the tax involved. "From the fact that an assessment is erroneous, and that a sale of the property assessed is a nullity for such error, it does not follow that the tax to pay which the sale was made is in itself illegal. An issue on those questions does not involve the legality of the tax. A circuit court has jurisdiction over such a cause, which does not come within that of this court where the matter in dispute does not exceed \$2,000." *State v. Judges of Court of Appeals*, 37 La. Ann. 898 (Syl.). See, also, *Favrot v. City of Baton Rouge*, 38 La. Ann. 230; *Minor v. Budd*, Id. 99; *City v. Schoenhausen*, 39 La. Ann. 237; *Bush & Levert v. Police Jury*, Id. 899; *State v. Fourcade*, 45 La. Ann. 723, 13 South. 187, 40 Am. St. Rep. 249; *Gillis v. Clayton*, 33 La. Ann. 285; *Kock v. Triche*, 52 La. Ann. 833, 27 South. 354.

The amount involved being less than that required to give jurisdiction to this court, and no issue involving the constitutionality or legality of a tax being presented by the pleadings, the appeal is dismissed.

On Rehearing.

(Nov. 17, 1902.)

BREAUX, J. The question of jurisdiction is before us for consideration and decision. Counsel for the city invite our attention to the first allegation in plaintiff's petition for an injunction, which reads as follows, viz.: "The treasurer of the city of New Orleans has advertised for sale his property to satisfy a pretended and illegal claim for taxes for the year 1896." His contention is that the allegation of itself is sufficient to vest this court with jurisdiction, under article 85 of the constitution of the state. This would be unanswerable if plaintiff's attack and injunction had been directed against the illegality of the tax. But we think, on the contrary, that the matter of the illegality of the tax plays an unimportant part in the suit. We note that all of the other allegations (save the one above referred to) in plaintiff's petition are directed against the illegality of the assessment. We read the averments of the petition, taken as a whole, as leading to the conclusion that (from plaintiff's point of view) the tax is illegal because of the illegality of the assessment, and on no other ground. Defendant's answer, on the other hand, leads to the conclusion that

reassessment of the property is the only question involved. Moreover, after eliminating all questions regarding the reassessment, there remains no issue relating to the illegality of the tax, and, in consequence, we feel safe, in the light of the jurisprudence of this court, in arriving at the conclusion that the appeal should be dismissed. We have consulted a number of decisions, and found that it has been repeatedly held, when other matters are brought up which do not concern the constitutionality or legality of the tax, that the appeal is not within this court's jurisdiction. *Penn v. Municipality*, 4 La. Ann. 18; *Albert v. Brewer*, 9 La. Ann. 64; *State v. Rabasse*, Id. 305. Leaving those decisions, and coming up to a more recent date, we find that, although an assessment was illegal (as it may be in this case), yet this of itself did not necessarily give rise to the inference that the tax is illegal and unconstitutional. This court has said: "A tax is deemed illegal only where there is no law to authorize the levying of it, or, where there being such law, that law is unconstitutional and void. An erroneous assessment does not make a tax illegal. *A tax may be legal or constitutional, though the assessment may be deficient.*" (Italics ours.) *Stubbs v. McGuire*, 32 La. Ann. 817; *Gillis v. Clayton*, 33 La. Ann. 286; *Board v. Huguet*, Id. 364; *Maclin v. Insurance Co.*, Id. 801. It is only where the illegality or irregularity of the tax itself is at issue that this court has jurisdiction. *State v. Judges of Court of Appeals*, 37 La. Ann. 899. Quite recently this court has said: "We have no functions to review questions of assessments unless the legality or constitutionality of the tax is involved, or the amount gives jurisdiction to this court." *Patterson v. City of New Orleans*, 47 La. Ann. 277, 16 South. 815. The learned counsel for defendant refers specially to *Palfrey v. Connelly*, 106 La. 699, 31 South. 148, and quotes from it with great confidence. He has not failed to observe that in the case just cited an appeal was taken to the court of appeal in so far as related to the assessment, and an appeal was taken to this court to the extent that illegality of tax was an issue. The court in the case cited supra did not decide that the question of illegality of the assessment was not properly brought before the court of appeals as being the court with jurisdiction. But upon consideration of the issues in this cited case it was found that the question of illegality and unconstitutionality arose ab initio; that it affected the tax and assessment as well, and stamped both with nullity. The property was not subject to taxation at all in the cited case supra,—a fact that the court declined to overlook in presence of the pleadings and issues, which raised in a distinct manner the question of illegality and unconstitutionality of the tax. Here the property was subject to taxation. The plaintiff in injunction had assumed the payment of the tax, and the only issue was one of legality

vel non of the reassessment; clearly, a question of erroneous assessment, and nothing more. The assessment in the Palfrey Case, cited *supra*, in view of the issues as presented, was practically a judgment affecting all the property owned by the plaintiff. The matter of assessment was merged in the judgment, and became thereby the matter of tax claimed. The taxes were on movables, and the court held: "That assessment would be practically a 'judgment' affecting consequently all movables owned by the plaintiff. The article declares that taxes on movables shall be collected by seizure and sale by the tax collector of the movable property of the delinquent, whether it be the property assessed or not, sufficient to pay the taxes." Here the property assessed is immovable, and the plaintiff complained of the assessment. The appellate tribunal in this case is the court of appeal. If any error was committed in the reassessment, it was one to be corrected by the district court. From its judgment there was a right of appeal to the court of appeal. If that court errs in such a case it may be brought up before this court under article 101 of the constitution; but it is not a case appealable directly from the district court.

Before leaving the subject, we will further state that evidently the purpose of the law-maker was uniformity in the interpretation of statutes relating to tax, and for that reason all appeals in which the legality and unconstitutionality of tax is involved are to be brought before this court. On the other hand, questions merely personal to the parties regarding assessment, not involving the legality or constitutionality of any tax, are to be reviewed by the court of appeal. Our decree granting a rehearing is revoked and annulled.

It is ordered, adjudged, and decreed that the decree heretofore rendered dismissing the appeal for want of jurisdiction be reinstated, and that the appeal be dismissed, at appellant's costs, as heretofore dismissed.

BLANCHARD, J., dissents.

(108 La.)

LOSECCO v. GREGORY. (No. 13,335.)
(Supreme Court of Louisiana. Jan. 7, 1901.)
CONSTRUCTION OF CONTRACT—PURCHASE OF
CROPS TO BE GROWN—ASSUMPTION OF
RISK—REHEARING ON APPEAL.

1. An agreement stipulating a sale of "all oranges my trees may produce in the years 1899 and 1900," *held* not to be an aleatory contract.

2. A clause in the contract reciting that "purchaser assumes all risks," *held* to mean all usual, known, ordinary, foreseen risks that may attend the inception, growth, development and maturity of the orange crop; not extraordinary or unforeseen risks, like the utter destruction of the entire grove of trees.

3. This assumption of risk by the purchaser applies to the thing sold, viz.:—the orange crop; not to that which was to produce the crops—the

trees themselves. Its application cannot be extended to the inclusion of the life of the trees.

Nicholls, C. J., and Monroe, J., dissenting.

On Rehearing.

4. By our Code the hope of a future crop is made merchantable as an incorporeal thing, separate from the crop, so that parties may make either this hope, or the crop itself, the subject of their contract of sale.

5. Where the future crop itself is sold, the sale becomes null for want of a thing to constitute its subject, if the crop fails entirely, or practically so; and in such case the price must be restored.

6. But where only the hope is sold, the sale is proof against eventualities.

7. The hope is a presently existing thing, and, it not being susceptible of delivery, its delivery accompanies the act of sale. The seller of it no more warrants its continued existence, or the continued existence of the conditions which form its basis, than the seller of a horse warrants the continued existence of the horse.

8. Written contracts are to be construed not so much according to mere verbal criticism as according to what, all things considered, was most probably the intention of the parties.

9. Clauses couched in general terms, which, if taken literally, would lead to inadmissible consequences, must be construed according to what, under all the circumstances of the matter, was most probably the intention of the parties.

10. Chief among the circumstances to be considered in determining whether the subject of the sale of a future crop was the crop itself, or the mere hope of it, is the comparison between the price agreed upon and the value of the crop; the inference being one way or the other accordingly as the disparity between the price and the value is wide or narrow.

11. An admission that a witness present in court would make a certain statement is not stronger or better evidence than the statement itself would have been if made by the witness.

12. Where the thing sold is described as "two crops of oranges on my place, as follows: All the oranges that my trees may produce in the year 1899; all the oranges that my trees may produce in the year 1900"; and the clause is added, "Purchaser assumes all risks;" and it appears that theretofore cold weather had been known to cut off the crop of the year, but never, within the memory of the oldest inhabitant, to kill the trees, or so to injure them as to prevent the crop of the following season; and there comes such cold weather as kills the trees; and there is no proof of the value of the crop, and no proof of local custom,—*held*, that the sale was not of a mere hope, but of the crops themselves, and that the purchaser assumed the risk of the loss of the crop of the year, but not of the loss of the crop of the following season.

Blanchard and Breau, JJ., dissenting.

On Second Rehearing.

13. In a suit involving a principal and a reconventional demand, if three justices concur in rejecting the principal demand, and three concur in rejecting the reconventional demand, there is a concurrence of a majority of the court.

14. Technically, this court cannot, on an application for a rehearing, proceed to make final disposition of the cause, even though oral argument was allowed on the application for the rehearing.

15. The contract describes the object sold as follows: "Two crops of oranges on my place, as follows, i. e.: 1st. All oranges that my trees may produce in the year 1899. 2nd. All oranges that my trees may produce in the year 1900." The price was a lump sum, one half of

¶ 2. See Contracts, vol. 11, Cent. Dig. § 730.

which was paid in cash, and the other half stipulated to be paid at a fixed date, with no stipulation for return in case the crops should not materialize. The purchaser assumed all risks, and the seller agreed to furnish the carts and teams and drivers to move the two crops. The value of the future crops was not shown, but it appeared that the purchaser had been in the habit of buying future orange crops on a speculation, some of which he had lost totally from cold weather, which was the one thing to be dreaded, and which was the main, if not the only, cause of the future crops being uncertain and contingent. Cold weather had been known to kill the trees halfway down, but never totally. The trees themselves having been killed by cold in the winter preceding the season in which the first crop was to be produced, *held*, that the sale was of the hope of the crops, and not of the crops themselves, and that the purchaser cannot recover back the part of the price paid, and must pay the part unpaid.

Breaux and Blanchard, JJ., dissenting.
(Syllabus by the Court.)

Appeal from judicial district court, parish of Plaquemines; Robert Hingle, Judge.

Action by Vincent Losecco against Albert Gregory. Judgment for plaintiff, and defendant appeals. Reversed. Judgment rendered for defendant.

Thomas M. Gill and Charles G. Gill (Henry Denis, of counsel), for appellant. James Wilkinson (E. Howard McCaleb, of counsel), for appellee.

BLANCHARD, J. Plaintiff is an orange merchant of New Orleans, in the habit of purchasing the produce of orange orchards in Louisiana in advance of the growth and maturity of the crops. Defendant was the owner of an orange orchard, and in November, 1898, he agreed to sell to plaintiff, and the latter to buy, the oranges which his orchard would produce in the years 1899 and 1900. The agreement was reduced to writing and is as follows:—"I have this day, in consideration of the terms hereinafter named, sold unto Vincent Losecco of the city of New Orleans, two crops of oranges on my place as follows, i. e.: 1st. All oranges that my trees may produce in the year eighteen hundred and ninety-nine (1899). 2nd. All oranges that my trees may produce in the year nineteen hundred (1900). For the sum of eight thousand dollars (\$8,000). Four thousand dollars paid cash down and the balance four thousand dollars to be paid on the 1st day of December, 1900. Purchaser assumes all risks. Vendor to furnish teams and carts and drivers to move the two (2) crops." This was signed by both parties. The plaintiff (Losecco) paid the \$4,000 stipulated for. In February, 1899—on the 12th, 13th and 14th days thereof—less than three months from the execution of the contract aforesaid, there occurred an unprecedented freeze, the thermometer going down to 7° above zero in the city of New Orleans and eight degrees above in the parish of Plaquemines, below the city, where defendant's orange orchard was situated. This freeze, plaintiff alleges, killed and utterly destroyed the orange trees of

defendant. The latter admits this in his answer, and the proof establishes it. Because of the utter destruction of the orchard and no possibility of the production of any crop thereon in the contract years, plaintiff demanded the return of the \$4,000 he had paid. This was refused and the present suit followed. The allegation is made that a freeze such as that which destroyed the orchard was never considered nor contemplated by the parties in making the contract, since no orange groves in the section of country, where the one in question was located, had ever before been destroyed by cold. The destruction of defendant's grove is ascribed to a fortuitous event, an act of God, and by reason thereof the cause or consideration of the contract is averred to have wholly failed, entitling plaintiff to the relief sought. Resistance is made on the ground that the agreement between the parties evidences an aleatory contract. The contention is that Losecco purchased an uncertain hope, an expectancy, a chance—classifying ungrown crops as such—and must take the consequences of his bargain. It is claimed that all risks are included by the nature of an aleatory contract, and, besides, that Losecco expressly assumed all risks. Judgment below was in favor of plaintiff and defendant appeals.

Is this an aleatory contract? If it be, the defense is good against plaintiff's alleged right of recovery. "A contract," says Civ. Code, art. 1776, "is aleatory or hazardous when the performance of that which is one of its objects depends on an uncertain event. It is certain when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated." Judged by this definition of the law, the contract under consideration is not an aleatory one, because the performance of that which was one of its objects—the growing of oranges—did not "depend on an uncertain event," within the meaning of the article of the Code. It is a "certain" contract, in the sense of the article, because "in the usual course of events it must happen." The cold of February, 1899, which killed all the trees of the grove and prevented the happening of the event—the growing of the crops of oranges in 1899 and 1900—was unusual in the course of events, was phenomenal and extraordinary. The evidence establishes this. There had been cold weather—very cold weather for an orange-growing country—in certain years, attended with destruction of the orange crop of the years when occurring, and sometimes with partial destruction of the orange trees—the killing of the upper and outstanding twigs and branches, requiring trimming and pruning. There, too, was one year, 1895, when it is said by one witness that about half of the orange trees were destroyed. But the total destruction of entire groves of orange trees had not been known

since, certainly, the year 1890, when, as we are vaguely informed by Martin's History of Louisiana (new edition, continuation by Condon), "the severity of the winter * * * destroyed the orange trees." The evidence discloses that for days following the great freeze of February, 1899, the remarkable spectacle was presented of ice floes in the Mississippi river passing the city of New Orleans, borne by the river's current to the Gulf of Mexico, and that some of the blocks of ice were from 20 to 30 feet in length by from 10 to 15 feet thick. It does not appear that the like was ever known before on the lower stretch of the river. It is shown that the temperature at the time of the freeze of 1899 was from 6° to 7° lower than ever before—the lowest point reached prior to that time of which any information is given having been in 1895 when the thermometer registered 14° above zero. The principal witness for the defense, who has lived in the parish of Plaquemines for 25 years, and who seems to have kept a record of the cold of the winters, admits that he had never known of a freeze in the parish which approached that of February either in intensity or duration.

We are justified, then, in holding that the contract between these parties litigant was "certain," as contradistinguished from "aleatory," in the meaning of the law, since in the usual course of events it must happen that the trees composing defendant's orange grove, or at least some of them, would have continued to exist during the contract years, and that their total destruction by the freeze in question must be considered as unusual in the course of events. Defendant sold by the contract "two crops of oranges." He did not sell the hope, or the chance of two crops. What he sold was oranges, and what he must be understood as warranting was that his trees would be there to do their part towards growing oranges. *Lanata v. O'Brien*, 13 La. Ann. 229. The contract certainly contemplated the continued existence of the trees, for the language is "all oranges my trees may produce in the year 1899; all oranges my trees may produce in the year 1900." The trees, however, disappeared, ceased to exist, were not there to produce oranges, or to make the effort of nature to produce oranges. But it is said "the purchaser assumed all risks." True, those words are in the contract, and are not to be read out of it. On the contrary, they meant something and effect must be given to them. We differ from defendant's counsel only in the scope of their meaning. They are to be considered as meaning all usual, known, or foreseen risks that may attend the inception, growth, development and maturity of the orange crop. This assumption of risk is held to apply to the thing sold, viz:—the orange crop of each year; not that which was to produce the crops—the trees themselves. Plaintiff took his chances on the crops, whether bountiful, or meager; whether of

good quality or bad. His risk may have included all the vicissitudes of the season as to the effect of same on the orange crop proper. If the season were such that only an orange or two were produced in the grove, the same would have been "the crop" of the year and that was what he bought and he would have no cause to complain. It may be that he took his chances as to whether there would be any oranges grown at all, the trees remaining. But his risk cannot be extended to an inclusion of the life of the trees themselves. The contract meant they were to remain in esse, to afford the orange crops which plaintiff purchased an opportunity to grow. Plaintiff did not purchase the trees; he purchased only what the trees were to produce. If the trees had remained and afforded the oranges nature's chance to grow, the fact that they were unable to grow because of unpropitious seasons, would not have availed plaintiff and he must abide his contract. But where the trees did not remain, were all destroyed and nothing was left to afford an orange a chance to grow, the case is different. Plaintiff took the risk only of the appearance on the trees, the growth, development and maturity of the oranges—not the risk that the orchard itself would continue to exist. See *Walker v. Tucker*, 70 Ill. 527. The contract may be likened unto a lease of the trees to gather the fruit they may produce in the years named. "If," says the law (Civ. Code, art. 2697), "during the lease, the thing be totally destroyed by an unforeseen event * * * the lease is at an end." If, then, the trees of defendant were destroyed by an uncontrollable event, *par cas fortuit*, or force majeure, it is a loss which must be held to fall on him. It would come under the head of an unforeseen accident. Plaintiff did not stipulate in the contract to run all chances of all foreseen and unforeseen accidents. Civ. Code, art. 2743. He stood to take all chances of foreseen accidents only. If, following the execution of the contract, war had been declared and an invading army had occupied the country, cutting down all the trees of this orange grove—would this be considered a risk which plaintiff assumed by the words:—"the purchaser assumes all risks"? We think not. If the great river which washed the front side of this orange grove had exerted its mighty force and engulfed the whole tract of land—not merely overflowing it, but appropriating it for its bed, causing the whole of it "to cave into the river," as the vernacular phrase is—would this come within the scope of the risks assumed by the purchaser? We cannot hold so. Yet these catastrophes would not have been more utterly destructive of the tree life of this orange orchard than was the freeze of February, 1899. The destruction of the orange trees was the destruction of the subject-matter on which the contract was to operate. The term *vis major* (superior force) is used

in the civil law the same way that the words "act of God" are used in the common law. These are not considered included in the assumption of risks such as that here disclosed. To be held so included it must clearly appear that such was the intention of the parties. Civ. Code, arts. 1933, 2743, 2219, 2120, 2697, 2754, 2939, 2970; *Viterbo v. Friedlander*, 120 U. S. 731, 7 Sup. Ct. 962, 30 L. Ed. 776. When the orange grove of defendant ceased to exist, the contract between him and the plaintiff became a contract "without cause" in the meaning of Civ. Code, art. 1897, which says:—"The contract is also considered as being without cause when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist." Here the consideration for making the contract, on part of the plaintiff, was the orange grove from which he expected to derive a crop of oranges in each of the contract years. He and defendant certainly expected the grove "thereafter to exist"—to continue to exist following the execution of the contract and for the two years of the life of the contract. But the grove did not continue to exist, and, thus, the consideration or cause of the contract failed. See Civ. Code, art. 1899; *Mayor, etc., v. Caldwell*, 14 La. 501; *Hall v. School Dist.*, 24 Mo. App. 213. "Where the consideration or cause of the contract," says Civ. Code, art. 1898, "really exists at the time of making it, but afterwards fails, it will not affect the contract if all that was intended by the parties be carried into effect at the time." It surely cannot be claimed that all that was intended by the parties to this contract at the time of its execution has been carried into effect, nor that all that was intended was carried into effect at the time. "When the certain and determinate substance," says Civ. Code, art. 2219, "which was the object of the obligation, is destroyed * * * so that it is absolutely not known to exist, the obligation is extinguished * * *." Here, the "certain and determinate substance" constituting the object of the contract was a grove of orange trees. Its destruction carried with it the destruction of the obligations growing out of the contract. Thus, if plaintiff were to sue defendant for the crop of oranges in the year 1899, had in contemplation in this contract, or were to sue him for damages because no crop of oranges was delivered that year, he could not, under the terms of this law, recover. See, also, Civ. Code, art. 1933, cl. 2. So, too, if *Losecco* had not paid in advance part of the purchase price and were, at the end of the contract period, sued for the whole of the \$8,000 he stipulated to give for the two crops of oranges, no recovery against him could be had. The orange grove having been destroyed by a fortuitous event, a *vis major*, the purchaser of the crops of oranges which the grove was expected to grow in the con-

tract years, had the right to recede from the contract. This being so, the seller is bound to make him restitution of that portion of the price received. Civ. Code, arts. 2497, 2301, 2302, 2304.

The judgment appealed from is found to be correct and is affirmed.

The CHIEF JUSTICE and MONROE, J. dissent.

On Application for Rehearing.

(March 31, 1902.)

PROVOSTY, J. Defendant owned an orange grove in the parish of Plaquemines, about 60 miles south of the city of New Orleans. Plaintiff was, and had been for 25 years, an orange-crop buyer. He had frequently bought orange crops in advance, some of which, as a result of cold weather, had failed entirely. Plaintiff had been known to buy crops as far in advance as three years. The parties entered into the following contract: "I have this day, in consideration of the terms hereinafter named, sold unto Vincent Losecco, of the city of New Orleans, two crops of oranges on my place, as follows, i. e.: 1st. All oranges that my trees may produce in the year (1899) eighteen hundred and ninety-nine. 2nd. All oranges that my trees may produce in the year (1900) nineteen hundred. For the sum of eight thousand dollars (\$8,000). Four thousand dollars paid cash down, and the balance, four thousand dollars, to be paid on the first day of December, 1900. Purchaser assumes all risks. Vendor to furnish teams and carts and drivers to move the 2 (two) crops." Within three months after the execution of this contract, and therefore during the same winter, and before the trees had had a chance to even put out the blossoms of the crop of 1899, a freeze came that killed the trees, root and branch. Cold weather had been known to destroy the crops of the year, and even to kill the trees halfway down; but never, within the memory of the oldest inhabitant, had the trees been killed entirely, or even so injured as not to produce a crop the following year. In the several histories of Louisiana, mention is made of such a killing frost having occurred in 1748, 1768, and 1830, but whether the trees then killed were so far south as these of defendant's, does not appear; and nothing shows that the parties, when they entered into their contract, had any knowledge of these events of the distant past.

Plaintiff claims back the \$4,000 paid under the contract, and defendant demands in re-convention the \$4,000 payable on the 1st day of December, 1900. Plaintiff contends that the subject of the sale was the future crops, and that the contract was conditional upon these crops eventually coming into existence, and that the failure of this condition annuls the contract. He contends further that so long as crops continue to be attached to the

reality they are part of the realty and belong to the owner of the soil, and if they perish by cas fortuit extraordinaire, or vis major, their loss falls upon such owner, and not upon the purchaser, unless the latter has specially assumed such risk; the presumption, otherwise, being that he has assumed only ordinary risks. Defendant contends that the subject of the sale was not the crops themselves, but only the hope of them, coupled with the right to take them in case they materialized, and that, even if the sale was of the crops themselves, plaintiff assumed the risk of their loss.

We do not see how the doctrine of the immobility of growing crops can cut any figure in the case. If the sale was of the hope, merely, then plaintiff got what he bargained for, and there is an end of the matter. If, on the other hand, the sale was of the crops themselves, then the loss must fall upon one or other of the parties according to the interpretation placed upon the risk clause. It cannot be, and is not, contended that the plaintiff could not validly assume the risk of the trees being destroyed by cold. The question must be, therefore, simply whether or not he made the assumption. It was possible, under our Code, for the parties to make either the crops themselves, or the hope of them, the subject of their contract. Civ. Code, arts. 2450, 2451. Had they made the crops themselves the subject of their contract, the sale, in the absence of contrary stipulation, would have been conditional upon the crops eventually coming into existence, as contended by plaintiff. Duranton, Vente, Nos. 169, 171, 172; Troplong, Vente, No. 240; Delsol, Vente, art. 1, pp. 28, 29; Pothier, Vente, No. 132; Baudry-Lacantinerie, vol. 2, No. 842. Had they made the mere hope of the crops the subject of their contract, the sale would have been proof against all eventualities, as contended for by defendant. Same authorities; also Baudry-Lacantinerie, Vente, No. 97; Laurent, Vente, No. 99.

Plaintiff argues that, even if the sale was merely of a hope, there went along with it a certain warranty of the continued existence of the trees during the time required for the production of the crops; that even in the case of the sale of the cast of the fisherman's net, which is the example given by the Code as an illustration of the sale of a hope, there goes with the sale a warranty that the net shall continue in being until the time shall arrive for the casting of it. And in support of this plaintiff quotes as follows:

"Celui qui me vend un coup de filet garantit que le filet sera jeté, et que la totalité de son produit me sera remise; si donc le pêcheur refuse de jeter son filet ou de me remettre la totalité du poisson qui en provient, on déterminera l'étendue de cette garantie: savoir, au premier cas, en estimant l'espérance du coup de filet, et au second cas, en estimant le poisson que le pêcheur refuse de livrer. Il n'en sera pas de même de la vente de fruits

avenir; car s'il ne provient aucun fruit, le prix convenu ne sera pas dû. La raison en est que cette sorte de vente est toujours censée faite sous la condition, *si fructus nascuntur*." Dictionnaire de Digeste, Thevenot-Desaules, t. 1, vo. "Eviction," p. 268.

We do not think that anything further is meant here than that the fisherman warrants that he shall not refuse to cast the net or to give up the fish.

The seller of a hope has satisfied his obligations fully and completely when he has executed the act of sale. Delivery accompanies the act, and nothing further remains for him to do. The hope is a presently existing incorporeal thing, and since it is, of itself, and separately from the thing on which it bears, made merchantable by the Code, its sale cannot be differentiated from the sale of any other thing, corporeal or incorporeal. Of course, the seller warrants that the basis of the hope is not illusory; that is to say, he warrants that there is in reality an existing hope, and that he is the owner of it; but so does the seller of a horse warrant that there is a horse, and that he is the owner of it. The horse must be actually delivered, whereas the hope cannot be delivered, and hence delivery accompanies the act of sale; but beyond this there is no difference between the two sales. The vendor of the hope no more warrants the continued existence of the hope, or of the conditions serving as the basis of it, than the vendor of the horse warrants the continued existence of the horse.

The question of whether the crops, or the mere hope of them, was the subject of the sale, is to be determined by the terms of the contract, read in the light of the attending circumstances. Chief among these, according to the unanimous sentiment of the civil-law writers, is the comparison between the price agreed upon and the value of the thing; the inference being one way or the other accordingly as the disparity between price and value is wide or narrow. Unfortunately, in this case, the question of this value has been left by the evidence as much in doubt as the main question itself, by the contract. Both sides argue from this value in favor of their own theory; one placing the value low, and the other high. Plaintiff proved that the crop of 1898 was sold for \$2,700; but at what stage of the growth of the crop this sale was made, and whether the purchaser assumed any risks, as in the present case, is not shown. Plaintiff proved, in addition, that the entire plantation of the defendant is assessed at \$3,000; also that it is 4 acres in width; also, by the owner of the adjoining plantation (defendant's witness), that the orange grove does not extend further back than from 5 to 6 acres; also that defendant bought 1 by 40 of the 4 by 40 acres composing his plantation in January, 1898, for \$1,000. But the witness admits that he might be mistaken as to how

far back the grove extends, and this court is aware that property is sometimes underestimated on the assessment rolls; and nothing shows that any part of the grove is on that part of the plantation bought in 1898, although in the latter case the acreage of the grove would have to be extended much further back to make room for the 12,000 trees, of which 6,000 bearing trees, according to defendant, compose the grove. To prove this large number of trees, and to overcome the strong circumstantial evidence offered by plaintiff, going to establish a small acreage for the grove, the only evidence offered by defendant is the following, which we copy verbatim: "It is admitted that Gregory who is present would swear that he had on his farm altogether 12,000 trees. About 6,000 of which were bearing trees." The age of the trees seems to be conceded to have been eight years. As to what is the value of the average yield of an orange tree of that age, there is no evidence. Plaintiff's counsel point to the small acreage of the grove, deducing from this exiguity a small number of trees, and point to the small value of the plantation, as appears by the assessment rolls and by the sale of January, 1898, and finally point to the price of \$2,700, for which the crop of 1898 was sold, and argue that \$4,000 was approximately a full price for the crop itself. Defendant's counsel claim that a distinction is to be observed between an admission that an absent witness would make a certain statement, and an admission that a witness present in court would make a certain statement; that the one admission is made under stress of circumstances, to avoid a continuance of the case, whereas the other admission is made voluntarily, and because the party making it finds himself unable to controvert the fact on which the statement bears; that the latter admission is in the nature of an acknowledgment of the correctness of the statement. Basing themselves on this, counsel assume that the proof shows that there were in the grove 6,000 bearing trees; and counsel argue that, as the product of each tree was worth \$5, the total crop was worth \$30,000, and that the fourth of this would be a value large enough to have induced the plaintiff to pay \$4,000 for the crop as a speculation, he assuming the risk of the nonmaterialization of the crop.

We can see no good reason why the admission that a witness would make a certain statement should be stronger evidence than the statement itself would be if made by the witness; and, dealing with the case as if defendant had made the statement in question, we must hold that this unsupported statement is not sufficient to overcome the strong showing made by plaintiff as to the probable number of these trees. Therefore, not knowing with any degree of certainty what was the number of the trees, and knowing still less what was the value

of the average crop of an orange tree eight years old, we are not in a position to establish a comparison between the value of the crops and the price of the sale.

Another circumstance on which defendant places reliance is the fact that plaintiff had made it part of his business to buy orange crops in advance, on a speculation, as he himself testifies. He was a speculator in orange crops, says defendant, assuming all risks, and securing thereby a material reduction in the price. But there is no proof as to how the prices of the crops thus bought in advance compared with the value of the crops after maturity; nor is there any proof that payment was exacted for the lost crops, nor of any local custom in that connection. Orange crops, like all other crops, vary in quantity and quality, affording a margin for speculation irrespective of the risk of total failure from extreme cold; and, besides, assumption of risk of loss of crop would not necessarily mean assumption of risk of loss of grove. Then, again, there is a broad and marked distinction between the purchase of a crop in advance, and the purchase of the hope of the same crop. As already stated, the one sale is valid only if the crop materializes, whereas the other is valid whatever befall. These previous purchases go to show that plaintiff must have been well up in the knowledge of what risks an orange crop was exposed to, but do not show that he consented to assume risks so extraordinary as to amount clearly to *vis major* or *cas fortuitu extraordinarie*. The salient feature of the case, outside of the contract itself, is that the obvious thing for the parties to deal about was the crops themselves, and not the mere hope of them, and that therefore the natural inference would be that they had made the crops, and not the hope, the subject of the sale.

Coming to the contract, there is no denying that the wording of it is peculiar. After the statement that what is sold is two crops of oranges, there is added, as if by way of explanation, the *videlicet*, "all the oranges that my trees may produce"; not what the trees will, but what they may; the use of the subjunctive form of the verb expressing uncertainty; implying that the trees might and might not produce any oranges, and that the plaintiff took his chances in that regard; and there is no denying that this peculiarity of language, when considered in connection with the sweeping assumption of risks, gives rise to an implication of considerable strength that the mere hope of the crops was the subject of the sale. Of course, if given the latitude of construction that its terms call for, this clause of assumption of all risks would show beyond a peradventure that nothing more than a mere hope was sold, for one who assumes literally all risks does not buy anything more than a mere chance, but when we come to consider later on, in another connection, the extent of the assump-

tion of risks under this clause, we shall show, we think, that clauses couched in such general terms are not to be construed according to their very letter, but according to what, under all the circumstances of the matter, was most probably the intention of the parties, and that by this clause the purchaser did not intend to assume any other risks than such as the crops were at that time supposed to be liable to. So construing this clause, the theory of the sale's having been of nothing more than a mere hope finds neither in the surrounding circumstances, nor in the terms of the contract, any support, other than the implication arising, as stated, from the peculiarity of the wording of the contract. This implication stops short of legal certainty. It leaves the mind in doubt, and hesitation in the premises must forebode failure to the defendant's theory. "The seller," says the Code (article 2474), "is bound to express himself clearly respecting the extent of his obligation; any obscure or ambiguous clause is construed against him." We do not forget that the rule of interpretation by which uncertainty is construed against the vendor is to be applied only in last resort, when all other means of knowing the intention of the contracting parties have failed; but has not that extremity been reached in the present case? Have we not, both on the submission of the case and on this application for a rehearing, exhausted all known means of interpretation in the vain endeavor to reach a satisfactory conclusion on this question? We shall give heed to the conservative wisdom of our predecessors, who, after deciding against the vendor in a case of considerable analogy with the present one, added the following: "But even were the case doubtful with us, we would come to the same conclusion. The price stipulated for plaintiff's pretensions was a large one, and, in a case of doubt, would incline in favor of a party striving to avoid a loss against one seeking to obtain a gain." *McDonald v. Aubert*, 17 La. 448. A consideration of this kind does not look strong from the standpoint of pure logic, but it addresses itself strongly to the conscience of the court.

Relinquishing as hopeless the attempt to determine, except by means of the presumption enforced above, the question of what, as between the crops themselves and the mere hope of them, formed, in reality, the subject of this sale, we address ourselves to the task of ascertaining what risks the parties intended that the purchaser should assume; in other words, what scope should be given to the clause "purchaser assumes all risks." Writings designed to express the conditions of an agreement are not to be read in the abstract, and to be construed by mere verbal criticism, but are to be read in connection with the facts of the case, and to be construed according to what, all things considered, was most probably the intention of the contracting parties. The clause now in

question, for instance, taken in its literal meaning, would embrace such unforeseen risks as those pointed out in our original opinion, namely, the invasion of the country by a foreign foe, or the irruption of the mighty river flowing near by, and the consequent destruction of the grove; and yet it must be clear to any one that nothing could be more improbable than that the contractants should have given a single thought to any such contingencies as these, in connection with their contract. The clause, then, is not to be construed according to its literal meaning. "However general may be the terms in which a contract is couched," says article 1959 of the Civil Code; "it extends only to the things concerning which it appears the parties intended to contract." "The reason of this rule," says *Poth.-Obl.*, No. 86, "is evident. The contract being formed by the will of the contracting parties, it can have effect only in regard to what the contracting parties have intended, or have had in contemplation."

Our question, then, is, what risks did the contracting parties have in contemplation? Or, more specifically, did they have in contemplation a freeze that, occurring before the end of the same winter, would cut off the crops bargained for? That question resolves itself into another: Had such a thing happened before? In so far as the cutting off of one crop is concerned, it had. According to plaintiff's witness Martin, the crop of 1881 failed as the result of a freeze that occurred on the 10th of January, 1881, and it failed entirely. The freeze that cut off the crop of 1899 came on the 12th-14th of February,—one month later than that of 1881. True, 17 years had gone by without a recurrence of this experience, but speculators in orange crops had nevertheless to keep note of it and govern themselves accordingly. It had to enter as one of the prime factors in their calculations. They had to know that what had happened might happen again, and that the crop ran the risk, and that the purchaser would assume it if he assumed the risks to which the crop was exposed. This fatal freeze of 1881 had happened within plaintiff's own experience, and therefore he had double reason to know of it, and to be guided accordingly; and, besides, there had been other years when the temperature had fallen low enough to kill the crops,—notably in 1886 and 1896. We hold that plaintiff assumed this risk, and that he must abide the consequences. But in his 25 years' experience, plaintiff had not known the trees to be killed, or even to be so injured as not to produce a crop the following year; nor had the oldest inhabitant known of such a thing. Some of the trees on the adjoining farm were 38 years old. Under the circumstances, we think it would be putting a most strained construction on the situation to hold that the parties, in making this contract, took into consideration the contingency of the trees be-

ing thus killed or injured. The most prudent and cautious speculator would hardly have done so. If he had thought of the matter at all, he would have assumed that nature would not deviate from her usual course. We hold, therefore, that the parties did not contemplate this risk, and that, as a consequence, plaintiff did not take it upon himself.

We have to assume that the degree of cold which proved fatal to the crop of 1881 proved equally fatal to that of 1899, and that therefore the crop of 1899 would have been cut off just the same if the temperature had not gone lower than in 1881. This being so, the loss of the crop is to be attributed to the fact that the temperature fell as low as in 1881, and not to the fact that it fell lower. The excess of cold beyond the degree of 1881 is therefore immaterial, in so far as the loss of the crop of 1899 is concerned. If the trees had not perished, the crop would have failed just the same as in 1881. At least, we are bound so to assume. The same is not true of the crop of 1900. For the freeze of February, 1899, to cut it off, a lower, and, for ought we know, a much lower, temperature was required than the degree attained in 1881. The freeze of 1881 did not prevent the crop of 1882. And we have to assume that if the freeze of 1899 had not been greater, and, for aught we know, very much greater, than that of 1881, or of any of the other frost years, the crop of 1900 would not have failed. If we had held the sale to have been of the hope of the crops, all risks of whatsoever nature would have fallen to the lot of the purchaser, under the maxim, "*Res perit domino;*" but holding, as we have done, that the sale was of the crops themselves, the legal situation is that the vendor warranted the continued existence of the grove during the time required for the production of the crops, and that he is relieved of this warranty only to the extent that the purchaser assumed the risk of the loss of the crop. Between the lease of a grove and the sale of the future fruits of the same grove there is a close analogy. Both contracts purport to procure to the taker the fruits of the grove in consideration of a fixed sum of money. The destruction of the grove would annul the lease, and for the same reason a destruction of the grove ought to annul the sale. A lessee may assume the risk, but a clause by which he should have assumed "all risks of whatsoever nature, including those of an extraordinary character," would not be construed as an assumption of the risk of the destruction of the leased premises, in whole or in part. The intention to assume such a risk would have to be "clearly manifested," and the assumption would have to be "restrictively construed." *Marcadé, Comm. on Art. 1773, Code Nap.*

Oral argument having been allowed and heard on the application for rehearing, it is considered that the case is before the court

for final action, as fully as though a rehearing had been formally granted. It is therefore ordered, adjudged, and decreed that the decree heretofore entered in this case be set aside in so far as it condemned the defendant to restore the \$4,000 paid for the crop of 1899, and condemned defendant to pay the costs of suit, and that said decree be maintained in so far as it rejected the reconventional demand of the defendant. And it is further ordered, adjudged, and decreed that the plaintiff's suit be rejected, with costs in both courts. Rehearing refused.

NICHOLLS, C. J., is of the opinion that the contract in question was an aleatory contract of sale of a hope. He therefore concurs in the decree in so far as it relieves the defendant of returning to plaintiff the portion of the price received, but dissents from that portion of the decree which relieves the plaintiff from payment of the balance of the price. BLANCHARD, J., dissents in so far as the judgment appealed from is disturbed by this decree; adhering to the opinion and decree first handed down by this court.

BREAUX, J. (dissenting). In this case, unquestionably, there is hardship. None the less, the loss cannot be divided on the ground that it seems hard that either party should sustain it entirely. The obligation is indivisible. Either the vendor owes a return of that portion of the price he has received, or the buyer the remainder unpaid. If the risk of the destruction of the fruit carries with it the implied assumption of the risk of the destruction of the trees by which it was expected that the fruit would be produced, then the buyer owes the whole price, and he should be held bound to pay the whole of the purchase money. If, on the other hand, the loss incurred did not fall within the terms of the contract, as a loss assumed by the buyer, then the seller should return that part of the purchase price already received. The pleadings and the arguments at bar did not suggest the possibility in any manner of dividing the obligation between the buyer and the vendor. I dissent.

On Application for Rehearing.

(Nov. 17, 1902.)

PROVOSTY, J. Ordinarily, when oral argument is heard on application for a rehearing, the court, in passing upon the application, proceeds to make final disposition of the cause. This having been done in the present instance, plaintiff complained that the case had been decided without affording him a hearing; and, as the complaint was technically well founded, the court set aside the judgment, and fixed the case for a hearing, and for a third time heard oral argument. Plaintiff also complained that a majority of the court had not concurred in the judgment. The complaint was unfounded. Three mem-

bers of the court had concurred in the decree rejecting plaintiff's demand, and three had concurred in the decree rejecting the reconventional demand. One member of the court has been of the opinion from the beginning that this contract evidences the sale of a mere hope. Two other members of the court reached early the conclusion that the contract evidenced the sale of future crops. The two other members of the court, as the court is at present constituted, would not have hesitated to give to the clause of assumption of all risks the broad latitude its letter calls for, if the crop of only the first year had been involved; but to give it this latitude in connection with the crop of the second year seemed to make the purchaser assume risks which in all probability had never entered his contemplation, and this seemed repugnant to the spirit in which contracts are usually interpreted. However, had the chocke lain between, on the one hand, relieving the purchaser from the risks which he had certainly assumed in connection with the crop of the first year, and, on the other hand, charging him with the risks which probably he had not thought of assuming in connection with the crop of the second year, these two members of the court would not have hesitated to enforce as to both crops the clause of assumption of all risks. It is impossible to read the decision handed down on the rehearing without being impressed with the fact that nothing but the strong repugnance on the part of these two members of the court to saddle the purchaser with a risk which, in all probability, had not been contemplated by the parties, kept them from adopting the view that the contract evidenced the sale of a mere hope. Further consideration of the matter has convinced them that the sale was of the mere hope of the crops.

The question of the distinction between the sale of a future crop, as contradistinguished from the sale of the mere hope of such crop, is treated more or less copiously by all the French writers on the civil law; and it may be well to insert here some extracts from their books, taken from the places referred to in the opinion handed down on the rehearing:

Pothier says:

"Il ne peut, à la vérité, y avoir de contrat de vente sans qu'il y ait une chose vendue; mais il suffit que la chose vendue doive exister, quoiqu'elle n'existe pas encore. Par exemple, tous les jours nous vendons avant la récolte le vin que nous recueillerons; cette chose est valable quoique la chose vendue n'existe pas encore; mais elle dépend de la condition de sa future existence; et si la chose vient à ne pas exister, et si l'on ne recueille pas de vin, il n'y aura point de vente.

"Une simple espérance peut même être l'objet d'un contrat de vente; c'est pourquoi si un pêcheur vend à quelqu'un son coup de filet pour un certain prix, c'est un vrai contrat de

vente, quand même il arriverait qu'il ne prit aucun poisson; car l'espérance des poissons qui pourraient être pris est un être moral qui est appréciable et qui peut faire l'objet d'un contrat."

Pothier, Contrat de Vente, § 5.

Duranton says:

"Il n'est pas nécessaire, au sur lus, que la chose que l'on vend existe au moment même de la vente; il suffit qu'elle puisse exister, comme des fruits à naître, le produit espéré d'un coup de filet ou d'une opération commerciale.

"Quant à la vente d'un coup de filet, comme ce n'est que l'espérance de ce qui sera pris de poisson qui est l'objet de la vente, il est clair que quand bien même il n'y aurait rien de pris, la vente ne devrait pas moins recevoir tout son effet; le prix convenu ne devrait pas moins être payé en entier. Et si le pêcheur ne voulait pas jeter son filet, ou livrer ce qu'il a pris, il y aurait lieu contre lui à l'action *ex emptio*, pour obtenir les dommages-intérêts.

"Mais si j'achetais d'un pêcheur, à tant la livre, le poisson qu'il prendra dans sa journée, il n'y aurait pas de vente, s'il ne prenait rien. La vente serait conditionnelle comme dans le cas de l'article 1585. Du reste, il serait obligé d'exécuter le marché, et, s'il ne voulait pas pêcher, j'aurais action contre lui pour obtenir mes dommages-intérêts.

"Dans le cas de vente des fruits que produira tel fonds en telle année, il importe de distinguer si les parties ont entendu faire un *contrat entièrement aléatoire*, traiter de *spe fructuum nasciturorum*, ou bien si elles ont voulu seulement traiter d'une récolte à venir, en ne faisant consister l'*alea* que sur le plus ou le moins de fruits. Si c'est comme *simple espérance* que les fruits à naître ont été vendus, il y a vente, et le prix doit être payé, quand bien même il ne naîtrait rien, ou presque rien, ou que la récolte serait entièrement détruite par la grêle ou autre accident.

"Mais si c'est comme récolte à faire sur tel fonds en telle année que les fruits à naître ont été vendus, il n'y a pas de vente, faute d'objet, s'il ne naît rien ou presque rien, ou si, par quelque autre cause, il n'y a point ou presque point de fruits (car dans l'ordre moral, presque rien et rien sont la même chose)."

Duranton, Du Contrat de Vente, §§ 169, 171, 172. (Italics are ours.)

Troplong says:

"On peut vendre, non seulement les choses qu'on possède actuellement, mais encore celles qu'en peut avoir pas la suite.

"En effet, les choses futures sont du ressort de la vente. Le jurisconsulte Pomponius en donne pour exemple la vente des fruits qui naîtront d'une terre, et celle du croît d'un animal. Nous ajouterons, la vente de produits qui seront fabriqués dans une manufacture. Une telle vente est conditionnelle. Elle ne se réalise qu'autant que les fruits viennent à naître, et alors elle produit un effet rétroactif au jour du contrat, comme nous l'enseigne le même Pomponius. Mais si l'année est entièrement stérile, il n'y a pas de vente.

"On peut même traiter par achat et vente d'une espérance, d'une chance incertaine, comme un coup de filet. Écoutons encore Pomponius:

'Aliquando tamen sine re (physica scilicet, dit Pothier en rappelant ce texte), venditio intelligitur, veluti quum quasi alea emitur. Quod si quum coptus piscium vel avium vel missillum emitur. Emptio enim contrahitur etiam si nihil incidit, quia spei emptio est.'

"C'est vente de ce genre que celle par laquelle on vend à quelqu'un le droit de percevoir les fruits de tel immeuble, et il ne faut pas la confondre avec la vente des fruits qui naîtront, dont nous avons parlé au no précédent. *'Multum interest,'* dit Favre, *'an fructus quis vendat qui ex eo fundo nascentur, an vero perceptionem fructuum ex eo fundo. Priore casu quasi conditionalis venditio est, quæ non nisi notis fructibus perfectur; ideoque si nulli fructus, eo anno, ex illo fundo provenierint, nihil venditori debetur. Posteriore vero, pura emptio est, et alea potius quam certa aliqua res empti intelligitur.'*

"En effet, le droit de percevoir les fruits contient une chance implicite et nécessaire, que le propriétaire fait passer au vendeur. Ce droit est subordonné aux intempéries des saisons; il varie dans son étendue, suivant que l'année est plus ou moins heureuse; quelquefois même il se trouve réduit à rien. C'est donc une incertitude qui a fait l'objet du contrat, et l'acquéreur droit en courir les hasards; mais il est autrement quand l'acheteur a voulu acheter conditionnellement une chose future, et son intention n'est pas douteuse lorsque, comme dans le cas dont nous parlons, il s'est servi d'expression conditionnelles; les fruits qui naîtront."

Troplong, De la Vente, § 204.

Baudry-Lacantinerie says: "La première règle résulte de l'art. 1130, aux termes duquel 'les choses futures peuvent être l'objet d'une obligation.' On peut donc vendre une chose future, c'est-à-dire une chose n'existant pas actuellement, mais dont l'existence est possible dans l'avenir. Ainsi je puis vendre en tout ou en partie la récolte de vin ou de blé que je ferai l'année prochaine dans ma propriété. Il est vrai que je puis ne récolter ni vin ni blé, la grêle ou tout autre accident peut détruire la récolte; mais il est possible que j'aie une récolte, et cela suffit pour que la vente que j'en fais ne soit pas sans objet. Il en serait autrement si, au moment de la vente, la récolte vendue était déjà détruite; alors ce serait la seconde règle qui deviendrait applicable. La vente d'une chose future est le plus souvent un contrat aléatoire; *Palés* peut d'ailleurs augmenter ou diminuer suivant les clauses convenues. Ainsi je puis vendre ma récolte moyennant un prix ferme qui me sera payé *quoi qu'il arrive*; je puis la vendre à raison de tant le tonneau de vin ou de tant l'hectolitre de blé. Dans le premier cas, l'acheteur devra le prix convenu, même si la récolte est nulle; dans le second cas, il ne paiera que les quantités récoltées, mais il les paiera au prix convenu d'avance, sans qu'il ait à tenir compte du cours du vin ou de blé au moment de la récolte; il y aura encore *aléa*, mais moindre." Baudry-Lacantinerie, Contrat de Vente, § 97.

Laurent says: "La vente des choses futures est aléatoire quand les parties ont entendu vendre et acheter une *chance*; telle est la vente d'une récolte quand, dans la pensée des parties contractantes, c'est une *espérance* qui fait l'objet

de la convention; qu'il y ait des fruits ou qu'il n'y en ait point, l'acheteur devra payer le prix, car le prix représente la *chance*, il ne représente pas les fruits. Quand les fruits futurs sont l'objet du contrat, il n'y aura pas de vente s'il n'y a point de fruits. Cela est élémentaire." Laurent, De la Vente, § 99. (Italics are ours.) Delsol says:

"De la vente des choses futures."

"Les choses futures et qui n'ont pas d'existence actuelle peuvent-elles être vendues? L'affirmative n'est pas douteuse; seulement il s'agit d'interpréter l'intention des parties, pour savoir si dès à présent elles se sont ou non définitivement liées. Ont-elles entendu ne faire le contrat que si la chose se réalisait? Alors la vente sera subordonnée à cette réalisation qui constituera une véritable condition suspensive. Ont-elles au contraire entendu contracter à toute événement? Alors la vente sera valable, lors même que la chose n'existerait jamais, car vente n'a pas eu pour objet la chose elle-même, mais la *chance* que cette chose existât."

"Un exemple montrera l'exactitude de cette distinction. Le propriétaire d'une vigne vend la récolte de l'an prochain à raison de tel prix par tonneau de vin récolté. Il est bien évident que, dans ce cas, les parties ont eu en vue la récolte elle-même, et, que si cette récolte n'existe pas, la vente est nulle faute d'objet. Mais si elles sont convenues que la vente de la récolte a lieu pour tel prix et à forfait, alors la vente a pour objet, non plus la récolte, mais la *chance* de la récolte, qui peut avoir, selon les circonstances une valeur très-supérieure ou très-inférieure au prix stipulé et cette vente est valable lors même que la récolte serait tout à fait nulle. L'importance du prix sera l'élément principal qu'on devra consulter pour savoir si les parties ont voulu faire un contrat commutatif ou un contrat purement aléatoire."

Delsol, De la Vente, § 422. (Italics are ours.)

Baudry-Lacantinerie again says:

"Ainsi je puis vendre la récolte que mon vignoble produira l'année prochaine, et je puis faire cette vente à tant la mesure, par exemple, à 2,000 fr. le tonneau, ou pour un prix ferme, exemple: toute la récolte pour 50,000 fr."

"Dans ce dernier cas, l'acheteur devra-t-il payer son prix, si la récolte est nulle ou a peu près, par exemple si la gelée l'a détruite ou l'a réduite à des proportions si exiguës qu'il ne vaudrait pas la peine de vendanger, parce que les frais absorberaient et au delà le produit? Tout dépend de la nature de la convention faite entre les parties. Si c'est seulement la chance d'une récolte qui a fait l'objet du contrat, alors c'est une simple espérance qui a été vendue; l'acheteur devra payer son prix, quoi qu'il arrive, même si la récolte est nulle. Il y a vente aléatoire, et le prix aura naturellement été fixé en conséquence. Quand, au contraire, les parties ont traité en vue d'une récolte future, et non du simple espoir d'une récolte, la vente sera non avenue faute d'objet s'il n'y a pas de récolte ou s'il y a une récolte à peu près nulle; car, en droit, presque rien équivaut à rien. Dans ce dernier cas, il y a vente conditionnelle."

Des Obligations, § 247. (Italics are ours.)

Mourlon, vol. 3, p. 193, says:

"La vente peut avoir pour objet des choses

futures: par exemple, la récolte de tel vignoble." Article 1138. "Il importe alors de savoir ce qui a été vendu. Est-ce la chance de la récolte—ou la récolte? Dans le premier cas, la vente est complètement aléatoire. L'acheteur doit son prix tout entier, même en l'absence de toute récolte. Dans le second, elle est en quelque sorte *commutative et aléatoire*. Si le vignoble donne une récolte, l'acheteur doit son prix tout entier, quoique la récolte soit peu abondante; sous ce rapport, la vente est aléatoire, car il peut y avoir une récolte très abondante ou une très mauvaise récolte. Mais si la récolte manque absolument, ou même si le vignoble n'a produit que quelques bouteilles de vin (car en droit, presque rien est considéré comme rien), l'acheteur ne doit pas son prix, puisqu'il l'a promis en échange d'une récolte que le vendeur ne peut pas lui livrer. Sous ce rapport, la vente est commutative.

"Mais à quel signe reconnaîtra-t-on si c'est la chance de la récolte ou la récolte qui été vendue? Les circonstances éclaireront le juge. Il faut surtout comparer le prix à la valeur ordinaire des récoltes que produit le vignoble. S'il est égal ou à peu-près égal, on suppose qu'il a été promis en échange de la récolte. S'il lui est très-inférieur, on suppose qu'il a été accepté comme équivalent de la chance de la récolte."

From these quotations it is very evident that the question of what formed the subject of the sale,—the future crop, or the hope thereof,—is one of what was the intentions of the parties; that is, of the interpretation of the contract. Contracts must be interpreted from the terms of the writings evidencing them, and from the circumstances surrounding them. In contracts of the nature of the one here in question, the main circumstance would be the comparison between the value of the crop if it materialized and the price fixed in the contract. Of the benefit of this circumstance the court is deprived in the present instance, as was fully explained in the opinion handed down on the rehearing. The other notable circumstances are pointed out in the same opinion. They are, on the one part: First, that the purchaser had been in the habit of buying orange crops in advance on a speculation, and that not unfrequently these crops had perished entirely from cold weather, which in that locality hung ever as a Damocles sword over the head of the orange grower; and, second, that the purchaser paid the large sum of \$4,000 cash, without a word of stipulation for its return on any contingency; and they are, on the other part, that never before, within the memory of the oldest inhabitant, had the trees been killed outright, or so injured as not to produce a crop the second year following, and that the purchaser stipulated that the vendor should furnish the teams and carts and drivers for moving the two crops.

First, as to the terms of the contract: It is undeniable that the wording of the contract is peculiar, and that a strong inference arises of its having been so made advisedly. In describing the crops, the vendor might have said, simply, "The two orange crops of the years 1899 and 1900 on my place," or, "The two orange crops that the trees on my place will

produce in the years 1899 and 1900." Instead of this, he industriously explains what is meant by "the two crops sold." After saying that he has sold two crops of oranges on his place, he goes on and adds the *videlicet*, "I. e.: 1st. All oranges that my trees may produce in the year 1899. 2nd. All oranges that my trees may produce in the year 1900." This specification must unquestionably be held to control the more general terms made use of previously. They were inserted in the contract for that very purpose. Now, why, if simply the future crops were in contemplation, the simple future form of the verb should not have been used? Why should the conditional future or potential form of the verb have been used, as if mere potential crops, or, in other words, the hope of crops, had been in contemplation? In the above extracts the simple future is invariably used in describing the future crops. Thus Pothier, "la récolte de vin que nous recueillerons" ("the wine crop that we shall gather"); thus Duranton, "vente des fruits que produira tel fonds" ("sale of the crops that such a tract of land shall produce"); thus Troplong, "vente des fruits qui naîtront" ("sale of the fruit that will be produced"); thus Baudry-Lacantinerie, "la récolte que je ferai l'année prochaine dans ma propriété" ("the crop I shall make next year on my property"); thus Delsol, "la récolte de l'an prochain" ("the crop of next year"); thus Baudry-Lacantinerie again, "la récolte que mon vignoble produira l'année prochaine" ("the crop my vineyard shall produce next year"); thus Mourlon, "la récolte de tel vignoble" ("the crop of such a vineyard"); thus Pardessus, "tout ce que produira le champ" ("all that the field shall produce"). In all these cases the form of expression is such as to give rise to the inference that the parties had in mind a crop that would come into existence, whereas the form, "all oranges that my trees *may* produce," raises no such inference, but, on the contrary, from the fact that the simple form is made to give place to this peculiar one, gives rise to an inference, and an inference, at that, of considerable strength, that the parties made use of the potential mood, instead of the simple indicative, advisedly, in order to describe crops not simply future, but also merely potential. Delsol, in the extract above, says that the sale must be held to have been of a mere hope, where the parties have contracted "à tout événement." The literal translation of this would be, "at all events"; a freer and more idiomatic translation would be, "subject to all contingencies," or "on the assumption of all contingencies," or, again, "the purchaser taking all chances," or "assuming all risks." This last translation would make this authority fit exactly the case in hand. Baudry-Lacantinerie, in the extract above, says that the sale must be held to have been of the mere hope where the parties have contracted "moyennant un prix ferme qui me sera payé quoiqu'il arrive"; *anglice*, "In consideration of a lump price to be paid me, no matter what happens." In the case in hand the price was of that character, and the purchaser "*assumed all risks*," which may be said to be fully the equivalent of "*no matter what happens*." Thus authority, again, would seem to fit the case. The purchaser, knowing full

well that the crop might never materialize, paid cash, and unconditionally, \$4,000, and bound himself to pay at a fixed date, and likewise unconditionally, the balance of the price; and he assumed all risks. On further consideration, the court is satisfied that this assumption of all risks meant that the purchaser assumed the risk of the crops never materializing, and that therefore the sale was merely of the hope of the crops. At the time this contract was entered into, the defendant had the hope or chance that his orange trees would produce crops of oranges in 1899 and 1900. His chance in that regard he conveyed to the purchaser. In consideration of the price paid and to be paid, the purchaser stepped into his shoes. From that moment he had no further chance in connection with the crop and no further risk, and from the same moment the purchaser had all the chance and all the risk.

In addition to the extract from Dictionnaire du Digeste, ou Substance des Pandectes Justininiennes, par M. Thevenot-Dessaules, quoted in the opinion on rehearing, going to show that the fisherman who sells the cast of his net warrants that the net shall be cast, or that the conditions essential to the casting of the net shall continue until the time comes for the casting, plaintiff's counsel quote the following: "Ainsi dans un cas opposé à celui que nous avons prévu No. 238, lorsqu'un pêcheur a vendu un coup de filet, si la pêche n'a pas lieu par force majeure, il sera libéré; mais celui qui lui avait promis un prix ne lui payera rien." Pardessus, Cours de Droit Commercial, 305. This goes very far toward convincing the court that it was in error in holding that such a warranty does not accompany the sale in the case of the fisherman; but, granting that the court was in error in that respect, this would not be to say that in the present case the vendor warranted the continued existence of the trees. The case can be easily distinguished from that of the sale of the cast of a net. In the latter case the hope is based on a condition of things to exist in the future, and the contract presupposes that the condition will exist; the sale is not of the hope that the net will be cast, but of the hope of the result of the casting. In the former case the hope is based on the actual existing condition of things. The seller says to the purchaser, "Such as my hope or my chance is at the present time, I sell it to you." If in the case of the fisherman a similar contract were made (that is, if the risk were made to include not only the result of the casting, but also the eventuality of the net's being cast), then the case would be different, and the contract would have to be enforced as made; and the fisherman would be liberated from warranty, saving, of course, as to his own acts.

Plaintiff quotes from Fuzler-Herman, Code Annoté, vol. 4, § 5, as follows: "In case of a thing future and uncertain, the formation of the contract is subordinated to the realization of the thing sold, in such a manner that the non-realization of the thing renders the contract radically null for the want of an object; and it is the same when a penal clause has been added. * * * Such a clause, far from validating the contract of sale, and furnishing

it an object, participates itself in the nullity in which the contract itself is stricken." What is here said is true only of the sale of a thing to come hereafter into existence, such as future crops; but it is not true of the sale of a presently existing thing, such as a hope. The annotation is taken from the decision of the court of Lyon in the case of Rodet against Lachapelle, 18th of May, 1854, reported among the decisions of the year 1855. It was the sale of some shares of the stock of a mining company thereafter to be organized, the organization of which fell through. Part of the price had been paid cash, and a penal clause inserted to provide for the contingency of the parties not complying with their contract. The suit was for the return of the price, and also for the recovery of the penalty. The defendant was willing to restore the price, but not to pay the penalty. The court held that the contract of sale was null for want of an object, and that the penal clause was also null because it was an accessory obligation partaking of the nullity of the principal obligation. The case would have been different, said the court, if the sale had been of a hope, or if the vendor, in addition to binding himself to sell the shares, had warranted that the company would be organized. The decision itself, and the annotation of the reporter of it, fully distinguish the case from that of the sale of a hope.

As attempted to be shown in the opinion handed down on rehearing, the parties clearly contemplated that the crops might prove a total failure. They had proven so before, not unfrequently. It is safe, therefore, to say that by assuming all risks the purchaser assumed this risk of total failure. From this it would follow that the clause obligating the vendor to furnish teams, carts, and drivers to move the crops is not inconsistent with the view that within the contemplation of the parties, and within the meaning of the contract, the crops might prove total failures, and there be no crops to move. This clause, therefore, is not inconsistent with the theory of the sale's having been merely of the hope of the crops.

It is therefore ordered, adjudged, and decreed that the plaintiff's suit be dismissed at his cost, and that he be condemned to pay to the defendant the sum of \$4,000, with legal interest thereon from the 1st day of December, 1900, and that the plaintiff pay the costs of this appeal.

BREAUX and BLANCHARD, JJ., dissent, adhering to their views as expressed in the first decision handed down by the court.

ILLINOIS CENT. R. CO. v. GARRISON et al.

(Supreme Court of Mississippi. Nov. 24, 1902.)
EQUITY—INJUNCTION—MULTIPLICITY OF SUITS—CONTINUING TRESPASS.

1. A railroad was defendant in several actions for trespass, the liability in each depending on whether the track had been properly constructed. The injury complained of was a constantly recurring one, and plaintiffs had previously sued for the trespass, and intended to continue to do so in the future. *Held*, that equity has jurisdiction to restrain the actions and consolidate them, to prevent the endless multiplicity of suits.

Appeal from chancery court, Madison county; H. C. Conn, Chancellor.

Suit by the Illinois Central Railroad Company against James Garrison and others. From a decree for defendants, complainant appeals. Reversed.

The Illinois Central Railroad Company filed the bill to enjoin defendants from prosecuting their seven different actions in a justice of the peace court in said county, and the equity relied on in the bill is that these different suits, prosecuted by seven different plaintiffs, acting by the same attorney, constitute a multiplicity of suits, which it is entitled to have enjoined. It further alleges that it is filed for an injunction to restrain a multitude of suits pending, and others which are threatened, every one of which is by persons peculiarly irresponsible, and based on what they themselves charge in their bill of particulars is an injury which is constantly recurring. The bill prays for an order restraining plaintiffs from further prosecuting these and other suits growing out of these same facts, and consolidating them all in the chancery court. Defendants all answered the bill. The cause was heard on the bill, answer, and affidavits. On the hearing the chancellor rendered a decree dissolving the injunction.

Mayes & Harris, for appellant. Brame & Brame and E. A. Howell, for appellees.

WHITFIELD, C. J. The case of *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, is a very different case from this one. There the damage resulted from a single past trespass, completed and over with; hence not to occur again in the future. The opinion of the court in that case expressly stated that the jurisdiction of the chancery court to enjoin, on the part of one, suits of many, or e converso, is maintainable where there is a "community of interest in the subject-matter of the controversy," or where there "is a common right or title." The case of *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, illustrates the exercise of the jurisdiction where there is a common right on the part of one against many, as does *Pollock v. Institution*, 61 Miss., at page 296, and these two cases are squarely in point. The case of *City of Albert Lea v. Nielsen*, 83 Minn. 246, 86 N. W. 83, is directly in point, also, on the only question involved,—whether the jurisdiction exists. We do not now consider the merits of the case,—we inquire only whether the chancery court has the jurisdiction; and the case in 83 Minn., 86 N. W., is directly in point on that proposition. The *Tribette* Case holds that the jurisdiction is not exercisable, as maintained by Mr. Pomeroy, where the community of interest consists merely in the fact that the same question of law and similar questions of fact are involved in the several cases. We do not rest the exercise of the

jurisdiction here on that proposition, but on the express holding in the *Tribette* Case that the jurisdiction exists when there is "a common right or title," or "a community of interest in the subject-matter of controversy." We hold that the jurisdiction is maintainable in this case for the following reasons: First. This is not the case of a single past trespass, over with when it occurred, for all time, as was the *Tribette* Case. The very first sentence in the brief of learned counsel for appellant in that case (page 182, 70 Miss., page 32, 12 South., and 19 L. R. A. 660, 35 Am. St. Rep. 642) shows that the very point on which that case turned was that the fire was a "single past trespass," and on page 183, 70 Miss., page 33, 12 South., and 19 L. R. A. 660, 35 Am. St. Rep. 642, the authorities are cited to that point, whereas here (a) there were some 10 suits brought in 1899, some of which were compromised, and some of which were tried and won by the railroad; (b) there were 23 different claims propounded against the railroad in 1892, all represented by 7 plaintiffs, who sued for themselves on their own 7 claims, and also for the other claims which had been assigned to them; (c) it further appears that some of the plaintiffs in 1899 are also plaintiffs here, bringing new suits grounded on substantially the same state of facts; (d) the parties now suing expressly declare that they expect to bring new suits indefinitely in the future; (e) and they are all averred to be insolvent and unable to pay court costs. In every one of these cases—past, present, and future—the liability of the railroad company depends upon whether it has properly constructed its railroad track. The determination of that question will settle all cases so long as the embankment remains unchanged in its condition. Here there is plainly a "common right" asserted by the railroad against all these various parties, and *Tribette v. Railroad Co.* in such case maintains the jurisdiction. Surely, on these facts, the jurisdiction of the chancery court to convene all the parties in one suit, and to determine therein the single question on which liability, past, present, and future, depends, so as to prevent this endless multiplicity of suits, with its attendant useless consumption of time and costs, is too well settled by modern authorities to be doubted. See authorities in brief of counsel for appellant, and in note of Mr. Freeman to *Woodward v. Seely*, 50 Am. Dec., at page 453. The case of *Pollock v. Savings Inst.* expressly maintains the equitable jurisdiction in this class of cases. See especially, pages 296, 297, 61 Miss., and authorities cited. This case falls squarely within Mr. Pomeroy's fourth class (section 255 of volume 1, 2d Ed.). *Pollock v. Savings Inst.* went far beyond *Bishop v. Rosenbaum*, 58 Miss. 84, as therein expressly pointed out. See, especially, *Insurance Co. v. Van Cleave* (1901) 191 Ill. 410, 61 N. E. 94; *Smith v. Dobbins*, 87 Ga. 303, 13 S. E. 496.

Of course, we say nothing upon the merits of the case. That is for the chancery court on final hearing. We determine the only question now before us,—that equity has jurisdiction of the case made by the bill below.

Decree reversed, injunction reinstated, and the cause remanded.

WOODS v. STATE

(Supreme Court of Mississippi. Nov. 24, 1902.)

HOMICIDE—INDICTMENT—TRIAL—INSTRUCTIONS.

1. An indictment charging that two persons named, on a certain day, willfully, feloniously, and "each of his malice aforethought, did then and there kill and murder" H., etc., was not objectionable on the ground that, "if each of his malice aforethought" did the killing, it was error to include them both in the same indictment.

2. An instruction in a prosecution for homicide that, if the jury believed certain facts to be proved by the evidence beyond a reasonable doubt, they should find defendant guilty as charged, unless they believed him guilty of manslaughter, was erroneous, as in effect directing the jury to return a verdict of guilty of manslaughter unless the jury should convict him of murder.

Appeal from circuit court, Leflore county; F. E. Larkin, Judge.

Lee Woods was convicted of manslaughter, and he appeals. Reversed.

Coleman & Ray, for appellant. Monroe McClurg, Atty. Gen., for the State.

TERRAL, J. The appellant, being convicted of manslaughter and sentenced to the penitentiary, appeals, and assigns several errors in the proceedings against him. He demurred to the indictment, which was overruled, and of that he complains. The indictment, in proper form in other respects, alleges "that Lee Woods and Wiley Short, in said county, on the 30th day of June, 1902, willfully, feloniously, and each of his malice aforethought, did then and there kill and murder Henry Hog, against," etc. The defect in the indictment pointed out in the assignment and brief of appellant is "that, when it is charged that each of his malice aforethought did the killing, it was error to include them both in the same indictment." The objection to the indictment, in our opinion, is rather critical and technical than substantial. The defect, if admitted, does not render the indictment void, because it has long been established that mala grammatica non vitiat chartam, when the meaning is apparent.

The third and fourth instructions for the state are assigned for error. As we must reverse the judgment for another cause, it is unimportant that we pass upon this ground, as it cannot arise upon a future trial; the acquittal of Short having made them inappropriate in the further consideration of the case.

Another instruction assailed as error is as follows: "Instruction No. 5. The court in-

structs the jury that if they believe from the evidence, beyond a reasonable doubt, that Henry Hog shot the sister of defendant, as shown by the testimony, and that defendant then accosted deceased with the remark, 'Damn you! you have shot my sister,' or similar words, at the same time presenting his rifle as if about to shoot Hog, and that Hog then raised his pistol and wheeled, and defendant then shot and killed deceased, they will find him guilty as charged, unless they believe him guilty of manslaughter." In our opinion, the instruction is erroneous. It, in effect, directs a verdict for manslaughter unless the jury should convict him of murder. And this direction to find him guilty of manslaughter is not left to the discretion of the jury, nor is it made dependent upon the intention of Woods in shooting, nor upon the condition whether he shot in self-defense or not. It is too bare of acts and their connection with each other, and of the intent in doing them, to be a safe guide to the jury. If epitomized, it is as if it said: "If Hog raised his pistol and wheeled, and Woods presented his rifle and fired, and killed Hog, you must find him guilty of murder, or at least of manslaughter." It does not commend itself to our conscience or judgment.

Reversed and remanded.

ORR v. STATE.

(Supreme Court of Mississippi. Nov. 17, 1902.)

INDICTMENT—DESCRIPTION OF PERSON—AMENDMENT.

1. Where the first count of an indictment charged defendant in the name of "Charlie Orr" with having committed a crime, and the second count charged the crime against him as "Charlie Dillard," a motion of the district attorney to amend the second count, by inserting the name of "Orr" instead of "Dillard," was within Code, § 1435, authorizing amendment in the description of any person whatsoever named or described in an indictment.

Appeal from circuit court, Panola county; P. H. Lowrey, Judge.

Charlie Orr was convicted of rape, and he appeals. Affirmed.

He was indicted of committing a rape upon one Martha Dillard. There were two counts in the indictment. The first count charged "Charlie Orr" with having committed the crime, and in the second count "Charlie Dillard" is charged with having committed the crime. On motion of the district attorney, the court permitted an amendment of the second count by inserting the name of "Orr" instead of "Dillard."

E. W. Rainwater and A. W. Shands, for appellant. Wm. Williams, Asst. Atty. Gen., for the State.

CALHOON, J. The amendment, if any amendment was needed, which we do not de-

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 514.

side, was proper under Code, § 1435, under the language "or other description whatever, of any person whatsoever, therein named or described." The clerical mispision in this indictment is perfectly manifest, the conviction entirely proper, and there is no error in the record.

Affirmed.

BARRIER v. KELLY.

(Supreme Court of Mississippi. Nov. 17, 1902.)
APPEAL AND ERROR—INTERLOCUTORY ORDERS—RIGHT OF APPEAL.

1. An order sustaining a demurrer to a bill, and allowing 60 days in which to amend it, is not a final decree, and hence not appealable, though the court allows an appeal "to settle the principles of the case."

Appeal from chancery court, Yazoo county; H. C. Conn, Chancellor.

Action by B. J. Barrier against I. M. Kelly. From an interlocutory order sustaining a demurrer to the bill, plaintiff appeals. Dismissed.

C. H. Williams and W. W. Lockard, for appellant. Barnette & Perrin, for appellee.

CALHOON, J. We cannot take cognizance of this appeal because it has no warrant of law. The same order sustains a demurrer to the bill, gives 60 days to amend it, and yet allows an appeal to "settle the principles of the case." Non constat but appellant would conclude to amend. He may have done so, for aught we know, since June 20th, the date of the decree. In order that a decree may be appealed from, it must be final as to its subject.

Appeal dismissed.

BRADSTREET CO. v. CITY OF JACKSON.

(Supreme Court of Mississippi. Nov. 24, 1902.)
LICENSE TAX—REPEAL OF ACT—EFFECT ON EXISTING RIGHTS.

1. Code 1892, § 3336, imposing an annual license tax on commercial agencies, was repealed by Laws 1896, p. 54, § 13, which did not provide for saving existing rights. Held, that the right to collect the tax for years prior to the repeal ceased with the repeal.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

Action by the city of Jackson against the Bradstreet Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action of assumpsit brought by the city of Jackson against the Bradstreet Company to recover the sum of \$300 alleged to be due by defendant to plaintiff as a privilege tax for carrying on the business of a commercial agency for the years 1892 and 1893. A summons was duly issued and served on one A. C. Jones, alleged to be the agent of defendant corporation, which was a non-resident of the state. Defendant's attorneys

appeared for the sole purpose of contesting the jurisdiction of the court, and filed a plea in abatement denying that A. C. Jones was its agent, and denying that it had been legally served with process. Issue was joined on this plea, and testimony heard. The court held that Jones was the agent of defendant, and that service of summons on Jones was sufficient. Defendant declined to plead further, and a judgment was rendered against it for the sum of \$300. From that judgment defendant appealed.

The opinion of the court contains a further statement of the facts.

Harper & Potter, for appellant. Sterling & Harris, for appellee.

CALHOON, J. We do not decide whether the service of process is valid, nor whether there was power in a municipality in Hinds county to tax appellant in view of Code 1892, § 3336, providing that the payment of the tax to the auditor, etc., by a commercial agency "shall exempt the company or party carrying on such business from the payment of this tax in any county."

The only remaining question, and the question we will decide, is whether the case-made can support the judgment by default taken. The policy of taxing the privilege of carrying on commercial agencies first appears in our legislation in Code, § 3336, imposing an annual state tax of \$300. This was repealed by Laws 1896, p. 54, § 13, and the repealing act has no saving clause. The declaration claims 50 per cent. of the state tax for the years 1892 and 1893, levied by the city as a debt. The levy fell by the repeal. The United States, Kentucky, Indiana, New York, North Carolina, and divers other states have a general law that any repeal, unless it so specially provides, shall have no effect on the situation as it was under the repealed law. Mississippi has no such statute, and so comes under a principle, nearly universal, that everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation. Cooley, Tax'n (2d Ed.) p. 18, notes; 23 Am. & Eng. Enc. Law, 500b, note 5; Id. 502-507, note 3; Bryan's Adm'r v. Harvey's Adm'r, 11 Tex. 311; Blairdon v. Abel, 5 Iowa, 5; Gortley v. Sewell, 77 Ind. 316; Mount v. State, 6 Blackf. 25; McQuilkin v. Doe, 8 Blackf. 581; Hampton v. Com., 19 Pa. 334; Taxing Dist. v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780; Williamson v. State of New Jersey, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915. This last case distinctly holds that there is no element of private property in the right of a city to tax.

No element of contract can be predicated of this case. Mississippi is fully committed to the general doctrine stated in this opinion. French v. State, 53 Miss. 651; Adams v. Fragiacomio, 71 Miss. 417, 15 South. 798; Musgrove v. Railroad Co., 50 Miss. 677; Anding v. Levy, 57 Miss. 58, 34 Am. Rep. 435. The

case does not support the judgment by default, and the court below does not seem to have had its attention called to this question.

Reversed and remanded.

BOARD OF SUP'RS OF WARREN COUNTY v. BOOTH.

(Supreme Court of Mississippi. Nov. 17, 1902.)

COUNTIES—ATTORNEYS—EMPLOYMENT—STATUTES.

1. Code 1892, § 293, provides that the board of supervisors shall have power, in its discretion, to employ counsel by the year, at an annual salary not to exceed \$300, or to employ counsel in all civil cases in which the county is interested. *Held* that, in view of a course of legislation (Code 1857, p. 420, art. 35; Code 1871, section 1385; Act Feb. 7, 1872; Laws 1876, p. 109; Code 1880, § 2176), it was the legislative intent that the word "or," in the statute, should be read "and," and the employment of an attorney to defend civil suits is authorized, though there be at the time an attorney employed by the year.

Appeal from circuit court, Warren county; Geo. Anderson, Judge.

"To be officially reported."

Action by R. V. Booth against the board of supervisors of Warren county. From a judgment for plaintiff, defendant appeals. Affirmed.

The board of supervisors employed R. V. Booth, an attorney at law, to defend four civil suits against the county, by an order duly entered upon its minutes. At the time appellee was so employed, the board had appointed an attorney as general advisory counsel, to attend all its meetings, at a salary of \$300 per annum, under section 293 of the Code of 1892. After the services had been rendered, appellee presented his claim to the board of supervisors for the fees in the several cases, which was rejected by the board on the advice of their attorney. He then brought this suit to recover his said fees. In the circuit court a jury was waived, and the cause tried before the court on an agreed statement of facts.

McLaurin & Thames, for appellant. R. V. Booth and Green & Green, for appellee.

WHITFIELD, C. J. The Code of 1857 provided (page 420, art. 35): "The boards of police shall have power, at their discretion, to employ counsel in all civil cases in which the county is interested, to conduct the proceedings, instead of the district-attorney, and to pay such counsel out of the county treasury, and such proceedings shall be as valid as if conducted by the district-attorney." This did not provide for employment of general advisory counsel, but only for employment in civil suits. Section 1385 of the Code of 1871 is substantially the same. In this state of the law, in January, 1871, the board of supervisors of Marion county employed Bentonville Taylor to act as advisory counsel

in certain matters, not requiring any civil suits. Taylor sued for compensation, and lost, because the law, as it then stood, did not permit employment of counsel except in civil suits. Here was a serious defect in the law, and to remedy it the legislature on February 7, 1872, passed an act (Laws 1872, p. 62) authorizing boards of supervisors to employ "an advising attorney, at a stated salary per annum, not to exceed the sum of \$300.00, payable out of the county treasury, for objects of general advice as to current matters in the administration of the affairs of their respective counties." This act was expressly repealed January 14, 1876 (Laws 1876, p. 109): "That an act entitled an act to enable the boards of supervisors to employ counsel at a stated salary, approved February 7th, 1872, be, and the same is hereby, repealed." The Code of 1880 (section 2176)—a new codification—merely recurred to and re-enacted the above provision of the Code of 1857, p. 420, art. 35. "Sec. 2176. The board of supervisors shall have power, in its discretion, to employ counsel in all civil cases, in which the county is interested, to conduct the proceedings, instead of the district-attorney, and to pay such counsel out of the county treasury; and such proceedings shall be as valid as if conducted by the district-attorney." The Code of 1892—still another codification of the subject-matter (section 293)—restores the status of the law as it was after the passage of the above act of February, 1872: "Sec. 293. The board of supervisors shall have power in its discretion, to employ counsel by the year, at an annual salary not to exceed three hundred dollars, or to employ counsel in all civil cases in which the county is interested, and in criminal cases against a county officer for malfeasance or dereliction of duty in office, when, by the criminal conduct of the officer, the county may be liable to be affected pecuniarily, to conduct the proceedings, instead of the district attorney, or in conjunction with him, and to pay such counsel, out of the county treasury, reasonable compensation for his services."

What, now, in the light of the history of these provisions, is the intent of the legislature on this subject-matter? The first clause of section 293 is not literally identical with section 1 of said act of February, 1872, but we think it is substantially so, and was meant to bring forward and re-enact that section. Both provide for the employment of counsel generally by the year, at a stated salary of \$300, and we think these material likenesses show that the first clause of section 293 of Code of 1892 is meant to be a re-enactment of section 1 of the act of February, 1872. Recurring now to the act of February, 1872, it is plain that there were then, after the passage of that act, two separate laws,—one the said act of February, 1872, authorizing the employment by the year, at a salary of \$300, of general advisory counsel

in current matters in the administration of the affairs of the counties; and another (section 1385, Code 1871) authorizing the employment of counsel in civil cases; and it is clear that at that time, after February 7, 1872, any board of supervisors could have, by one order, employed such general advisory counsel, and also counsel in civil cases. The purpose of the legislature in the passage of the act of February 7, 1872, was manifestly to add to the power to employ counsel in special cases the power to employ general advisory counsel, in the discretion of the board. From February 7, 1872, to January 14, 1876, the boards had power to employ counsel for both purposes. From January 14, 1876, to the adoption of section 293 of the Code of 1892, there was no power to employ advisory counsel. That section was manifestly intended to restore the law to the condition it was in when both powers existed, and this was accomplished by bringing forward and combining in section 293 of the Code of 1892 the said section 1 of the act of February 7, 1872, and article 35, p. 420, of the Code of 1857. The obvious intent of the legislature was not to leave the counties in the helpless condition of not being able to employ in special civil or criminal cases, where very large county interests might be involved, requiring the ablest counsel, by reason of the previous employment of merely advisory counsel. Suppose, for example, the statute should be construed to mean that the board of supervisors may employ one or the other kind of counsel, but not both; then it inevitably follows that, if a board employs general advisory counsel, it never could during that year employ counsel in any civil or criminal case, no matter how vast the interests involved, and no matter how great the damage entailed upon the county by such inability to employ counsel in the civil or criminal case. No such result was ever intended by the legislature, and no such construction can possibly be reconciled with reason. The entire difficulty grows out of the use of the word "or" instead of "and." But it is well settled that, whenever it is clear that either of these words has been mistakenly used for the other, the one intended will be substituted for the one mistakenly used, so as to carry out the legislative intent. 2 Am. & Eng. Enc. Law (2d Ed.) pp. 333-336. And see, for two strikingly similar cases, *State v. Brandt*, 41 Iowa, 615, and *Hughes v. Smith*, 64 N. C. 495; the first involving a mistake occurring in a new codification, as here. It is not that "or" is read "and," for, as correctly pointed out by *Jessel*, Master of the Rolls, in *Morgan v. Thomas*, 51 Law J. Q. B. 557, "or" never means, and is never read, "and," but "or" used by mistake for "and" is substituted by "and," the legislative intent imperatively so requiring. We are therefore of opinion that boards of supervisors have power, under section 293, to employ, in their sound discretion,

both advisory counsel by the year, at \$300, and counsel in civil and criminal cases.

Affirmed.

PEOPLE'S BUILDING & LOAN ASS'N v. McPHILLAMY.

SAME v. HAWKS.

(Supreme Court of Mississippi. Nov. 24, 1902.)
BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—BORROWING MEMBERS—RIGHTS AND LIABILITIES.

1. Where a building association goes into voluntary liquidation, the equitable principle of accounting with the stockholders is the same, whether the association be solvent or insolvent.

2. Where a building association goes into voluntary liquidation, a borrowing member is not entitled to be credited on his debt with the total amount he has paid the association, including both dues on stock and payments on the principal and interest of the loan, but only with payments made on the loan specifically, plus the value of his shares, if that can be estimated; and, if such estimation is impracticable, he can receive the value of his shares only on distribution by the receiver.

3. On the voluntary liquidation of a building association, the rule of distribution among its stockholders cannot be altered by the fact that the proceeding in which the rule must be applied is or is not an administration suit.

Appeal from chancery court, Lauderdale county; Stone Deavors, Chancellor.

Separate suits by Joseph McPhillamy and Mrs. L. Hawks against the People's Building & Loan Association. From a decree for plaintiff in each action, defendant appeals. Reversed.

Appellees were borrowing members of the People's Building & Loan Association. The association went into voluntary liquidation, and was about to foreclose the mortgages, that the appellees had given it to secure their loans, when they filed the bills in these cases in the chancery court of Lauderdale county to enjoin the sale of the property under the mortgages, and claimed in their bills that their debts had been more than paid, and prayed for an accounting. The association filed its answers, and joined in the prayer for accountings. The court thereupon ordered an account to be stated, and appointed a commissioner to state the accounts. The commissioner stated these accounts, and, on the account as stated by the commissioner, decrees were rendered in the court below in favor of the complainants. The court ordered an accounting on the following principle: Charge complainants with the sums actually borrowed, with 6 per cent. interest per annum, and credit them with all sums paid by them, according to the rule for the application of partial payments prescribed by section 2351 of the Code of 1892.

S. B. Watts, McWillie & Thompson, and Alexander & Alexander, for appellant. S. A. Witherspoon and Amis & Dunn, for appellees.

¶ 2. See *Building and Loan Associations*, vol. 2, Cent. Dig. §§ 63, 66.

WHITFIELD, C. J. These cases will be considered and determined together, as they are one, so far as the method of accounting is concerned. This is a true building and loan association, and it is a domestic building and loan association, and hence no question of usury is involved. It had been operating for some years, and, finding that its business ceased to be profitable, it went into voluntary liquidation in September, 1898. We are inclined to think that the association is insolvent, but whether so or not is not material in considering the method of accounting. The equitable principle of accounting must be the same whether the association be solvent or insolvent. The question for consideration in these cases is, therefore, where an insolvent association goes into voluntary liquidation prematurely, what is the proper method of accounting between the borrowing and nonborrowing members, respectively, on the one hand, and the association, on the other? And the precise question here, more particularly, is, should a borrowing member be credited on his debt with the amount of dues he has paid in on his stock? A borrowing member of a building and loan association occupies a dual relation to the association. In his capacity as borrower, he is a debtor. In his capacity as shareholder, he is a member of the corporation. What he pays as interest is paid in his character as debtor on his loan. What he pays as stock dues is paid in his character as stockholder. The two are separate and distinct, and must be so dealt with. *Hundermark v. Loan Ass'n* (Miss.) 29 South. 528. When a building and loan association becomes insolvent, there is nothing to do but wind up its affairs. The shareholder who has been a member remains a member, liable to his just proportion of losses and expenses. He suffers a hardship, in this: that, instead of having his payments on his loan distributed in small installments over many years, he is compelled by the necessity of the situation, and the nature of the building and loan association, to pay up his loan in one lump sum, with legal interest. This often involves great injustice to him, but it is nevertheless one of the risks which he assumed in becoming a member of this mutual association. There are instances where, because of peculiarly framed contract stipulations, a shareholder may cease to be a member upon insolvency or premature liquidation, but we speak of the ordinary membership, with the usual incidents in a building and loan association, such as we have before us in these cases. It is thoroughly settled by the authorities that when such insolvency ensues, or such premature liquidation occurs, the contract between the borrower and the association is abrogated; but there is diversity of opinion as to the point of time from which it is to be abrogated. Some of the earlier authorities held that, since the association cannot do for a borrower what it

contracted to do, the contract is abrogated in such case ab initio, and the simple relation of debtor and creditor between the borrower and the association established from the beginning, and that all payments made by the borrower, under whatever name,—whether interest, premium, fines, stock dues, or what not,—shall be credited upon the loan, and only the balance, with legal interest, collected from the borrower. In other words, the nonborrower would in such case sustain the whole burden of the loss incurred up to the time of such insolvency. This ignores the fact that the borrower was a member of the association up to the time of insolvency; had proceeded all along upon that basis, bearing his proportionate part of expenses and losses up to the time of such insolvency,—bearing them as his part of losses and expenses, under that name. Close analysis makes it plain that this is not just to the nonborrower, for under this method the borrowing member would get back, entire, all his stock dues, without abatement of a single cent, whereas the nonborrower would only get back such portion of his stock dues paid in as would result from the winding up of the affairs of the association,—less than the whole in every case of insolvency. The true doctrine undoubtedly is that the contracts are to be abrogated for the future,—that is to say, so far as they are executory,—but that prior to insolvency they shall stand. In other words, up to insolvency the payments must stand in the character they had when made,—for example, stock dues as payments made by the member in his capacity as member,—but that after insolvency the borrower's obligation to pay stock dues, etc., shall cease, because the consideration for such payments fails from that time forward. Merely because the association becomes insolvent, what he has heretofore paid as his allotted part of expenses and losses has not by some occult process changed its character, and become interest or principal paid on the debt. He remains a member after insolvency, even, charged, just as the nonborrowing member, with the duties and obligations of a member, until the final settlement of the affairs of the association, which obligations consist, however, after insolvency, in simply paying his just pro rata of expenses and losses; expenses including, of course, such things as receiver's commissions, court costs, etc. He will be entitled, when such settlement is made, to have whatever his share of stock proves ultimately to be worth then credited on the loan. More than this, if there can be a reasonably certain estimate of what his shares are worth prior to the final settlement,—such an estimate as will surely not exceed their value,—the court may, in cases like these, credit such estimated value as payment on the debt. Whether such value of the shares shall be estimated and credited in advance of the settlement, or only at the settlement, must be determined

by the chancery court in its sound discretion. The earlier cases to which we referred, holding that stock dues are to be credited on the debt, and that the contract is to be abrogated from the beginning, and the borrower treated as a mere debtor from the beginning, are as follows: *Association v. Goodrich*, 48 Ga. 445; *Association v. Buck*, 64 Md. 338, 1 Atl. 561; *Cook v. Kent*, 105 Mass. 246; *Bulst v. Bryan*, 44 S. C. 121, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787; and various other authorities. See, also, 4 Am. & Eng. Enc. Law (2d Ed.) 1081, and note; 7 *Thomp. Corp. p.* 7359, note 63. Add to this the late case of *Hale v. Barker*, 129 Cal. 419, 62 Pac. 168. See, also, *Carpenter v. Richardson*, 101 Tenn. 176, 46 S. W. 452. We are inclined to think that the California case of *Hale v. Barker* is not in accord with later cases decided in that state, as pointed out by counsel for appellant. We refer to it, however, as the best-reasoned case on that side. We think a careful consideration of the recent and best-considered cases shows that this early doctrine is being departed from, as the nature of building and loan contracts becomes better understood, and the practical operation of such associations, under their contracts, more fully disclosed. The true doctrine must be that set forth by Judge Thompson in his work on Corporations (volume 7, § 8796), as follows: "The effect upon the borrowing members of a premature dissolution, or what practically amounts to the same thing, requires some notice. In return for the undertakings of the borrower in the transaction of loan or advancement, as they have been pointed out, there is an implied undertaking on the part of the association that the borrower shall have the advantage of the building association scheme in the liquidation of the whole of his indebtedness; i. e., that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortune, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although, in terms, only given for installments. He is therefore deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premium, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fall also. In other words, there remains on the one side a claim, on the other a liability to be measured simply by the amount of money actually advanced. In such case, therefore, all the borrower can be held for, on the theory of a rescission of at least part of his con-

tract, and remitting the parties, as to the rest, to the position of the ordinary lender and the borrower, is the amount received by him from the association, with legal interest. Upon this point nearly all the authorities agree. Some of them also declare the borrower to be entitled to a reduction from this amount of all periodical payments of dues and interest paid by him. In others it is declared that the borrower shall be required to pay back what he has actually received, with interest, and without deduction on account of any stock payments, and that he will then be entitled, after the debts of the association have been paid, to a pro rata dividend, alike with the nonborrowing stockholders, upon what he has paid into the association as dues. When it is remembered that the borrower still rests under the membership liability to contribute towards the losses and expenses of the association, it is clear that the former of these methods cannot be correct; for by it he will escape some part of his share of the losses. But on the other hand, the hardship and increased expense of settlement which may result from requiring the borrower to pay back all that he has received, without any credit for the dues he had paid in, remitting him to final distribution for a return of the excess of his payment over what shall be found justly due from him, would seem to indicate the propriety of a third method, wherever practicable, viz., to ascertain what the receipts, profits, and losses of the society have been, what its liabilities are, what available assets are on hand, and what, accordingly, is the present real value of every share, making allowance for the expenses of settlement; to credit the amount on the borrower's debt in respect to each share held by him, and charging him with the sum actually advanced to him and interest, reduced by part payments of interest and premium, collect from him only the balance." See, also, *End. Bldg. Ass'ns*, § 477, and an elaborate note in 5 Am. & Eng. Dec. Eq., to *Williams v. Maxwell*, at page 254, par. 2, where the same doctrine is very clearly and fully stated, with a full citation of authorities. The editor says: "Since the cessation of the business of the building association puts an end to the contract between it and its borrowing members, and makes their loans due and payable at once, it converts the relation between them into that of mere debtor and creditor, and consequently should entitle the borrower to have the dues paid credited upon the loan, if no equities supervene. Accordingly this rule is generally acknowledged to prevail in cases of a voluntary dissolution or cessation of business (*Association v. Goodrich*, 48 Ga. 445; *Association v. Buck*, 64 Md. 338, 1 Atl. 561; *Association v. Braden* [Tex. Civ. App.] 32 S. W. 704), and has in a few instances been held to apply to the winding up of an insolvent association, when the contract of loan was usurious (*Association v. Jaec-*

ksch, 51 Md. 198; *Bank v. Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862; *Strauss v. Association*, 118 N. C. 558, 24 S. E. 116; *Bulst v. Bryan*, 44 S. C. 121, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787). But inasmuch as this doctrine enables the borrower to evade his liability to share in the losses of the association, it can only be upheld on the theory that he is not a member thereof; and, whenever he is to be regarded as such, he cannot claim credit for dues paid, in case of the insolvency of the association, but must pay up the whole debt, and share in the assets pro rata with the other members (*Sullivan v. Stucky* [O. C.] 86 Fed. 491; *Curtis v. Association*, 69 Conn. 6, 38 Atl. 1023, 61 Am. St. Rep. 17; *Browne v. Archer*, 62 Mo. App. 277; *Weir v. Association*, 56 N. J. Eq. 234, 38 Atl. 643; *Strohen v. Association*, 115 Pa. 273, 8 Atl. 843; *Association v. Carroll*, 15 Pa. Co. Ct. R. 522; *Id.*, 4 Pa. Dist. R. 6; *Lepore v. Association*, 5 Pa. Super. Ct. 276, affirming *Association v. Lepore*, 17 Pa. Co. Ct. R. 426; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430), * * * unless the actual loss and expense of winding up are capable of calculation, in which case it is the preferable practice to permit him to pay the balance between the actual value of his stock and the loan, or, as it has been otherwise expressed, the difference between the dues paid in and the loan, plus his pro rata share of the defalcation of the association (*Reddick v. Association* [Ky.] 49 S. W. 1075; *Williams v. Maxwell*, 123 N. C. 586, 31 S. E. 821, 5 Am. & Eng. Dec. Eq. p. 224)."

We select two other opinions for their marked ability in setting forth this view. They are the opinions of *Sherwin, J.*, in *Hale v. Kline*, 113 Iowa, 526, 85 N. W. 814, and the opinion of *Brannon, J.*, in *Young v. Association*, 48 W. Va., at page 514, 38 S. E. 670; this last being the finest opinion we have seen on the subject. In the former, Justice *Sherwin* says: "The only question presented for our determination in this case is whether the defendants are entitled to credit for any part of the dues paid on the 12 shares of stock issued to A. D. Kline, and assigned by him as collateral security for the loan and premium in question. At the outset of the discussion of this question, we should say that the association was purely a mutual one, that every stockholder was a member thereof, and that every member thereof was a stockholder. Except as to the liability incurred by borrowing money of the association, every member assumed the same liabilities, and was entitled to a proportionate share of its earnings, from whatever source derived. With this mutuality of interest and liability in view, what are the rights of the defendants, and the rights of the other members and creditors, as represented by the plaintiff? There were two classes of members, which we may designate as borrowers and nonborrowers. To become a borrower, it was necessary to offer a pre-

mium of so much per share on the shares held by the applicant. The premium which these defendants contracted to pay was \$600, represented by one-half the amount for which they gave their note. If the association had continued as a going concern until the monthly dues paid on the 12 shares of stock had matured the stock, then, by the terms of the note, itself, a surrender of the stock could have been made in full payment of the money actually received, and of the premium represented in the note; and in such case the defendants would, of course, receive indirectly the amount paid in dues. But the association became insolvent before the maturity of the stock, and it is obvious that the rights and equities of the members are thereby placed upon a different footing. This changed condition has been held by some courts to operate as a rescission of the entire contract, and to leave the members to an equitable adjustment of their rights and liabilities. It is conceded by all or most of the courts, however, that the insolvency of such a mutual association releases the stockholders from further payment of dues on stock. It is the almost universal holding that, in the settlement of the affairs of an insolvent mutual association, a borrowing member, whose stock has not matured, shall be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower would then be entitled to credit for its value in addition to the items heretofore mentioned. *Wilcoxon v. Smith*, 107 Iowa, 555, 78 N. W. 217, 70 Am. St. Rep. 220; *Hale v. Cairns*, 8 N. D. 145, 77 N. W. 1010, 44 L. R. A. 261, 73 Am. St. Rep. 746; *Phelps v. Association*, 121 Mich. 843, 80 N. W. 120; *Leahy v. Association*, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; *Knutson v. Association*, 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *Weir v. Association*, 56 N. J. Eq. 234, 38 Atl. 643; *Curtis v. Association*, 69 Conn. 6, 38 Atl. 1023, 61 Am. St. Rep. 17. And see note to this case, page 24, 61 Am. St. Rep.; *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016. See, also, *End. Bldg. Ass'ns* (2d Ed.) 477; *Am. & Eng. Enc. Law* (2d Ed.) 1080; *Post v. Association*, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; *Strohen v. Association*, 115 Pa. 273, 8 Atl. 843." In the latter opinion, *supra*, Judge *Brannon* says: "Seeing that, upon insolvency of a building association, it must be wound up, and to that end that its borrowing members, though their debts are not yet payable, must pay up at once, the question is one of account between them and the association. How shall they be charged? I answer, with debt and interest. End.

Bldg. Ass'ns, 528-531. With what shall they be credited? I answer, with payments made expressly on such indebtedness, and with fines and premiums, but not with periodical dues paid on stock. End. Bldg. Ass'ns, 477.

* * * Counsel for the knitting companies say, as above stated, that when those companies made the contracts of loan, and assigned their stock for security for the debt, and the contract gave them the power to pay dues on stock up to a certain amount, and thereby cancel their indebtedness, they were not members in future, and cannot be held to be still paying dues on stock; that such payments are not to be credited on stock, as would be the case of nonborrowing members, but all payments of dues must go on their indebtedness. The proposition that they cease to be members is not sound in law. They still continued members of the association. 7 Thomp. Corp. §§ 8772, 8773, where it is stated that only Virginia and the District of Columbia have held that the relation of stockholder ceases under the circumstances stated above. See same work, page 332, saying: 'The member, as a borrower, is still a member, with all his rights, except as pledged. He may vote, hold office, transfer his shares, subject to the lien, and do everything another shareholder may do.' *Lister v. Association*, 38 Md. 115, holds the same doctrine. So End. Bldg. Ass'ns, § 123. See 5 Am. & Eng. Dec. Eq. 234. To sustain the proposition that when these borrowing members gave their bond for the advance of money, and assigned their stock as collateral, they ceased to be members, and were absolved from all obligations to sustain any share of losses, we are cited to End. Bldg. Ass'ns, § 81, reading thus: 'The liability to contribute to expenses ceases with the cessation of membership bona fide, and with the consent of the association. If, upon becoming a borrower, the member relinquishes his membership, or if, being an investor merely, he avails himself of a provision in the rules or by-laws of the association, or of the statute supreme over it, to withdraw himself from it, he cannot subsequently be made liable for its debts and losses, and called upon by the society to contribute towards their payment.' Clearly so. If he relinquishes his membership or withdraws, he is no longer a member; but merely borrowing, giving bond and pledging stock as collateral, do not lose him the benefits or release him from the obligations of membership. * * * Being still a member after such borrowing, the party occupies the twofold character of debtor and stockholder, and his payments on debts are payments of debts, and his payments on stock are payments on stock,—so intended in both cases. When insolvency comes, he is still a member of the association, organized as well for his benefit as that of other members; and other members not borrowing are entitled to call upon him to still occupy the status of a member, and help

bear the burden of disaster. He has no right to apply his stock payments on his indebtedness. When insolvency comes, the original plan of the association is defeated. Such operations as were contemplated by all members, borrowers and nonborrowers, are unavoidably frustrated. They cannot be accomplished. The association cannot demand further payments on stock, because, its business being stopped, it cannot apply such payments to effect the design for which they were stipulated to be made, and the consideration for their payment has ceased. Close up the affairs of the association is the only alternative. To do this, outstanding debts must be paid, chiefly from debts due from members, though not yet mature, because the association owns these debts as material assets, and indispensable to pay outstanding debts, and then to be divided among stockholders. The member who is a borrower, as such, occupies the position of a borrower. The relation between the association and him makes him its debtor for the money advanced to him, and he must pay at once, to enable the association to do the only thing it can do,—wind up. Out of the assets, including this indebtedness of this stockholder, a division is made, after payment of debts among the stockholders, including this borrowing stockholder. His stock is worth what his dues and other sources of revenue make it worth. What he paid in dues must go on his stock, to constitute the capital stock, as he contracted to pay such dues on his shares of stock, not on his debt. Here he is a stockholder, not a debtor. His contract of subscription is for stock, and his dues go on that by contract. Only in one event, by the contract, can those dues paid for stock go to pay the debt; that is, when, in case of success of the association, those dues, with dues from other members and other sources of income, bring the stock to par. and thus discharge the debt, by the letter of the contract. But that being defeated by disaster, the set-off of stock against debts cannot be made. The member cannot be allowed to go on paying dues, in specific performance of the contract, for the company is incompetent to go on. The time has come when the outside debts must be paid,—when members must suffer some loss. It is obvious, they ought to suffer this loss equally,—borrowing and nonborrowing stockholders. Now, if you credit A's dues paid on his stock upon his debt, he gets the benefit of them in full, whereas B., who has no money borrowed from the association, but who paid the same amount of dues as A., gets no benefit from those dues. This, in justice, cannot be allowed. So the true rule is, in case of insolvency, to keep A. in his twofold character,—debtor and stockholder. Make him pay back to the common treasury what he borrowed from it, and thus end his relation of debtor; and later, when the assets have been collected, and the divisible fund, after the payment of

debts, is found, give him his share in that fund, much or little. All shareholders will thus stand equal. There are some authorities contra, but the great current of authority, the latest and best considered, as building associations have increased, sustain this position. In the great case, *Strohen v. Association*, 115 Pa. 273, 8 Atl. 843, the court stated the matter thus: "The insolvency of the company puts an end to its operation as a building association. To a certain extent, it also ends the contracts between it and its members, and nothing remains but to wind it up in such manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burden equally, and not throw on either the borrowers or nonborrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually received, with interest. He would then be entitled, after the debts are paid, to a pro rata dividend with the nonborrower of what he had paid upon his stock. He will thus be obliged to bear his proper share of losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the nonborrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner." To same effect, see 5 Am. & Eng. Dec. Eq. 254; *Leahy v. Association* (Wis.) 76 N. W. 625, 69 Am. St. Rep. 945, 5 Am. & Eng. Eq. 206; *Price v. Kendall* (Tex. Civ. App. 1896) 36 S. W. 810; *Eversmann v. Schmitt*, 53 Ohio St. 174, 41 N. E. 139, 29 L. R. A. 184, 53 Am. St. Rep. 632; *Weir v. Association* (N. J. Ch.) 88 Atl. 643; *Wohlford v. Association*, 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177; *Post v. Association*, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; *Thomp. Bldg. Ass'n*, 396."

It follows from these views that the accounting in these cases was had upon the wrong basis. It should be remarked that the law of building and loan associations is just now assuming definite shape, and the learned and accomplished chancellor below could hardly be expected to anticipate a doctrine as to accounting just now being for the first time firmly established.

There is only one other point that we will notice in these cases, and that is this: That these suits are not administration suits,—not being brought as such. We do not think, however, that the form in which the suit has been brought should dominate the method of accounting. What these borrowers are equitably entitled to, they should receive; but they should receive only that, whether the suits be administration suits or not. The equities by which the substantial rights are determined cannot be made more or less by the particular procedure resorted to. On the return of these cases into the chancery court,

if there can be an estimate made of the value of the shares of these borrowers, such as will certainly not give them more than the shares will be worth on a final settlement, such ascertained value of the shares may be credited on the loan. If not, no stock dues should be credited on the loan, but the borrowers should be remitted to their right to receive whatever the value of these shares may be, when finally ascertained by the proper procedure.

Both cases reversed and remanded.

PRIM et al. v. HAMMEL.

(Supreme Court of Alabama. Nov. 13, 1902.)

NOTES—NEGOTIABILITY—ALTERATION—BONA FIDE HOLDER—PAYMENT—EVIDENCE.

1. A payee drew up a note with marginal figures of the amount thereof, but left a blank space for the amount in the body of the note to be filled in by the maker, and sent it to the maker, who signed it without filling in the blank space. The payee then filled in a sum less than the marginal figures, and changed the latter to correspond with the writing in the blank. *Held*, that the negotiability of the note was not destroyed by the alteration of the figures in the margin.

2. When the maker of a note signs it in blank as to the amount and returns it to the payee, the latter is authorized to fill in the blank, so as to make the note enforceable in the hands of an indorsee for value, without notice, and before maturity.

3. A note transferred to secure a pre-existing debt, in consideration of an extension of the time of payment of the debt, makes the transferee a bona fide holder, and not subject to equities between the original parties of which he had no notice.

4. It is no defense to an action on a note by a bona fide transferee before maturity that the maker paid the original payee.

5. A note, indorsed in blank, was delivered to H. by the payee to secure the payment of a debt owing by the payee to him. *Held*, in an action by H. on the note, that the evidence that the payee was indebted to H. & Co. was inadmissible.

Appeal from circuit court, Clark county; Jno. C. Anderson, Judge.

Action by L. Hammel against Prim & Kimbell. From a judgment for plaintiff, defendants appeal. Affirmed.

McIntosh & Rich, for appellants. Fitts, Stoutz & Armbricht, for appellee.

DOWDELL, J. The instrument sued on was drawn up by the payee, Fitzpatrick & Co., leaving a blank to be filled in by the makers with the amount, but with marginal figures of "\$1,500," and in this form was sent to the defendants, Prim & Kimbell, for execution; and it was by them signed and returned to Fitzpatrick & Co., without writing any amount in the body, but leaving the blank to be filled in by the payee. Fitzpatrick & Co. filled in the blank by writing "one thousand dollars," and changed the marginal figures from "\$1,500" to "\$1,000" to corre-

¶ 4. See Bills and Notes, vol. 7, Cent. Dig. §§ 966, 1240.

spond with the writing in the body of the paper. Fitzpatrick & Co. then indorsed the instrument in blank, and before maturity delivered the same to the plaintiff as collateral security on a debt then owing by them to him, and in consideration of an extension by the plaintiff of their said indebtedness. It is not pretended that the plaintiff had any knowledge, at or prior to the time of the transfer of the paper to him, of the alteration of the marginal figures by Fitzpatrick & Co.

The instrument by the statute is made negotiable paper. Code, § 869; Banking Co. v. Gray, 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120, and authorities there cited. Did the changing of the marginal figures from "\$1,500" to "\$1,000" constitute such an alteration as to avoid the contract? It is evident that the change which was made was in the interest of the makers, and consequently of no detriment to them. But avoiding a contract by a material alteration, after its execution, by an interested party, without the knowledge and consent of the maker, does not depend on the question of detriment to the maker. See *Brown v. Johnson*, 127 Ala. 292, 28 South. 579, 51 L. R. A. 408, 85 Am. St. Rep. 184, where the subject is discussed, and authorities cited. It is a well-settled proposition of law that in a bill or note, where the figures in the margin do not correspond with the amount written in the body, the latter will always control. It has been held that the marginal figures are no part of the bill or note. *Smith v. Smith*, 53 Am. Dec. 652, and notes to that case. In 1 Daniel, Neg. Inst. (3d Ed.) p. 96, § 86, it is said: "Marginal figures are really not a part of the instrument, but a mere memorandum of the amount." See, also, 4 Am. & Eng. Enc. Law (2d Ed.) p. 130. But without determining how far the marginal figures are a material part of the instrument where no amount is expressed in the body, we are satisfied, on authority and reason, that where the amount is written in the body of the instrument, the marginal figures do not constitute such a material part as that an alteration of the same would amount to a material alteration of the contract. Since the writing in the body controls, the marginal figures are wholly unimportant. If Prim & Kimbell had filled in the blank by writing "one thousand dollars," it is quite clear that the subsequent change of the marginal figures of \$1,500 to \$1,000, to correspond with the writing in the body, would have made no material alteration in the contract. Signing the note in blank, as was done, and returning it to the payee in that condition, was authority to the payee to fill in the blank. *Bank v. Johnston*, 97 Ala. 664, 11 South. 690; *Robertson v. Smith*, 18 Ala. 225; *Huntington v. Bank*, 3 Ala. 186. Where authority to fill blanks left in a negotiable instrument has been exceeded, the instrument, notwithstanding, will be enforceable in the hands of a

transferee for value who comes regularly by it without notice that the authority had been exceeded. *Winter v. Pool*, 104 Ala. 583, 16 South. 543; *Huntington v. Bank*, supra; 2 Am. & Eng. Enc. Law (1st Ed.) p. 340, and note 4. Whatever may have been the effect as between the payee and maker as to the marginal figures indicating what amount the maker intended for the payee to fill in the blank left in the instrument, we need not decide; but in such case, for the same reason that a negotiable instrument in the hands of an innocent transferee for value in due course of business is enforceable, where the authority given to fill blanks has been exceeded, the understanding or intention of the maker and payee, or either of them, could not affect the rights of an innocent transferee for value. A negotiable note transferred to secure a pre-existing debt makes the transferee a bona fide holder for value, and the note in his hands is not subject to equities between original parties of which he had no notice. *Banking Co. v. Howard*, 123 Ala. 380, 26 South. 207, 82 Am. St. Rep. 126; *Banking Co. v. Gray*, 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120; *Bank v. Johnston*, 97 Ala. 655, 11 South. 690; *Spira v. Hornthall*, 77 Ala. 145; *Connerly v. Insurance Co.*, 66 Ala. 432.

To the plea of payment there was a special replication, which averred that plaintiff acquired the note or instrument sued on by indorsement before maturity for value, and that said note was never paid to plaintiff or any one for him by him authorized, and issue was joined on this replication. Having made the note negotiable and put it in circulation, the holder became the only payee with whom the maker could settle, and it is no defense to the suit to show that the maker paid the original payee. The instrument was indorsed in blank and delivered to L. Hammel. The suit was brought in the name of Hammel individually, and there was no error in sustaining plaintiff's objection to the question whether Fitzpatrick & Co. were indebted to L. Hammel & Co.

The seventh and eighth assignments of error are expressly waived in argument by counsel.

What we have said disposes of the questions presented in the remaining assignments of error.

We find nothing in the rulings of the circuit court complained of prejudicial to the rights of the appellants.

Let the judgment be affirmed.

MAYOR, ETC., OF TUSCALOOSA v. HOLCZSTEIN.

(Supreme Court of Alabama. Nov. 13, 1902.)
MUNICIPAL CORPORATIONS—LICENSES—MILLINERY ESTABLISHMENTS.

1. A statute authorized a city to levy a tax on millinery establishments and persons engaged

in merchandising of a mercantile character. Held not to authorize an ordinance levying a license tax on "merchants selling millinery, in addition to merchant's license," so as to require one who had taken out a merchant's license, and who sold millinery, but did not trim any hats, to take out any license in addition to such merchant's license.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

A. Holczstein was tried for violation of an ordinance of the city of Tuscaloosa. From a judgment for defendant, the mayor and aldermen appeal. Affirmed.

Vaude Graaff & Verner, for appellants. Foster & Oliver, for appellee.

MCLELLAN, C. J. The mayor and aldermen of Tuscaloosa are authorized by the charter of that city "to levy and collect annually a tax on and to regulate and license the persons, businesses, vocations and privileges" therein mentioned, to wit: " * * * millinery establishments; * * * each person or firm engaged in merchandising or carrying on any business of a mercantile character," etc. The mayor and aldermen of the city, in attempting to exercise the power thus conferred, passed an ordinance levying license taxes upon a great number of persons, businesses, occupations and privileges, and among the rest, the following:

"Art. 87. Millinery establishments not paying merchants' tax, \$10.00.

"Art. 88. Merchants selling millinery, in addition to merchants' license, \$7.50.

"Art. 89. Merchants, each person, or persons, or firm engaged in merchandising or carrying on any business of a mercantile character whose gross amount of sales are less than ten thousand dollars per annum, \$10.00.

"Art. 90. Merchants whose gross amount of sales exceed ten thousand dollars and less than twenty thousand dollars per annum, \$15.00.

"Art. 91. Merchants whose gross sales exceed twenty thousand dollars per annum, \$20.00."

The appellee, Holczstein, was, during the year 1901, engaged in a mercantile business, selling dry goods and clothing, and also as a part of his stock kept and sold a cheaper grade of ladies' hats; also sold laces, ribbons, and artificial flowers; but he did not trim or make any hats. A license was paid for and issued to him for the year 1901 for engaging in the business of merchandising, or being a merchant, but he did not take out or pay for the milliner's license prescribed by article 87 of the ordinance quoted above, nor the license required by article 88 of said ordinance. He was proceeded against by the city authorities for selling millinery without having taken out and paid for the license required by article 88 of the ordinance, and tried before the mayor, and convicted. From that conviction he appealed to the circuit court, where upon a trial before the circuit

judge without a jury he was discharged, the trial judge holding that article 88 of said ordinance is invalid. And that is the question presented for our consideration on this appeal prosecuted by the mayor and aldermen from the judgment of the circuit court.

It seems to us that the legislature itself, in conferring the power of license taxation on the municipality of Tuscaloosa, took and made a clear distinction between the "millinery establishments" and the business of merchandising or carrying on "a business of a mercantile character," for the purposes of the licensing and taxation authorized. It is, it seems to us, as if the lawmakers had said, in terms, "a millinery establishment is one thing, and merchandising is another and different thing, within the purview and meaning of this act." As an abstract proposition, it would not be inapt to say that a milliner is a merchant, or a person engaged in carrying on a business of a mercantile character. But there is in point of fact a difference between an ordinary mercantile business and the business of a milliner. The merchant only deals in commodities, buying and selling. The things he buys, those things he sells in the same condition in which he bought. The milliner doubtless also buys and sells articles without changing their form, uses, or identity while in her hands; but she (we say "she," because they mostly are feminine, and when not they are usually called man-milliners) also buys goods which she combines, and fabricates and fashions into articles of women's apparel. She is thus not only a dealer, but, in a sense, a manufacturer. And this is the distinctive feature of her business, the feature which differentiates it from the business of the ordinary merchant, and on account of which she is called a "milliner" and is not referred to as a "merchant." The Century Dictionary defines a milliner thus: "in common usage, a woman who makes and sells bonnets and other head-gear for women; also, in England, one who furnishes bonnets and dresses, or complete outfits;" and this idea of fabrication is prominent in other standard definitions. A merchant may sell articles of millinery, such as hats, ribbons, artificial flowers, plumes, etc., in the forms in which he has purchased them and not be a milliner. On the other hand, if, as a part of his general mercantile business, he should engage in buying the articles or materials necessary to and used in the making of finished, "ready to wear," millinery "creations," and in combining, fabricating, and fashioning these materials into the perfected article of women's gear, and selling the completed commodity, he would be a milliner in the strict sense, the sense of this statute; and he would be liable both for the merchants' tax and for the tax imposed on "millinery establishments." This distinction between the merchant and the milliner, a mercantile business simply and a millinery establishment, is the distinction recognized

in the statute itself. Its clear intent and purpose was to authorize the imposition of one tax on the buying and selling merchant, and another tax on the buying, fabricating, and selling milliner. The merchant is none the less clearly a merchant only, for the fact that he buys and sells articles of millinery; and the milliner is none the less clearly engaged in carrying on a "millinery establishment" for that, while she makes or trims hats and the like, she also sells articles of millinery in their original forms. To hold that a merchant could be taxed as a milliner, merely because he keeps and sells articles of millinery, would be to extend the authorization of this statute well beyond its fair and reasonable construction, and this in the teeth of the thoroughly established doctrine that such authorizations to municipalities are to be strictly construed, so that no taxes, except such as are with reasonable certainty within the terms employed, shall be deemed to be authorized. The act of assembly did not, in our opinion, authorize the ordination of article 88, under which the appellee is prosecuted, and that article is void.

Reliance for appellant is had on the cases of *City of Mobile v. Craft*, 94 Ala. 156, 10 South. 534, and *City of Mobile v. Richards*, 98 Ala. 594, 12 South. 793. Those decisions are perfectly sound, and the views we have expressed and the conclusion we have reached in this case are in no degree opposed to them. The question in those cases is wholly different from the question we have here passed on, as a careful reading and consideration of those opinions will suffice to demonstrate. There would be similitude if the legislature had only authorized the city of Mobile to impose license taxes on cigar makers and distillers of whisky, and also upon merchants, and the ordinance had undertaken to impose on a general merchant a tax as a merchant and an additional tax for selling whisky or cigars as a part of his mercantile business; but if that had been the state of law and fact presented to this court in those cases, the imposition of the tax would surely have been held unauthorized and illegal.

The judgment of the circuit court must be affirmed.

HENLEY v. JOHNSTON.

(Supreme Court of Alabama. Nov. 13, 1902.)

ADMINISTRATORS DE BONIS NON—APPOINTMENT—VALIDITY—PRESUMPTIONS—VACANCY IN ADMINISTRATION—REAPPOINTMENT—INSOLVENT ESTATES—SALE OF LAND—ORDER—DECEDENT'S INTEREST—DESCRIPTION.

1. Under Code, § 155, providing that land may be sold by the personal representative for payment of debts, if necessary, the right belongs solely to the personal representative, and therefore an issue as to the validity of an order of sale involves the validity of the administrator's appointment.

2. In an attack on an order of sale of lands by an administrator de bonis non, involving collaterally the validity of his appointment, it is to

be presumed, in the absence of an affirmative showing to the contrary, that there was a vacancy in the administration; the probate court being, as to such appointment, a court of general and unlimited jurisdiction.

3. Where an application for letters de bonis non showed that the applicant had been former administrator, and had rendered, and had approved, his final accounts, but did not show his discharge, the appointment as administrator de bonis non was not void, as the rendition of final account was not inconsistent with the presumption of resignation or removal.

4. Where application for letters de bonis non showed that the applicant had been the former administrator, but did not show that he had been discharged, his appointment as administrator de bonis non was not void, as such appointment and qualification thereunder was a relinquishment or resignation of the former letters.

5. Under the direct provisions of Code, § 326, a decree of insolvency of a decedent's estate by a court of competent jurisdiction makes a prima facie case of necessity for a sale of the lands, dispensing with the necessity of taking depositions as in chancery cases, substituting the decree for proof of the existence of debts and of the insufficiency of personal assets.

6. Where the validity of an appointment of an administrator de bonis non by the probate court is in issue, and on appeal it appears that the former administration was in the chancery court, but it does not appear that the administration is still pending in that court, it will be presumed, in favor of the correctness of the judgment appealed from, that the probate court had jurisdiction, and not that it still remained in the chancery court.

7. A petition by an administrator for sale of lands which avers that decedent "died seised and possessed of the following described real estate, to wit: Certain interest and rights, not definitely known to your petitioner, in and to about forty-eight tracts of land," etc.,—sufficiently shows that deceased had a legal or equitable interest in the lands sought to be sold.

8. Under Code, § 158, requiring an application for the sale of lands by an administrator to accurately describe the lands, failure to indicate with any degree of accuracy the section, township, and range in which the lands are located invalidates the petition.

Appeal from probate court, Jefferson county; J. P. Stiles, Judge.

Petition by Jos. F. Johnston, administrator de bonis non, for a sale of the land of his decedent. From an order granting the petition, Tom P. Henley, an heir, appeals. Reversed.

The petition averred that the personal property of the estate was insufficient for the payment of the debts thereof; that the decedent died seised and possessed of certain interests and rights, not definitely known to petitioner, in certain lands, as described in the opinion; that the estate had theretofore been declared insolvent by the chancery court of Jefferson county, Ala., which had jurisdiction thereof, and that it was necessary to sell said real estate to pay the debts thereof; that Tom P. Henley was the only heir of said estate,—and giving his age, condition, and residence. The petition for letters of administration de bonis non, and its averments, are sufficiently described in the opinion, as well as such other facts as are necessary to an understanding thereof.

Smith & Smith, for appellant. Forney Johnston, for respondent.

TYSON, J. The order of the probate court granting letters of administration is not appealed from, and its validity is only involved in the attack made upon the decree ordering a sale of the lands of the intestate to pay debts upon the petition of the administrator, to whom letters of administration *de bonis non* had been heretofore granted. The right to prefer the application to have the lands sold to pay debts devolves alone upon the personal representative. It is therefore essential to the validity of the decree of sale that the proceeding be instituted and maintained by him. Section 155, Code; *Landford v. Dunklin*, 71 Ala. 594. It follows, therefore, that, if the petitioner's appointment as administrator *de bonis non* was void, the decree of sale is void. Was his appointment void? In answering this question, it is well to bear in mind that this is a collateral attack upon the order granting the letters to him. In the matter of appointment of an administrator *de bonis non*, courts of probate are courts of original, unlimited, and general jurisdiction, just as they are in the exercise of their jurisdictions in the appointment of an administrator in chief. "Nothing is intended to be without its jurisdiction, except that which so appears specifically." In other words, it must be presumed, in the absence of an affirmative showing to the contrary, that there was a vacancy in the administration, by resignation or removal of the former administrator, to sustain the order of the court in granting the letters. *Ikelheimer v. Chapman's Adm'rs*, 82 Ala. 676; *Sims v. Waters*, 65 Ala. 442; *Gray's Adm'rs v. Cruise*, 36 Ala. 559; *Allen v. Kellam*, 69 Ala. 442; *Bean v. Chapman*, 73 Ala. 140; *Landford v. Dunklin*, *supra*. In the petition for letters it is shown that the petitioner had been former administrator, and had performed the duties of said administration, his final accounts being audited, stated, and approved on about the 12th day of February, 1894, and that there are assets belonging to said estate unadministered; that the estate is insolvent; and that the debts have never been paid in full. It is not shown by the averments of this petition or otherwise whether the petitioner, as former administrator, had been discharged, by an order, from his office as administrator. If he had, the fact that he made a final settlement and was discharged is entirely consistent with the presumption that he did so after resigning, or his removal for cause, from office. If he was not discharged by an order, then the order appointing him administrator *de bonis non*, and his act of qualifying as such, amounted to a relinquishment or resignation of his former letters. *Turner's Ex'rs v. Wilkins*, 56 Ala. 173. So, then, in either aspect, the grant of letters is not void; and, as administrator *de bonis*

non, he is the proper person to make application for the sale of the lands of the decedent to pay the debts of the estate.

It cannot be doubted that the lands are subject to the payment of the debts of the decedent, if the personal property is insufficient to pay them, and that they may be subjected by the probate court upon proper application of the administrator *de bonis non*. That they are still the property of the decedent, and that there are debts still unpaid, are clearly shown by the averments of the petition. It is also shown that the personal property was insufficient to pay the debts, and the estate has been decreed to be insolvent by a court of competent jurisdiction. The decree of insolvency makes a *prima facie* case of necessity for a sale of the lands, dispensing with the necessity of taking depositions as in chancery cases; substituting the decree for proof of the existence of debts, and of the insufficiency of personal assets. Section 326, Code; *Meadows v. Meadows*, 78 Ala. 240; *Dolan v. Dolan*, 89 Ala. 256. 7 South. 425; *Chandler v. Wynne*, 83 Ala. 301, 4 South. 633.

It is insisted, however, that the decree of sale should not stand, because it appears that the former administration of the estate was had in the chancery court. This may be conceded, but it is not made to appear that the administration is still pending in that court. For aught appearing, that court has wound up the former administration, and has not now a right to exercise its jurisdiction in the further administration of the estate. No objection or defense of this sort appears to have been interposed in the court below, and there is nothing in the record which would justify the conclusion that the fact exists. We certainly cannot presume it in face of the rule that requires us to indulge the presumption of correctness in favor of the decree appealed from until error is shown.

Again, it is objected that the petition is defective, in that it fails to show by the allegations that the decedent, at the time of his death, had or owned either a legal or equitable right or interest in the lands sought to be sold. There is no merit in this contention. It is distinctly averred that he "died seised and possessed of the following described real estate, to wit: Certain interest and rights, not definitely known to your petitioner, in and to about forty-eight tracts of land," etc. It is of no consequence that the interest and rights of the decedent in and to the lands were not definitely known to the petitioner. The fact necessary to be averred is that the decedent owned either a legal or equitable right or interest in the lands sought to be sold. *Jones v. Iron Co.*, 95 Ala. 551, 10 South. 635. However, it is indispensable that the petition accurately describe the lands. Section 158, Code; *Gilchrist v. Shackelford*, 72 Ala. 7; *Wright's Heirs v. Ware*, 50 Ala. 549. This was not

done. Neither does the decree accurately describe them. There is nothing to indicate with any degree of accuracy in what section, township, and range they are located. Not even are the initial letters denoting the section, township, and range used to indicate their location by the government survey. It is true, some figures are set down,—for instance, "8-13-5 opposite to E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ —E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$." But what these figures denote or represent is matter purely conjectural. This omission renders the petition defective, for which the decree must be reversed. *Wright v. Ware, supra; Long v. Pace, 42 Ala. 495.*

Reversed and remanded.

STATE v. ALABAMA BIBLE SOC.

(Supreme Court of Alabama. Nov. 13, 1902.)

CONSTITUTIONAL LAW—CHARTER OF CORPORATION—EXEMPTION FROM TAXATION—SUBSEQUENT LEGISLATION—IMPAIRMENT OF OBLIGATION OF CONTRACT.

1. Where the charter of a corporation exempts its property from taxation, the constitution at the time not ingrafting on charters any liability to alteration, any act or constitutional provision subjecting the property to taxation is violative of Const. U. S. art. 1, § 10, prohibiting laws impairing the obligation of contracts.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Petition by the Alabama Bible Society to the board of revenue of the city of Montgomery for a vacation of an assessment. From a judgment of the city court, on appeal thereto, quashing the assessment, the state appeals. Affirmed.

The tax collector of Montgomery county assessed against the Alabama Bible Society, a corporation, certain real estate in the city of Montgomery for escaped taxes for the years 1886 to 1900. A petition was filed by the Bible society with the board of revenue, praying that said assessment be set aside and vacated, which petition was denied. On appeal to the city court of Montgomery, that court granted the petition and quashed the assessment. The Alabama Bible Society relies upon the provisions of its act of incorporation of February 17, 1854 (Acts 1853-54, p. 317), to show that its property is exempt from taxation.

John G. Finley, for appellant. Halloway & Halloway, for appellee.

SHARPE, J. An act of the general assembly approved February 17, 1854, incorporated the appellee, and provided, among other things, that it should have power to hold real and personal property, and "that the property of the said 'Alabama Bible Society at Montgomery' shall be exempt from taxation." Pursuant to the act, the appellee

corporation was organized, entered upon the exercise of its corporate functions, and is continuing in the exercise of the same. In January, 1901, its real estate situated in Montgomery was assessed as for taxes accruing for the years from 1886 to 1900, inclusive. Appellee petitioned the board of revenue to vacate the assessment and, the petition having been refused, the city court of Montgomery was appealed to, and quashed the assessment by a judgment, wherefrom this appeal was taken.

In the brief for appellant it is conceded correctly that the exempting clause in question was not obnoxious to the constitution of 1819, which was in force when the act was passed, and was originally valid; but it is insisted that this clause was repealed by later constitutional provisions, which purport to limit exemptions from taxes to property classified by uses different from the uses made of appellee's property, or else was repealed without special mention by statutes passed pursuant to the later organic law.

The constitution of 1819, unlike the constitutions of 1868, 1875, and 1901, respectively, did not ingraft on acts chartering private corporations liability to alteration and revocation by the legislature for the public good. The grant of appellee's charter and its acceptance was unqualified, and effected a contract between the state and the appellee, such as came within the meaning of that part of section 10, art. 1, of the federal constitution which prohibits the state to pass any law impairing the obligation of contracts. The doctrine so controlling is too well established and familiar to require an extended citation of authorities here. See the leading case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, also *The Binghampton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Home of the Friendless v. Rouse*, 8 Wall. 431, 19 L. Ed. 495; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128; *Daughdrill v. Trust Co.*, 31 Ala. 91; *Association v. Green*, 48 Ala. 346; *Railroad Co. v. Burkett*, 46 Ala. 569. In *Cooley's Constitutional Limitations* it is well said of charters of private corporations generally that they "are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself." This quotation was used approvingly in *City of Mobile v. Stonewall Ins. Co.*, 53 Ala. 570. The contractual element of consideration for the exemption was supplied when the charter was accepted and acted under. Acceptance of the charter being shown, the existence of a consideration for the exemption is presumed; and it is un-

¶ 1. See *Constitutional Law*, vol. 10, Cent. Dig. §§ 283, 408.

necessary to inquire whether the passage of the act was induced by any actual benefit received by, or expected to accrue to, the state. Daughdrill's Case, *supra*; Home of the Friendless v. Rouse, *supra*, and authorities there cited. In *Christ Church v. Philadelphia Co.*, 24 How. 800, 16 L. Ed. 602, cited for appellant, the act, which was held to be repealable, because lacking consideration, and belonging to the class of laws denominated "privilegia favorabilia," was not an act of incorporation; nor was the act which was similarly dealt with in *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 873, 20 L. Ed. 611, of the latter kind. Those cases are therefore not applicable as authority here. The restrictions imposed by the federal constitution upon the state are as rigidly binding upon those who frame state constitutions as upon state legislatures. *Railroad Co. v. Burkett*, *supra*; *Hare v. Kennerly*, 83 Ala. 608, 3 South. 683. The exemption declared in appellee's charter stands unaffected by subsequent legislation, whether enacted by constitution or statute.

The judgment of the city court will be affirmed.

MEMORANDUM DECISIONS.

ADAMS v. LASSETER et al. (Supreme Court of Alabama. June 28, 1902.) Appeal from city court of Montgomery; A. D. Sayre, Judge. W. L. Martin, for appellant. R. L. Harmon and C. H. Roquemore, for appellee. This was an action of trover, brought by the appellant against the appellee, to recover damages for the conversion of two bales of cotton, one mule, and one ox. From a judgment in favor of the defendants, plaintiff appeals. The judgment is reversed, and the cause remanded. Opinion by Haralson, J.

BAKER v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. B. H. Powell, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for an assault with intent to ravish a woman. The judgment of conviction is affirmed. Opinion by Haralson, J.

BODDY v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from criminal court, Jefferson county; Daniel A. Greene, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for larceny. The judgment of conviction is affirmed. Opinion per curiam.

BODINE v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from circuit court, Marshall county; J. A. Bilbro, Judge. John A. Lusk, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for obstructing a public road. The judgment of conviction is affirmed. Opinion by Haralson, J.

BROWN v. COLEMAN. (Supreme Court of Alabama. June 17, 1902.) Appeal from circuit court, St. Clair county; John Pelham, Judge. James A. Embry and M. M. Smith, for appellant. Inzer & Greene, for appellee. This was an action brought by the appellee, J. R. Coleman, against the appellant, J. T. Brown, and counted upon several promissory notes. From a judgment in favor of the plaintiff, the defendant appeals. The judgment is reversed, and the cause remanded. Opinion by Haralson, J.

BRYANT v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from criminal court, Jefferson county; Daniel A. Greene, Judge. The appellant in this case was indicted, tried, and convicted for grand larceny. The judgment of conviction is affirmed. Opinion by McClellan, C. J.

CARTER v. STATE. (Supreme Court of Alabama. June 28, 1902.) Appeal from criminal court, Jefferson county; Daniel A. Greene, Judge. B. M. Allen, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for murder in the first degree, and sentenced to the penitentiary for life. On this appeal, the bill of exceptions is stricken from the record, because not signed within the time prescribed by law. The judgment is affirmed. Opinion by Tyson, J.

CROOKS v. WELLS-JONES PLOW CO. (Supreme Court of Alabama. June 28, 1902.) Appeal from city court of Bessemer; B. C. Jones, Judge. Pinkney Scott, for appellant. Porter & Perry and O. W. Ward, for appellee. This was an action of assumpsit, brought by the appellee against the appellant. There was a judgment in favor of the plaintiff, from which the defendant appeals. The judgment is affirmed. Opinion by Haralson, J.

CRUTOHFIELD v. HECK et al. (Supreme Court of Alabama. June 28, 1902.) Appeal from chancery court, Cullman county; W. H. Simpson, Chancellor. F. E. St. John, for appellant. Brown & Curtis, for appellee. The bill in this case was filed by the appellant against the appellees for the purpose of enjoining the enforcement of a judgment at law. A preliminary injunction was issued. The defendants made a motion to dissolve the injunction and to dismiss the bill, and also filed demurrers to the bill. On the submission of the cause upon these motions and the demurrers, the chancellor rendered a decree sustaining the demurrers, and ordered the injunction dissolved and the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error. The decree is affirmed; the court holding that, according to the averments of the bill, the complainant had an adequate remedy at law. Opinion by Sharpe, J.

GILLAM v. CUMBEE et al. (Supreme Court of Alabama. Feb. 13, 1902.) Appeal from chancery court, Tallapoosa county; Richard B. Kelly, Chancellor. W. M. Lackey, J. A. Terrell, and H. J. Gillam, for appellant. Thos. L. Bulger, for appellee. The bill of exceptions was filed by the appellant against the appellees, and sought to have enforced a specific performance of a contract, alleged to have been entered into, providing for the execution of a deed, and to remove certain deeds as clouds upon complainant's title. On the submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to

the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error. Upon the original announcement of the cause, the decree of the chancellor was affirmed. On application for rehearing, the judgment of affirmance theretofore rendered was set aside, and judgment was rendered reversing the decree of the chancery court and granting the relief prayed for in the bill. Haralson, J., dissented from the judgment rendered on application for rehearing.

HALIBURTON v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted and tried for an assault with intent to murder, and was convicted of assault and battery, and fined \$500. The judgment of conviction is affirmed. Opinion per curiam.

HENDERSON et al. v. HORTON.¹ (Supreme Court of Alabama. Feb. 13, 1902.) Appeal from chancery court, Crenshaw county; W. L. Parks, Chancellor. Rushton & Powell, for appellants. Lane & Crenshaw, for appellee. The appellee, by her bill of complaint in the court below, sought the cancellation of a deed of conveyance of lands, her statutory separate estate, made by her and her husband to J. D. Henderson, one of the appellants, on the ground that said deed, though in form an absolute deed of conveyance, was in fact a mortgage, and made to secure a pre-existing debt due from her husband to the firm of J. D. & J. C. Henderson, and to get an extension of time for the payment of the same. On the submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for by the complainant. The defendant appeals, and assigns as error the rendition of said decree. Judgment affirmed. Opinion by McClellan, C. J.

HILL et al. v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for rape, and was sentenced to the penitentiary for 20 years. The judgment of conviction is affirmed. Opinion per curiam.

HURD v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Bessemer; H. Clay Jones, Judge. Pinkney Scott, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant was prosecuted and convicted for criminal libel. The judgment of conviction is affirmed. Opinion by Haralson, J.

JOHNSON v. SLOSS IRON & STEEL CO. (Supreme Court of Alabama. June 28, 1902.) Appeal from city court of Birmingham. Chas. A. Senn, Judge. James A. Mitchell and H. K. White, for appellant. Appeal dismissed by agreement. Opinion per curiam.

LOWE v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. Chas. G. Brown, Atty. Gen., for the State. The

appellant in this case was indicted, tried, and convicted of grand larceny. The judgment of conviction is affirmed. Opinion by McClellan, C. J.

LUNSFORD et al. v. HUDSON. (Supreme Court of Alabama. June 28, 1902.) Appeal from circuit court, Jefferson county; A. A. Coleman, Judge. Sterling A. Wood, for appellant. This was an action of assumpsit, brought by the appellee against the appellants. There was judgment rendered for the plaintiff for a sum greater by \$5.02 than that claimed in the complaint, including interest. From this judgment the defendant appeals, and assigns the rendition thereof as error. The judgment is here corrected, and the proper judgment rendered as of the date of its rendition in the circuit court; and, as so corrected, the judgment is affirmed. Opinion by Sharpe, J.

MINGE et al. v. PRATT et al. (Supreme Court of Alabama. June 28, 1902.) Appeal from chancery court, Marengo county; Thos. H. Smith, Chancellor. Elmore & Harrison, for appellants. The appeal in this case was dismissed on appellant's motion. Opinion per curiam.

NATIONAL BUILDING & LOAN ASS'N v. MCGAULEY.¹ (Supreme Court of Alabama. Feb. 18, 1901.) Appeal from chancery court, Montgomery county; William L. Parks, Chancellor. Wm. L. Martin and W. E. Holloway, for appellant. Gordon Macdonald, for appellee. The bill in this case was filed by the appellee, Mrs. Kate McGauley, against the National Building & Loan Association, and sought the redemption of certain mortgages made by one Engelhardt to the building and loan association, conveying certain real estate which Engelhardt had devised to the complainant, and for the appointment of a receiver of the defendant corporation. The defendant moved to dismiss the bill for want of equity, and demurred to the bill upon several grounds. On the submission of the cause on this motion and demurrer, the court rendered a decree overruling the same. From this decree the defendant appeals, and assigns the rendition thereof as error. Upon the authority of *Johnson v. Association* (Ala.) 28 South. 2, 82 Am. St. Rep. 257, the decree of the chancellor is reversed, and decree rendered in this court, dismissing the bill without prejudice. Reversed and rendered. Opinion by McClellan, C. J.

NORWOOD et al. v. WOOD et al.¹ (Supreme Court of Alabama. Feb. 13, 1902.) Appeal from circuit court, Montgomery county; J. C. Richardson, Judge. J. M. Chilton, for appellants. C. E. Hamilton and Watts, Troy & Caffey, for appellee. This was an action on the case, brought by the appellees, Wood & Hattemer, against the appellants, Norwood & Co., to recover damages for the destruction of plaintiffs' lien on cotton. From a judgment in favor of the plaintiffs, the defendants appeal, and assign as error the rulings of the trial court in sustaining the demurrers interposed by the plaintiffs to certain pleas filed by defendants. The judgment is affirmed. Opinion by Haralson, J.

O'NEIL v. STATE. (Supreme Court of Alabama. June 28, 1902.) Appeal from city court of Montgomery; A. D. Sayre, Judge. Terry Richardson, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant in this

¹ Rehearing denied June 28, 1902.

¹ Rehearing denied June 28, 1902.

case filed his petition, addressed to the judge of the city court of Montgomery, asking for his discharge from custody, upon the ground that, after he was convicted, he was unlawfully detained for an unreasonable length of time by the sheriff. From a judgment denying the petitioner's discharge, he prosecutes the present appeal. The judgment is affirmed, on the authority of *O'Neil v. State* (decided at the present term), 32 South. 607, and *White v. State* (decided at the present term) Id. 820. Opinion by McClellan, C. J.

PARTLOW v. STATE. (Supreme Court of Alabama. June 28, 1902.) Appeal from circuit court, Colbert county; E. B. Almon, Judge. W. P. and W. L. Chitwood, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for burglary, and was sentenced to the penitentiary for a term of three years. The appeal is dismissed. Opinion per curiam.

PERKINS v. BIRMINGHAM S. R. CO. (Supreme Court of Alabama. Feb. 18, 1902.) Appeal from circuit court, Jefferson county; A. A. Coleman, Judge. Action between Henry Perkins and the Birmingham Southern Railroad Company. From a judgment in favor of the railroad company, Perkins appeals. Affirmed. *Bowman & Harsh* and C. D. Comstock, for appellant. Smith & Weatherly, for appellee.

DOWDELL, J. The judgment in this case is affirmed, on the authority of *Railway Co. v. Bunt* (decided at the present term of this court) 32 South. 507. Affirmed.

PRINCE v. STATE. (Supreme Court of Alabama. June 28, 1902.) Appeal from city court of Anniston; Thos. W. Coleman, Judge. Lapsley & Martin, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant, Sylvester Prince, was indicted, tried, and convicted for maliciously shooting at or into a passenger car, which was a part of a railroad train, and was sentenced to the penitentiary for two years. The judgment of conviction is affirmed. Opinion by Haralson, J.

SCOTT et al. v. STATE. (Supreme Court of Alabama. June 28, 1902.) Appeal from criminal court, Pike county; T. L. Borom, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellants, Roland Scott and Fannie Davis, were prosecuted and convicted for living together in a state of adultery or fornication, and from this judgment they appeal. The judgment of conviction is affirmed. Opinion by McClellan, C. J.

SEAWRIGHT v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from criminal court, Jefferson county; Daniel A. Greene, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for burglary. The judgment of conviction is affirmed. Opinion per curiam.

STATE v. STEWART. (Supreme Court of Alabama. June 28, 1902.) Appeal from order of W. L. Pratt, probate judge of Bibb county, allowing bail on habeas corpus. Chas. G. Brown, Atty. Gen., and W. W. Lavender, for the State. Ellison, Thompson & Loring, for petitioner. The appellee, T. J. Stewart, was indicted for murder, and was arrested and committed to jail. He thereupon filed a petition for habeas corpus, and asked to be admitted to

bail. The probate judge, to whom the petition was addressed, on the hearing of the evidence, admitted the petitioner to bail, and from this judgment the state appeals. The order of the probate judge admitting the petitioner to bail was reversed, and the judgment here rendered denying bail and dismissing the petition. Opinion by Sharpe, J.

STOVALL v. BARTLETT. (Supreme Court of Alabama. Nov. Term, 1900.) Appeal from chancery court, Walker county; Thomas Cobbs, Chancellor. J. H. McGuire and Alex. T. London, for appellant. Coleman & Bankhead, for appellee. Bill by D. L. Stovall against J. H. Bartlett and others to enjoin defendants from acting as officers of the Jasper Land Company. From a decree sustaining a demurrer to the bill, and dismissing it, complainant appeals. Affirmed. Decree affirmed. Opinion by Tyson, J.

TAYLOR v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted and tried for an assault with intent to murder, and was convicted of an assault and battery. The judgment of conviction is affirmed. Opinion per curiam.

WEST v. ALFORD et al. (Supreme Court of Alabama. June 28, 1902.) Appeal from chancery court, Geneva county; W. L. Parks, Chancellor. Sollie & Kirkland, for appellant. W. O. Mulkey, for appellees. The bill in this case was filed by the appellant against the appellees, and prayed for an injunction restraining them from cutting, boxing, working, or using the timber on certain lands described therein. A preliminary injunction was issued upon the filing of the bill. On the final submission of the cause, the chancellor rendered a decree denying the relief prayed for, dissolving the injunction, and dismissing the bill. From this decree the defendant appeals, and assigns the rendition thereof as error. The decree is affirmed. Opinion by Tyson, J.

WIGGINS v. STATE. (Supreme Court of Alabama. June 5, 1902.) Appeal from city court of Montgomery; William H. Thomas, Judge. Hill & Hill, for appellant. Chas. G. Brown, Atty. Gen., for the State. The appellant in this case was indicted, tried, and convicted for gaming. The judgment of conviction is reversed, and the cause remanded, on the authority of *James v. State* (present term) 32 South. 237. Opinion by Sharpe, J.

WILLIAMS v. DILLARD. (Supreme Court of Alabama. June 12, 1902.) Appeal from circuit court, Pike county; John P. Hubbard, Judge. Worthy & Gardner, for appellant. E. R. Brannen, for appellee. This was an action of unlawful detainer, brought by the appellee, Jasper Dillard, against the appellant, E. D. Williams. From a judgment in favor of the complainant, the defendant appeals. "What purports to be a bill of exceptions in the transcript was signed out of term time and in vacation. The record does not show any order by the court allowing this to be done. There appears, in what purports to be the bill of exceptions, this statement: 'On this, July 6, 1901, it is considered and adjudged by the court that said motion for a new trial be, and the same is hereby, refused, and 30 days given to present a bill of exceptions.' The judgment entry in the record shows that the trial was had at the

March term, 1901." What purports to be an order of the court, as shown by the quotation set out above, is no order of the court, as it was made in vacation. "It has been repeatedly held by this court that unless the bill of exceptions be signed in term time, or, if in vacation, by an order of court made in term time, or by consent of parties in writing made in term time, for signing in vacation,—in other words, in accordance with the requirements of the statute,—it cannot be looked to for any purpose. There are no assignments of error on the record proper." The judgment appealed from is affirmed. Opinion by Dowdell, J.

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(107 La.)

CITY OF NEW ORLEANS v. SAM WAH. (No. 14,233.) (Supreme Court of Louisiana. June 16, 1902.) Appeal from second city court of New Orleans; Andrew P. Marmouget, Judge. Sam Wah was convicted of violating a city ordinance, and appeals. Affirmed. Lionel Adams, for appellant. Joseph E. Generelly, for appellee.

BLANCHARD, J. This case is identical with that of city of New Orleans v. Hop Lee, 104 La. 601, 29 South, 214, and, for the reasons assigned in the opinion of the court in the latter case, the judgment appealed from is affirmed.

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(107 La.)

SARIGNET v. RIVOIRE. (No. 14,038.) (Supreme Court of Louisiana. May 12, 1902.) Appeal from civil district court, parish of Orleans; Thomas O. W. Ellis, Judge. Action by Marie Sarignet, wife of Hypolite Rivoire, against Hypolite Rivoire. Judgment for plaintiff. Defendant appeals. Affirmed. Robert J. Maloney, for appellant. Clement L. Walker and John G. Robin, for appellee.

PROVOSTY, J. The only question in this suit, which is one by the wife for separation from bed and board on the ground of cruel treatment, is as to the sufficiency of the evidence. We agree fully with the views expressed by the learned judge a quo in his written reasons for judgment. It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, with costs.

INDEMNITY FIRE INS. CO. v. METZGER. (Supreme Court of Mississippi. June 9, 1902.) Appeal from circuit court, Warren county; Geo. Anderson, Judge. Action by S. P. Metzger against the Indemnity Fire Insurance Company upon a fire insurance policy for \$1,500, covering cotton in bales contained in a certain yard in Vicksburg, Miss. To plaintiff's declaration defendant pleaded several pleas, demurrers to the pleas were sustained, defendant declined to plead further, and a judgment was entered against it for the full amount sued for and interest. From that judgment it appeals. The same pleas were filed in this case by defendant as were filed in the case of Insurance Co. v. Shlenker, 32 South, 155, and that case is here referred to for a further statement of the facts. Judgment affirmed. E. J. Bowers and Catchings & Catchings, for appellant. Smith, Hirshe & Landon, for appellee.

WHITFIELD, C. J. This case abides the result in Insurance Co. v. Shlenker, 32 South, 155. Affirmed.

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OWENS v. STATE. (Supreme Court of Mississippi. June 9, 1902.) Appeal from circuit court, Lafayette county; P. H. Lowrey, Judge. "Not to be officially reported." Whit Owens was convicted of murder, and he appeals. The facts in this case are the same as in the case of Owens v. State (No. 10,377) 32 South, 152, both John and Hugh Montgomery being murdered at the same time and place, and that case is referred to for a full statement of the facts. Reversed. Stephens & Stephens and McWillie & Thompson, for appellant. W. L. Easterling, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. This case is controlled by the opinion this day delivered in the case of Same Appellant v. State (No. 10,377) 32 South, 152. Reversed and remanded.

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HALLE et al. v. EINSTEIN. (Supreme Court of Florida. June Term, 1900.) Appeal from circuit court, Duval county; Rhydon M. Call, Judge. R. H. Liggett, for appellants. F. W. Pope, for appellee. The bill in this cause was filed by the appellee against the appellants. There was decree for the complainant, and the defendants appeal. Appeal dismissed for failure to comply with rule 20 (26 South, v) as to filing abstracts of the record.

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ALEATORY CONTRACTS.

See "Gaming," § 1.

ALIBI.

Instructions as to, see "Criminal Law," § 21.

ALIMONY.

See "Divorce," § 2; "Husband and Wife," § 4.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

ALTERATION.

Of geographical or political divisions, see "Municipal Corporations," § 1; "Schools and School Districts," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

The mere fact that alterations are apparent on the face of a deed does not destroy its validity.—*Harper v. Reaves* (Ala.) 721.

The negotiability of a note *held* not destroyed by the payee filling in the blank space for the amount and changing the figures in the margin to correspond with the amount inserted in the blank space.—*Frim v. Hammel* (Ala.) 1006.

AMENDMENT.

Of constitution, see "Constitutional Law," § 1. Of indictment or information, see "Indictment and Information," § 5.

Of pleading in equity, see "Equity," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 1; "Courts," § 2.

ANIMALS.

Injuries from operation of railroads, see "Railroads," § 5.

Acts 1898-99, p. 1776, to extend the stock law of Clay county to adjacent districts, *held* not void because of failure to require notice of an application for such extension.—*Street v. Hooten* (Ala.) 580.

An indictment for injuring cattle under Cr. Code, § 5061, *held* fatally defective.—*Dunklin v. State* (Ala.) 668.

Passengers, having no control, *held* not guilty of overloading and overdriving a team.—*Atkins v. State* (Miss.) 921.

ANSWER.

As evidence, see "Equity," § 8.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

See "Certiorari;" "Exceptions, Bill of;" "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 3.

Effect of remedy by appeal or writ of error on right to mandamus, see "Mandamus," § 1.

Review of proceedings of justices of the peace, see "Justices of the Peace," § 3.

Review in particular civil actions.

Summary proceedings by landlord to recover possession, see "Landlord and Tenant," § 4.

Review in special proceedings.

For allowance of claims against decedents' estates, see "Executors and Administrators," § 7.

For distribution of decedents' estates, see "Executors and Administrators," § 5.

For sale of decedents' estates, see "Executors and Administrators," § 6.

Trial of right of property, see "Attachment," § 2.

Review of criminal prosecutions.

See "Criminal Law," §§ 25-30; "Homicide," § 13.

Finding of grand jury, see "Indictment and Information," § 1.

Summary trial, see "Criminal Law," § 5.

§ 1. *Decisions reviewable.*

Matter *held* not a judgment, which will support an appeal, but only a part of the finding.—*Barnemann v. Morrison* (Ala.) 649.

Where an appeal was not taken from an order appointing a receiver, as allowed by Code, § 429, an order refusing to discharge the receiver and increase his bond cannot be assigned as error.—*Hereford v. Hereford* (Ala.) 651.

Where there is a final decree dissolving an injunction and dismissing the bill, there can be no appeal solely from the order dissolving the injunction.—*Burnham v. Driggers* (Fla.) 796.

Where, in a suit to cancel an assessment, the sole question is as to its validity, and the amount is less than \$2,000, the supreme court is without jurisdiction.—*State ex rel. Zeigler v. Board of Assessors* (La.) 67.

Where, in an action to recover land, defendant denies the right of plaintiff, and exhibits title in himself, and at the same time disclaims title in the land, and there is a judgment recognizing defendant as the owner of the buildings, the value of the land is to be considered in determining jurisdiction on appeal.—*City of New Orleans v. Fredericks* (La.) 80.

Where judgment is asked on a bond against the principal for more than \$2,000, and against the principal and surety for less than \$2,000, and judgment is rendered against both in solido for \$390, an appeal lies to the court of appeals.—*Perkins v. Lapeyronnie* (La.) 83.

When by remittitur in the lower court the amount in dispute is reduced below the jurisdiction of the appellate court, it has no jurisdiction.—*State ex rel. Taylor v. Judges of Court of Appeal* (La.) 186.

In an action of boundary the test of the jurisdiction of the supreme court is the value of the property which lies between the contested lines.—*Salles v. Jacquet* (La.) 411.

An order sustaining a demurrer to a bill, but authorizing its amendment within 60 days, held not appealable.—*Barrier v. Kelly* (Miss.) 999.

§ 2. Right of review.

Where the court has set aside an injunction upon the ground that it enjoined the execution of an absolute judgment of the supreme court, it should refuse an appeal to the party cast, and compel him to apply to the supreme court for relief.—*City of New Orleans v. Bilgery* (La.) 429.

§ 3. Presentation and reservation in lower court of grounds of review.

In a suit to set aside a deed, an objection that the suit has not been discontinued as to a deceased life tenant cannot be taken for the first time on appeal.—*Letohatchie Baptist Church v. Bullock* (Ala.) 58.

On appeal from an order overruling a general demurrer to a bill for want of equity, neither the question of multifariousness nor misjoinder of parties can be raised for the first time.—*First Nat. Bank v. Kirkby* (Fla.) 881.

An appeal will not lie where there was no motion for new trial.—*Armstrong v. Gaddis* (Miss.) 917.

§ 4. Requisites and proceedings for transfer of cause.

An appeal from two interlocutory decrees, one entered more than six months before the appeal, entitles the appellant to a review only of the decree entered within the six months.—*Mattair v. Furchgott* (Fla.) 925.

An appeal from two interlocutory decrees, one of which was entered more than six months before the appeal, will entitle the appealing party to have only the decree entered within six months reviewed.—*Ray v. Frank* (Fla.) 925.

Where the transcript was filed in due time, and all requirements complied with, but service of citation could not be made, because appellee could not be found, a citation may be served after 12 months from the judgment.—*Levy v. Levy* (La.) 117.

Appellee should be cited personally when he resides in the state; but if he cannot be found, and has no domicile, citation served on his at-

torney will save the appeal from dismissal.—*Levy v. Levy* (La.) 117.

The granting of an appeal to a court without jurisdiction does not deplete the trial court of jurisdiction to grant an appeal to another tribunal to which it properly lies.—*Vallee v. Hunsberry* (La.) 359.

Where an appeal is taken by motion in open court when the judgment is rendered, no citation of appeal is required.—*Vallee v. Hunsberry* (La.) 359.

Where the district court grants an appeal to the circuit court on filing bond, it may vacate such an order before the filing of the bond, and grant an appeal to the supreme court, if applied for in time.—*Vallee v. Hunsberry* (La.) 359.

Where appellant furnishes a bond for the amount fixed by the court, the appeal will be maintained as devolutive, though the bond be too small for a suspensive appeal.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

§ 5. Effect of transfer of cause or proceedings therefor.

Where the court has set aside an injunction against the execution of a judgment of the supreme court, and has granted a suspensive appeal, it should not oust the appellant from his possession and place the property in the hands of a sequestrator and enjoin the appellant from acts of possession.—*City of New Orleans v. Bilgery* (La.) 429.

§ 6. Record and proceedings not in record.

When a motion is not incorporated in the bill of exceptions, the ruling of the court on it will not be reviewed.—*Hamilton v. Maxwell* (Ala.) 13.

The decision of the trial court in overruling a motion will be affirmed, though the motion is incorporated in the bill of exceptions, when the record fails to set out the evidence introduced in support of it.—*Hamilton v. Maxwell* (Ala.) 13.

Judgment affirmed where motion appealed from does not properly appear in record.—*Craig v. Etheredge* (Ala.) 65.

A bill of exceptions, signed after trial term, will not be considered; no agreement or order extending time appearing.—*Lindsey v. Kenau* (Ala.) 123.

Exceptions to rulings on motions must be shown by bills of exception.—*Evans v. Southern Ry. Co.* (Ala.) 138.

Where a bill of exception shows that it was signed by the judge in vacation without an order in the record authorizing it, the bill will be stricken out on appeal, though the bill recites the making of such an order.—*Zion Fountain Lodge No. 54, F. & A. M., v. Folkes* (Ala.) 485.

A record recital that defendant's demurrers were overruled is not a judgment on the demurrers, and will not support an assignment of error.—*Speer v. Crowder* (Ala.) 658.

A certificate to a transcript of record on appeal held defective.—*Burnham v. Driggers* (Fla.) 796.

Appellate courts will sometimes sua motu order correction of records, for the purpose of informing its conscience, in order to affirm a judgment.—*Turman v. Whaley* (Fla.) 811.

Where an abstract of the record, not excepted to, shows no evidence to support the verdict, but the briefs show that there was some testimony to support it, the appellate court, where the omissions were not intentional, will call sua motu for either true abstracts of the record

or additional copies, under the rules.—Turman v. Whaley (Fla.) 811.

Where decrees appealed from do not appear in the transcript of the record, they cannot be reviewed.—Mattair v. Furchgott (Fla.) 925.

A district judge cannot be called upon to make a statement of facts after an appeal has been perfected, either by motion in the trial court or certiorari from the supreme court.—Harvin v. Blackman (La.) 452.

Appellant is entitled to have a statement of facts made out, but is not called upon to do so in behalf of the appellee.—Harvin v. Blackman (La.) 452.

It is not the duty of appellant to make out a proper record for appellee, if he through negligence has failed to do so.—Harvin v. Blackman (La.) 452.

Where the transcript on appeal has been made up under instructions from the appellant, and contains only such matter as he has directed to be included, the appeal will be dismissed.—Charter Oak Stove & Range Co. v. Rice (La.) 957.

§ 6½. Assignment of errors.

Where a motion to dissolve an injunction is joint, as are the appeal from a decree overruling the motion and the assignments of error, the decree being proper as to certain respondents, it must be held proper as to all.—Niehaus v. Cooke (Ala.) 728.

Joint assignments of error are bad, where not good as to all the appellants.—Killian v. Cox (Ala.) 738.

Where no assignment of errors was presented to the judge on making an ordinary bill of exceptions, and the bill exhibits no sufficient statement of evidence, there is nothing to review.—Southerland v. Sandlin (Fla.) 786.

An appellee is not restricted to the examination of error contained in the assignment of errors.—Yazoo & M. V. R. Co. v. Adams (Miss.) 937.

§ 7. Dismissal, withdrawal, or abandonment.

Under supreme court rule 45 (8 South. vi), an appeal will not be dismissed for failure to file the transcript in time, where the motion was not made on or before the next Thursday after the default.—Martin Mach. Works v. Miller (Ala.) 305.

Where an appeal bond was given within the year allowed, the appeal will not be dismissed for delay in giving notice not due to appellant's fault.—Martin Mach. Works v. Miller (Ala.) 305.

Where a writ of error was issued in August, 1896, and made returnable to the January term, 1897, and no scire facias has been issued or served, the cause will be dismissed.—Solary v. Weed (Fla.) 779.

Where plaintiff in error fails to file a transcript within the term of the court to which his writ of error is returnable through laches, the writ of error will be dismissed at his cost.—Rush v. Connor (Fla.) 790.

Where, on appeal from two interlocutory decrees, it appears that one was entered more than six months before the appeal and the other is not in the transcript, the appeal will be dismissed.—Mattair v. Furchgott (Fla.) 925.

A writ of error to review refusal to compel the issuance of a license will be dismissed, where the time during which such license would have remained operative has expired.—State v. Martin (Fla.) 926.

The same grounds cannot form the basis of a second motion to dismiss an appeal.—Levy v. Levy (La.) 117.

A motion to dismiss an appeal, because of informality in, or absence of, an order of appeal, must be filed within three days after the filing of the transcript.—Vallee v. Hunsberry (La.) 359.

An appeal from an order for the production of books and papers will be dismissed, where it does not appear that irreparable injury can result to the complaining party.—Succession of Marks (La.) 401.

The appeal of a particular appellant will not be dismissed in limine, on the ground that he has no interest, where an examination of the entire record is necessary to ascertain the relation of the parties.—L. J. Mestier & Co. v. A. Chevalier Paving Co. (La.) 520.

An appeal will be dismissed where, by eliminating a duplicated item of damages, the demand is reduced below the limit of the jurisdiction of the court.—Johnson v. Hosmer (La.) 961.

§ 8. Hearing and rehearing.

The supreme court technically cannot, on an application for rehearing, make a final disposition of the cause, even though oral argument was allowed on application for rehearing.—Lo-secco v. Gregory (La.) 985.

§ 9. Review.

On an appeal from an order refusing to discharge a receiver, a former interlocutory decree overruling a motion to dismiss the bill for want of equity cannot be reviewed.—Hereford v. Hereford (Ala.) 651.

The denial of a motion to strike a paragraph of a complaint which is mere surplusage is not reviewable.—Marx v. Miller (Ala.) 765.

Overruling of demurrer to count in contract, because joined with counts in tort, held cured by subsequent action as to the latter.—Kansas City, M. & B. R. Co. v. Foster (Ala.) 773.

Where the preponderance of the evidence is in favor of plaintiff, the judgment in his favor will not be disturbed.—Goothye v. DeLatour (La.) 391.

The supreme court will not examine numerous books and other records brought up on an appeal by an opponent on an accounting by a receiver to eke out the want of showing in the final account as to certain assets of the estate.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

Under Const. 1890, § 146, and Code 1892, § 4350, the supreme court may affirm a judgment on points expressly rejected by the trial court.—Yazoo & M. V. R. Co. v. Adams (Miss.) 937.

§ 10. — Parties entitled to allege error.

Where no appeal was taken by the appellees, their cross assignments of error cannot be considered without appellant's consent in writing.—Jones v. Peebles (Ala.) 60.

If an appellee wishes to have rulings adverse to him reviewed, he must either take a cross appeal or cross assign error.—Long v. Campbell (Ala.) 591.

An assignment of error by a party who did not join in the appeal cannot be considered.—Worthington v. Miller (Ala.) 748.

§ 10½. — Presumptions.

Where a cause was submitted for final decree on pleas to which an objection had been entered, but which was not urged, issue will be presumed to have been taken on them.—Adair v. Feder (Ala.) 166.

It could not be presumed, on appeal in tort, where the judgment recovered did not exceed \$20, that the judge made the certificate authorized by Code, § 1326, that larger damages should have been awarded, so as to entitle

plaintiff to a larger judgment for costs, in the absence of an express recital in the record.—*Guttery v. Boshell* (Ala.) 304.

An appointment of an administrator de bonis non by the probate court will be presumed jurisdictional on appeal.—*Henley v. Johnston* (Ala.) 1009.

Where answers to interrogatories propounded by creditors to a wife, to whom the husband has conveyed immovables, showed that property in another state was conveyed for a consideration arising under the laws of that state, the court on appeal will not assume that a different consideration, testified to as moving in the matter of a conveyance of Louisiana property, was included.—*Rush v. Landers* (La.) 95.

§ 11. — Harmless error.

A plaintiff, having offered no evidence, *held* not entitled on appeal to review of ruling overruling demurrer to pleas and striking replication.—*Cross v. Esslinger* (Ala.) 10.

The refusal to strike out immaterial averments in the complaint *held* not reversible error, unless it affirmatively appears that such refusal was prejudicial.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

Where on the trial the plaintiff abandons certain counts in the complaint, the effect is equivalent to an amendment by striking out such counts; hence any errors in overruling demurrers thereto are not subject to review.—*Southern Ry. Co. v. Bunt* (Ala.) 507.

Where there was a plea of the general issue, error in sustaining a demurrer to a plea amounting merely to a denial of certain alleged facts *held* to be without injury.—*Nashville, O. & St. L. Ry. Co. v. Bates* (Ala.) 589.

Where the general issue is pleaded, and pleas setting up matters provable under the general issue, error in sustaining a demurrer to the special pleas is harmless.—*Louisville & N. R. Co. v. Hall* (Ala.) 603.

Overruling of demurrer to part of bill *held* harmless; proofs under the remainder being sufficient.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

Error in striking out special pleas *held* not harmless.—*Troy Fertilizer Co. v. State* (Ala.) 618.

If the court abused its discretion in declining to allow defendant to examine a witness after plaintiff had closed his evidence, the error *held* harmless.—*Jernigan v. Clark* (Ala.) 686.

Allowance of questions on cross-examination *held* harmless, in view of answers.—*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.) 745.

In an action by a servant for wrongful discharge, plaintiff being entitled to a general charge, exclusion of evidence which would not produce any conflict in the evidence was harmless.—*Marx v. Miller* (Ala.) 705.

In an action by remainder-men for waste committed by an assignee of the tenant by the curtesy, the erroneous admission of evidence of waste by others prior to the time when defendant's trespasses began, and of waste by defendant barred by limitation, *held* not cured.—*Learned v. Ogden* (Miss.) 278.

The rejection of evidence which could not have affected the verdict *held* harmless error.—*Advance Gin & Mill Co. v. Thomas* (Miss.) 316.

The other evidence being such as to make the verdict necessary, introduction of evidence *held* harmless.—*Fletcher v. Sovereign Camp Woodmen of the World* (Miss.) 923.

§ 12. — Error waived in appellate court.

Assignment of error, not referred to in briefs, is presumed to be waived.—*Beyer v. Fields* (Ala.) 742.

Assignments of error, not argued on appeal, are waived.—*Southerland v. Sandlin* (Fla.) 786.

Where a party fails to ask for any ruling on his objection to parol evidence, it will be presumed on appeal that the objection was waived.—*Rush v. Landers* (La.) 95.

Where a motion to dismiss an appeal is based on several grounds, the last stated of which refers to want of citation, the latter will be considered waived.—*Vallee v. Hunsberry* (La.) 359.

§ 13. Determination and disposition of cause.

On appeal in an action for tort, *held*, that judgment would be rendered in appellate court in conformity with Code, § 1326, relating to costs.—*Guttery v. Boshell* (Ala.) 304.

Where an improper judgment is entered on a proper verdict, the appellate court will reverse it, with directions for entry of a proper judgment on the verdict.—*Geiger v. Henry* (Fla.) 874.

Action on appeal from an order in a case postponed until the issue on the main demand was adjudicated.—*Freilisen v. Strader Cypress Co.* (La.) 170.

Where, in divorce, the evidence is insufficient to entitle plaintiff to relief, and would be insufficient, though certain evidence had not been excluded, the judgment will be affirmed.—*Pirby v. Phelps* (La.) 182.

Where a writ of mandamus is granted below, and defendant appeals, and counsel agree that the judgment appealed from may be affirmed, such judgment will be affirmed.—*State ex rel. Richardson v. Schwartz Foundry Co.* (La.) 189.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

APPROPRIATION.

For payment of municipal debts, see "Municipal Corporations," § 8.

ARBITRATION AND AWARD.

See "Submission of Controversy."

§ 1. Submission.

Where, in a submission to an amicable compounder, parties make admissions as to a matter not to be submitted, there is no reason, where it was not a matter in which there was any difference between them, to give it consideration.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

§ 2. Award.

Where the amicable compounder was not sworn, and some of the facts were not before him, the return was properly annulled.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

Where a claim is based on a gambling contract in futures, but on an award of arbitration the legality of the transaction is not submitted, the award is not conclusive on such execution.—*Lum v. Fauntleroy* (Miss.) 290.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 2.
In criminal prosecutions, see "Criminal Law," § 19.

ARRAIGNMENT.

See "Criminal Law," § 6.

ARREST.

See "Prisons."
Illegal arrest, see "False Imprisonment."

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 23.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 8.
Assault with intent to rape, see "Rape," § 1.
§ 1. **Criminal responsibility.**
Any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault.—*Jacobi v. State* (Ala.) 158.

ASSESSMENT.

Of expenses of public improvements, see "Municipal Corporations," § 4.
Of tax, see "Taxation," § 4.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 6½; "Criminal Law," § 29.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."

§ 1. **Requisites and validity.**
The statutory right of redemption from foreclosure sale being personal to the owner of the land, an attempted assignment of the right furnishes no consideration for a contract.—*Terry v. Allen* (Ala.) 664.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

§ 1. **Requisites and validity.**
Incapacity or mismanagement on the part of an assignee for the benefit of creditors is ground for his removal, but not for avoiding the assignment.—*Long v. Campbell* (Ala.) 591.

A deed of assignment conveying all of grantor's property, "except his homestead," is not invalid, as containing a reservation for the benefit of the grantee.—*Long v. Campbell* (Ala.) 591.

A deed of assignment, bona fide in its inception, cannot be rendered fraudulent by collusion between the grantor and the assignee after its execution.—*Long v. Campbell* (Ala.) 591.

§ 2. **Administration of assigned estate.**
A creditor held estopped by his own conduct from maintaining a suit to set aside a judicial sale of his debtor's property for inadequacy of price, on the ground of surprise, acci-

dent, or mistake.—*Helena Coal Co. v. Sibley* (Ala.) 718.

A judicial sale to a stranger will not be set aside for inadequacy of price, unless there is fraud or surprise not attributable to the interested parties.—*Helena Coal Co. v. Sibley* (Ala.) 718.

ASSOCIATIONS.

See "Building and Loan Associations."

ASSUMPSIT, ACTION OF.

See "Account Stated"; "Money Paid"; "Work and Labor."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 6.

ATTACHMENT.

See "Garnishment"; "Sequestration."

Against national banks, see "Banks and Banking," § 3.

In fraud of creditors, see "Fraudulent Conveyances," § 3.

§ 1. **Proceedings to support or enforce.**

Under Code, §§ 486, 487, relative to attachments of debts owing to foreign creditors, and not authorizing a personal decree, no such decree can be had; the proceeding being purely statutory.—*Rothrock Const. Co. v. Port Gibson Mfg. Co.* (Miss.) 116.

§ 2. **Claims by third persons.**

Where an agreement of the parties by which the jury was to be governed in their findings is recited in the verdict, which does not assess each item of property, as required by Code, § 4143, in trials of right to property, it will be presumed on appeal that the agreement dispensed with the necessity of such assessment.—*Massillon Engine & Thresher Co. v. Arnold* (Ala.) 594.

Where a verdict in an action to determine the right of property describes the property as a sawmill, consisting of boiler, engine, and fixtures, but does not assess each item of the property, as required by Code, § 4143, it will be presumed on appeal, in the absence of contrary evidence, that such assessment was impractical.—*Massillon Engine & Thresher Co. v. Arnold* (Ala.) 594.

Under Rev. St. § 1200, judgment held to be authorized against claimant in attachment and his sureties for the amount of the value as fixed by the attaching officer.—*Geiger v. Henry* (Fla.) 874.

Under Rev. St. § 1200, concerning adverse claims of third persons in attachment suits, held error to enter judgment against the claimant and his sureties for an indefinite sum, to be thereafter ascertained by the judgment to be entered in the principal suit.—*Geiger v. Henry* (Fla.) 874.

§ 3. **Wrongful attachment.**

In an action for wrongful attachment, the question whether the attachment was wrongfully sued out is for the jury.—*Hamilton v. Maxwell* (Ala.) 13.

In an action for wrongful attachment, the record of motions by plaintiff in the original suit to substitute the writ of attachment and for an order directing the sheriff to sell the property levied on, and the order of the court thereon, held admissible.—*Hamilton v. Maxwell* (Ala.) 13.

In an action for wrongful attachment, evidence held to show that the writ of venditionis

expenses grew out of the attachment suit mentioned in the bond sued on.—*Hamilton v. Maxwell* (Ala.) 13.

Where one has furnished materials to a contractor engaged in building a railroad, and he wrongfully levies a seizure on property belonging to the company, he is liable to the company; but where the seizure is against the contractor is good, and would of itself have stopped the work, no greater damages will be allowed than are clearly proven.—*Cameron v. Orleans & J. Ry. Co.* (La.) 208.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 2.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 19.

Attorneys in fact, see "Principal and Agent."

Employment of attorney by county, see "Counties," § 1.

§ 1. Retainer and authority.

Client held not charged with knowledge of attorney acquired before his employment to make purchase.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

Client held not charged in making purchase with knowledge of his attorney, who without his knowledge was representing vendors, and was personally interested in making the sale.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

In an action to recover land, where defendant pleads an estoppel by certain writings, plaintiff cannot be divested of the land by a verbal admission and conclusion of law of his attorney that the plea of estoppel is well founded.—*Harvin v. Blackman* (La.) 452.

AUCTIONS AND AUCTIONEERS.

Where, on sale at auction, the adjudicatee is tendered a title valid on its face, strengthened by judicial proceedings and accompanied by undisturbed possession as owner for 18 years, she is bound to accept it.—*Abraham v. Mieding* (La.) 829.

AUTHORITY

Of agent, see "Principal and Agent," § 1.

AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 2.

AWARD.

See "Arbitration and Award," § 2.

BAILMENT.

See "Banks and Banking," § 2; "Carriers," § 1; "Pledges."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Bankr. Act 1898, § 70e, held not to limit a trustee to an action at law; but he may, under Code, § 818, maintain suit in equity in state court for property fraudulently conveyed.—*Andrews v. Mather* (Ala.) 738.

Under Bankr. Act 1898, § 23, held, that a trustee may sue in a state court for property fraudulently conveyed.—*Andrews v. Mather* (Ala.) 738.

BANKS AND BANKING.

§ 1. Banking corporations and associations.

The banking department of the Citizens' Bank of Louisiana did not by purchase of state bonds issued in aid of bank extinguish them, and is entitled to the benefits of the funding scheme, created by Act Jan. 24, 1874, in reference to the bonds it may hold.—*Hope v. Board of Liquidation of State Debt* (La.) 547.

The banking department of the Citizens' Bank of Louisiana, created under Acts 1853, No. 246, held to have the capacity to purchase as an investment the bonds of the state issued in aid of the Citizens' Bank in the same manner as any other bank or third person could do.—*Hope v. Board of Liquidation of State Debt* (La.) 547.

Banking department of Citizens' Bank of Louisiana, created in 1853, held not liable for bonded debt of the state in aid of bank.—*Hope v. Board of Liquidation of State Debt* (La.) 547.

Acts 1853, No. 246, passed for the reorganization of the Citizens' Bank of Louisiana, and creating the banking department of such bank, held a creation of a new corporation.—*Hope v. Board of Liquidation of State Debt* (La.) 547.

§ 2. Functions and dealings.

The fact that money is deposited in a bank to the individual credit of the depositor shows prima facie that it belonged to him, but not conclusively so.—*Bessemer Sav. Bank v. Anderson* (Ala.) 716.

§ 3. National banks.

A suit in equity on attachment against a seller and a national bank, which had purchased a draft with bill of lading of the goods, held not an attachment, within Rev. St. U. S. § 5242, relating to attachments against national banks.—*Russel v. Smith Grain Co.* (Miss.) 287; *Searles v. Same*, Id.

BAR.

Of prosecution by previous conviction or acquittal, see "Criminal Law," § 4.

BASTARDS.

§ 1. Proceedings under bastardy laws.

Where the state, in bastardy, had proved defendant's association with the prosecutrix about the time of conception, it was error to exclude evidence of association with other men during the same period.—*Kelly v. State* (Ala.) 56.

On a prosecution for bastardy, it was proper to permit the bastard child to be introduced for identification.—*Kelly v. State* (Ala.) 56.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

In criminal prosecutions, see "Criminal Law," § 7.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 4.

Of witness, see "Witnesses," § 4.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF SALE.

See "Chattel Mortgages," § 1.

BILLS AND NOTES.

See "Guaranty," § 1; "Usury," § 1.

Alteration, see "Alteration of Instruments."

§ 1. Requisites and validity.

A payee *held* authorized to fill in the blank space for the amount of a note left blank by the maker.—*Prim v. Hammel (Ala.) 1006.*

§ 2. Rights and liabilities on indorsement or transfer.

Under Code, §§ 892, 894, where the holder of a note has been induced to delay suing the maker of a note, at the next term of court after the note is due, by any act or promise of the indorser, suit may be brought against the indorser without suing the maker at any time.—*Brown v. Fowler (Ala.) 584.*

Where the holder of a note was induced to delay suit against the maker by a promise of the indorsers to pay, the fact that the holder afterwards recovered judgment against the maker was not a waiver of such promise.—*Brown v. Fowler (Ala.) 584.*

Where the holder of a note was induced to delay suit against the maker by the request of the indorsers and their promise to pay the note, in a suit against them thereon evidence of the solvency and property of the maker of the note at its maturity is irrelevant.—*Brown v. Fowler (Ala.) 584.*

Where the complaint in an action against the indorsers of a note alleges that the holder was induced to delay suing the maker by the express promise of the indorsers to pay the note, a demurrer to a plea denying that there was any consideration for such promise was properly sustained.—*Brown v. Fowler (Ala.) 584.*

Under Code, § 894, where the holder of a note was induced to delay suing the maker an express promise need not have been in writing to fix the liability of the indorsers.—*Brown v. Fowler (Ala.) 584.*

A note transferred to secure a pre-existing debt in consideration of an extension of the time of payment of the debt makes the transferee a bona fide holder.—*Prim v. Hammel (Ala.) 1006.*

It is no defense, in an action on a note by a bona fide transferee before maturity, to show that the maker paid the original payee.—*Prim v. Hammel (Ala.) 1006.*

§ 3. Actions.

Where, in an action against the indorsers of a note, they denied having induced the holder to delay suit against the maker, a corporation, by promising to pay the note, it was proper to show, on cross-examination of one of the defendants, that he and the other defendant owned the majority of the stock of the maker.—*Brown v. Fowler (Ala.) 584.*

Where the complaint in an action against two indorsers of a note alleges that they indorsed it, the presumption is that they indorsed sep-

arately, and evidence that either promised to pay the note is good as against him.—*Brown v. Fowler (Ala.) 584.*

Where the complaint in an action against two indorsers of a note alleges that they each promised to pay the note, the plaintiff may recover on proof of a separate promise by each; a joint promise not being necessary.—*Brown v. Fowler (Ala.) 584.*

In an action against the indorser of a note, an allegation in the complaint, as to the indorsement, that on the day of the date of the note "the defendants indorsed a written obligation executed" by the maker "in words and figures following," setting out the note, is sufficient.—*Brown v. Fowler (Ala.) 584.*

In an action by the holder of a note against the indorsers, the refusal of the court to strike out allegation of the complaint that plaintiff had recovered judgment against the maker, and that execution thereon had been returned, "No property found," was not reversible error.—*Brown v. Fowler (Ala.) 584.*

A complaint against the indorsers of a note considered, and *held* sufficient, and the suit properly against them as indorsers.—*Brown v. Fowler (Ala.) 584.*

In an action by H. on a note indorsed in blank to secure a debt due him from the payee, the action of the court in sustaining plaintiff's objection to the question whether the payee was indebted to H. & Co. *held* not erroneous.—*Prim v. Hammel (Ala.) 1006.*

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

Of goods, see "Sales," § 4.

Of land, see "Vendor and Purchaser," § 2.

BONDS.

Municipal bonds, see "Municipal Corporations," § 8.

Of contractors for convict labor, see "Convicts." Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Officers," § 1; "Registers of Deeds."

Bonds in legal proceedings.

See "Appeal and Error," § 4; "Criminal Law," § 27; "Injunction," §§ 3, 4.

Appeal from justice of the peace, see "Justices of the Peace," § 3.

BOUNDARIES.

See "Municipal Corporations," § 1; "Schools and School Districts," § 1.

Of drainage districts, see "Drains," § 1.

BREACH.

Of contract, see "Vendor and Purchaser," § 1.

Of warranty, see "Sales," § 7.

BREACH OF THE PEACE.

See "Disturbance of Public Assemblage."

BROKERS.

See "Factors"; "Principal and Agent."

BUILDING AND LOAN ASSOCIATIONS.

On the voluntary liquidation of a building association, the rule of distribution among its

stockholders cannot be altered by the fact that the proceeding in which the rule must be applied is or is not an administration suit.—*People's Building & Loan Ass'n v. McPhillamy* (Miss.) 1001; *Same v. Hawks, Id.*

Borrowing member of building association in voluntary liquidation *held* not entitled to credit for dues paid on stock.—*People's Building & Loan Ass'n v. McPhillamy* (Miss.) 1001; *Same v. Hawks, Id.*

Where a building association goes into voluntary liquidation, the equitable principle of accounting with the stockholders is the same, whether the association be solvent or insolvent.—*People's Building & Loan Ass'n v. McPhillamy* (Miss.) 1001; *Same v. Hawks, Id.*

BURDEN OF PROOF.

In civil actions, see "Evidence," § 3.
In criminal prosecutions, see "Criminal Law," § 8; "Homicide," §§ 6-8.

BURGLARY.

Limitation of prosecution, see "Criminal Law," § 3.

§ 1. Offenses and responsibility therefor.

That one charged with breaking and entering with intent to steal stole nothing does not affect his guilt.—*Walker v. State* (Fla.) 954.

§ 2. Prosecution and punishment.

Evidence examined, and *held* to support a verdict of guilty of breaking and entering a dwelling house with intent to steal.—*Walker v. State* (Fla.) 954.

Laws 1895, c. 4405, § 5, relating to breaking and entering a dwelling house with intent to commit a felony, *held* not to apply where the entry occurred in the daytime.—*Walker v. State* (Fla.) 954.

In a prosecution for burglary in the nighttime, the question, "When, if at any time, was the warehouse broken open?" can work no injury to the case.—*State v. Elia* (La.) 476.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Cancellation of insurance policy, see "Insurance," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

§ 1. Right of action and defenses.

One claiming land as devisee has an adequate remedy at law against one in possession under a deed from testator subsequent to the will, which is claimed to be void for want of mental capacity and because attempting to convey the homestead without the wife's signature; and hence a bill in equity to set aside such deed will not lie.—*Letohatchie Baptist Church v. Bullock* (Ala.) 58.

Where one claiming as devisee seeks to recover the land from one in possession under a deed from testator subsequent to the will, a bill alleging that the deed was procured by undue influence, and praying that it be canceled on that ground, presents grounds for equitable relief.—*Letohatchie Baptist Church v. Bullock* (Ala.) 58.

Where the grantor in a deed which was procured by fraud is not in possession, he cannot maintain bill to cancel the deed or remove cloud.—*Treadwell v. Torbert* (Ala.) 126.

Where the grantor in a deed which was procured by fraud delivered possession to the gran-

tee, he cannot regain possession, so as to maintain an action in equity to cancel the deed, by contracting with the tenants of such grantee to lease the premises to them.—*Treadwell v. Torbert* (Ala.) 126.

§ 2. Proceedings and relief.

Where a bill to cancel a deed on the ground that it was procured by undue influence alleges the persons who exerted such influence, it is sufficient, and need not allege the mode in which such influence was exerted.—*Letohatchie Baptist Church v. Bullock* (Ala.) 58.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Parol evidence affecting tickets, see "Evidence."

§ 1. Carriage of goods.

In an action against a carrier for failure to deliver freight, evidence that the consignees had never received the freight was admissible.—*Alabama Midland Ry. Co. v. Thompson* (Ala.) 672.

A carrier having failed to take certain cotton seed for shipment, and the other contracting party abandoning it, so that it was destroyed, the measure of damages is its value at the place of intended delivery, after deducting its value at the place of intended shipment and the freight, and adding the expense which would have been incurred in preserving the seed.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

A bank having discounted drafts with bills of lading attached, though liable after payment of the drafts for defects in the shipment covered by the bills of lading, were not liable for the drawer's breach of other contracts.—*Exchange Nat. Bank v. Russell* (Miss.) 811; *Same v. Searis, Id.*

Verdict in action against a carrier for damage to a car of perishable fruit, delayed by unprecedented rains, *held* properly directed for defendant.—*Burnham v. Alabama & V. Ry. Co.* (Miss.) 912.

Plaintiff *held* not entitled to recover a penalty imposed on railroad companies by Code, §§ 4287, 4288, for overcharges or discrimination.—*Gilliland v. Illinois Cent. R. Co.* (Miss.) 918.

§ 2. Carriage of passengers.

A street railway company *held* liable for failure to provide a reasonably safe place for the landing of passengers.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

The complaint in an action by a passenger against a street railway company for injuries received in alighting from the car *held* to state a cause of action.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

A plea assuming that it was the duty of a passenger to inquire of a street railway company or its agent as to whether the place of stopping is a reasonably safe place for him to alight was properly overruled.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

A plea attempting to set up contributory negligence *held* defective, in not affirmatively alleging any act or omission.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

Certain pleas in an action for wrongfully ejecting a passenger from a railroad train *held* demurrable as neither in confession and avoidance nor denials.—*Nashville, C. & St. L. Ry. Co. v. Bates* (Ala.) 589.

Punitive damages *held* recoverable for willfulness or gross negligence of conductor in carrying passenger beyond her station.—*Birmingham Ry., Light & Power Co. v. Nolan* (Ala.) 715.

Wrong of ticket agent in giving a ticket to a place other than that for which it was bought *held proximate cause of damages*.—*Kansas City, M. & B. R. Co. v. Foster (Ala.)* 773.

Ticket agent of one carrier *held* agent of connecting carrier for selling tickets to points on its line.—*Kansas City, M. & B. R. Co. v. Foster (Ala.)* 773.

The measure of damages of a passenger who, buying a ticket to one point, is given one to a less distant point, where he is ejected, is not confined to the mere cost of transportation between the two points.—*Kansas City, M. & B. R. Co. v. Foster (Ala.)* 773.

Starting a local freight train with a caboose attached before passenger could enter the train *held* negligence for which plaintiff could recover.—*Kelly v. Vicksburg, S. & P. Ry. Co. (La.)* 388.

In an action by a passenger for a failure of a carrier to stop and take her aboard, evidence *held* insufficient to warrant the submission of the question of punitive damages.—*Yazoo & M. V. R. Co. v. Faust (Miss.)* 9.

Where a round trip railroad ticket is sold, good only for one day, it is good for a return trip on the only train returning that day.—*Illinois Cent. R. Co. v. Harris (Miss.)* 309.

CARRYING WEAPONS.

See "Weapons."

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

Certified copies, see "Evidence," § 8.

Of corporate stock, see "Corporations," § 2.

Of purchase of public lands, see "Public Lands," § 1.

Of record for purpose of review, see "Appeal and Error," § 3.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 3.

§ 1. *Nature and grounds.*

Under rule 12 of the supreme court (28 South. iv), it must appear that an application was made for a rehearing in court of appeals to entitle relator to a consideration of his application for a writ of review.—*Trellsen v. Riddock Cypress Co. (La.)* 169; *In re Riddock Cypress Co., Id.*

CHALLENGE.

To juror, see "Jury," § 4.

CHANCERY.

See "Equity."

CHARACTER.

Instructions as to character of accused, see "Criminal Law," § 21.

CHARGE.

To jury in civil actions, see "Trial," § 4.

To jury in criminal prosecutions, see "Criminal Law," § 21.

CHARITIES.

§ 1. *Construction, administration, and enforcement.*

Where the trustees of a church fail to administer a fund for the care of the poor of the church, and the higher authorities of the church fail to act, the court will take charge of the fund until such higher authorities will take charge of and properly administer it.—*Von Hoven v. Immanuel Presbyterian Church of New Orleans (La.)* 389.

The members of a church have a standing in court to compel a board of trustees to administer a charitable fund in accordance with a will of the testator.—*Von Hoven v. Immanuel Presbyterian Church of New Orleans (La.)* 389.

CHattel MORTGAGES.

See "Pledges."

§ 1. *Requisites and validity.*

Description in a mortgage of the mortgagees as agents of another does not prevent title to the property vesting in them, so that they may maintain action therefor.—*Elston v. Roop (Ala.)* 129.

Instruction as to bill of sale operating as a mortgage *held* properly refused.—*Long v. State (Fla.)* 870.

§ 2. *Rights and liabilities of parties.*

A mortgage on its face importing a present conveyance of property as security for a debt to accrue on the mortgagor's failure to do something, and not postponing the mortgagees' right to possession or making it depend on such failure, entitles the mortgagees to immediate possession.—*Elston v. Roop (Ala.)* 129.

In order to render a bill of sale, which is absolute on its face, a mortgage, it must have been executed with the intention or purpose of operating as a security.—*Long v. State (Fla.)* 870.

§ 3. *Removal or transfer of property by mortgagor.*

In trover by a mortgagee against a purchaser from the mortgagor, defendant may show a prior mortgage owned by another, and the consent of such other to the sale.—*Beyer v. Fields (Ala.)* 742.

The sale of mortgaged personalty without paying the debt secured by the mortgage, when the debt is not yet due at the time of the sale, is not a violation of Ann. Code 1892, § 1184.—*State v. Sullivan (Miss.)* 55.

CHEAT.

See "False Pretenses."

CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCH.

See "Religious Societies."

CITATION.

See "Process."

On appeal, see "Appeal and Error," § 4.

CITIES.

See "Municipal Corporations."

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 4.
 Against property in hands of receiver, see "Receivers," § 3.
 To property levied on, see "Attachment," § 2;
 "Execution," § 3.
 To property subjected to garnishment, see "Garnishment," § 2.

CLERKS OF COURTS.

Under Code, § 934, subsec. 9, Id. §§ 4511, 4893, clerk of circuit court *held* entitled to compensation for entering caption for indictment on final record of conviction.—Carmichael v. Matthews (Ala.) 681.

Code, § 934, subsec. 9, Id. §§ 2642, 4511, and Acts 1896-97, p. 1532, construed, and *held* not to entitle clerk of circuit court to compensation for entering on final record of conviction the order setting day for trial, judgment, and sentence.—Carmichael v. Matthews (Ala.) 681.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL ATTACK.

On execution sale, see "Execution," § 4.

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

Of taxes, see "Taxation," § 6.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMMERCE.

Carriage of goods and passengers, see "Carriers."

§ 1. Means and methods of regulation.

An ordinance imposing a license tax on railroad *held* not to interfere with interstate commerce.—Nashville, C. & St. L. Ry. Co. v. Alabama City (Ala.) 731.

COMMISSION.

To take testimony, see "Depositions."

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Of receiver, see "Receivers," § 4.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Judicial notice of common law, see "Evidence," § 1.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 3.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
 Of clerks of courts, see "Clerks of Courts."
 Of curator of absentee, see "Absentees."
 Of receiver, see "Receivers," § 4.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 4.
 Of evidence in criminal prosecutions, see "Criminal Law," § 7.
 Of experts as witnesses, see "Criminal Law," § 12; "Evidence," § 10.
 Of jurors, see "Jury," § 4.
 Of witnesses in general, see "Witnesses," § 2.

COMPLAINT.

In civil actions, see "Pleading," § 1.
 In criminal prosecution, see "Criminal Law," § 5; "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

Compromise of suit on liquor dealer's bond, see "Intoxicating Liquors," § 2.

Where a claim is made for a balance due for services rendered, and plaintiff alleges an amount previously paid under duress, his failure to prove the duress alleged *held* to leave the settlement conclusive as to plaintiff.—Comer v. Illinois Car & Equipment Co. (La.) 380.

A litigant who has violated a compromise cannot plead such compromise in bar of his adversary's action.—Armistead v. Shreveport & R. R. Val. Ry. Co. (La.) 456.

COMPUTATION.

Of interest, see "Interest," § 2.
 Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCLUSION.

Of witness, see "Evidence," § 10.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In insurance policies, see "Insurance," § 3.
 In mortgages, see "Mortgages," § 4.
 Precedent to action against guarantor, see "Guaranty," § 2.
 Precedent to action on insurance policy, see "Insurance," § 8.
 Precedent to action to quiet title, see "Quieting Title," § 1.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 13.
Instructions as to, see "Criminal Law," § 21.

CONFLICT OF LAWS.

What law governs contract, see "Contracts," § 2.
What law governs transfers of property between husband and wife, see "Husband and Wife," § 1.

CONSENT.

Of married woman to subject separate property to husband's debts, see "Husband and Wife," § 2.

CONSIDERATION.

For assignment, see "Assignments," § 1.
For mortgage, see "Mortgages," § 1.
For sale of goods, see "Sales," § 1.
For waiver of limitations, see "Limitation of Actions," § 1.
Of contract, see "Contracts," § 1.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

CONSOLIDATION.

Of actions, see "Action," § 1.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law."

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Counties," § 1; "Elections," §§ 1, 2; "Eminent Domain," § 2; "Jury," § 1.
Enactment and validity of statutes, see "Statutes," § 1.
Subjects and titles of statutes, see "Statutes," § 2.

§ 1. Establishment and amendment of constitutions.

The validity of an amendment to the constitution, duly proposed by general assembly and adopted, is in no manner affected by any petition which previously has been presented to a municipal council or to the general assembly.—*Brennan v. Sewerage & Water Board (La.)* 563; *City of New Orleans v. New Orleans Sewerage Co., Id.*

§ 1½. Construction, operation, and enforcement of constitutional provisions.

Const. § 212, held not self-executing, so as to require the state auditor to pay interest on the trust funds belonging to the Industrial Institute and College for Girls without an appropriation therefor.—*State v. Cole (Miss.)* 314.

§ 2. Obligation of contracts.

Where charter of a corporation exempts its property from taxation, any act or constitutional provision subjecting the property to taxation held violative of Const. U. S. art. 1, § 10.—*State v. Alabama Bible Soc. (Ala.)* 1011.

CONTEST.

Of election, see "Elections," § 3.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 8.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 18.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Alteration, see "Alteration of Instruments."
Cancellation, see "Cancellation of Instruments."
Damages for breach, see "Damages," § 4.
Impairing obligation, see "Constitutional Law," § 2.
Liquidated damages or penalties, see "Damages," § 2.
Operation and effect of gaming laws, see "Gaming," § 1.
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 9.
Reformation, see "Reformation of Instruments."
Restraining performance or breach, see "Injunction," § 2.

Contracts of particular classes of parties.

See "Corporations," § 4; "Counties," § 2; "Husband and Wife," § 1; "Master and Servant"; "States," § 1.

Contracts relating to particular subjects.

See "Interest."
Convict labor, see "Contracts."
Ground for mechanics' liens, see "Mechanics' Liens," § 1.
Transportation of passengers, see "Carriers," § 2.

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Guaranty"; "Insurance"; "Partnership"; "Sales."
Agency, see "Principal and Agent."
Employment, see "Master and Servant."
Leases, see "Landlord and Tenant."
Mutual benefit insurance see "Insurance," § 9.
Sales of realty, see "Vendor and Purchaser."
Separation agreements, see "Husband and Wife," § 4.
Submission to arbitration, see "Arbitration and Award," § 1.
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Account Stated"; "Money Paid"; "Work and Labor."

Particular modes of discharging contracts.

See "Compromise and Settlement."

§ 1. Requisites and validity.

An agreement not to sue one on notes on which he is liable partly as maker and partly as indorser is sufficient consideration for the promise of such party to pay his obligations as indorser, from which he has been released by failure to protest.—*Pollak v. Billing (Ala.)* 639.

§ 2. Construction and operation.

Where a contractor agrees to pay for materials half in cash and half in bonds secured by mortgage on the work, and he fails to go on with the contract, the furnisher of the material has the right to demand the full amount due him in money.—*Cameron v. Orleans & J. Ry. Co. (La.)* 208.

Where a married woman contracts in Missouri, and her obligation is binding under the laws of that state, it will be enforced in Louisiana, whither the obligor has removed.—*Baer v. Terry (La.)* 353.

Where defendant agreed to pay plaintiff one-half of the net profit on work solicited by plaintiff, the latter held entitled to nothing where the former sues on a claim for work done and compromises the claim by advice of counsel at

a loss.—*Comer v. Illinois Car & Equipment Co.* (La.) 390.

Written contracts must be construed according to what, all things considered, was most probably the intention of the parties.—*Losecco v. Gregory* (La.) 985.

Clauses in a written contract, couched in general terms, must be considered according to what, under all the circumstances, was most probably the intention of the parties.—*Losecco v. Gregory* (La.) 985.

§ 3. Modification and merger.

Where plaintiff executed to defendant a mortgage, to be used if defendant secured a settlement for a stated sum of a joint judgment against them, they may modify the agreement so as to permit the application of the mortgage on a settlement for a larger amount.—*Sheats v. Scott* (Ala.) 573.

§ 4. Actions for breach.

A petition setting forth a contract and a breach thereof shows a cause of action.—*Miller v. Kline* (La.) 197.

Where plaintiff swore to an agreement to do certain work under a government contract, sharing with defendants in the profits, evidence held sufficient to sustain plaintiff's claim, though the agreement was denied by one of the defendants.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

CONTRADICTION.

Of witness, see "Witnesses," § 4.

CONTRIBUTION.

Among sureties, see "Principal and Surety," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Registers, see "Registers of Deeds."

Conveyances by or to particular classes of parties.

See "Husband and Wife," § 1; "Infants," § 2.

Heirs, see "Descent and Distribution," § 1.

Married women, see "Husband and Wife," § 2.

Conveyances of particular species of property.

Separate property of married women, see "Husband and Wife," § 2.

Particular classes of conveyances.

See "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CONVICTS.

Under Rev. St. § 3066, the matter of the approval of the bond of a contractor for state convicts rests in the discretion of the board of commissioners of state institutions, and that discretion cannot be reviewed by the courts.—*Camp v. McLin* (Fla.) 927.

Under Rev. St. §§ 3065, 3066, the approval of the bond of a contractor for convicts is mandatory, and a condition precedent to the validity of the contract, so that the approval of the contract alone will not render the same valid.—*Camp v. McLin* (Fla.) 927.

Under Rev. St. §§ 3065, 3066, the acceptance of an advance payment held not to estop the

state from denying the validity of a contract for state convicts.—*Camp v. McLin* (Fla.) 927.

Acts of board of state institutions held not to constitute an approval of the bond of a contractor for state convicts, preventing the board from thereafter disapproving and rejecting it.—*Camp v. McLin* (Fla.) 927.

CORONERS.

Proceedings at inquest as evidence on trial for homicide, see "Homicide," §§ 6-8.

CORPORATIONS.

Admissions by corporate officers, see "Evidence," § 6.

Injunctions affecting, see "Injunction," § 2.

Laws impairing charters, see "Constitutional Law," § 2.

Quo warranto, see "Quo Warranto."

Taxation of corporations and corporate property, see "Taxation," §§ 2, 4.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Religious Societies"; "Street Railroads," § 1.

Banks, see "Banks and Banking," § 1.

Telegraph companies, see "Telegraphs and Telephones," § 1.

Water companies, see "Waters and Water Courses," § 2.

§ 1. Corporate existence and franchise.

Where an association is carrying on a business as a corporation, the state can by judicial action test its claims, both as to its organization and as to the business it is conducting.—*State v. New Orleans Debenture Redemption Co.* (La.) 102.

§ 2. Capital, stock, and dividends.

Ten years after relator became the purchaser of certain stock, no claim can be made to a lost certificate by another.—*State ex rel. Benedict v. Southern Mineral & Land Imp. Co.* (La.) 174.

§ 3. Members and stockholders.

In a suit by a judgment creditor of a corporation to subject unpaid stock subscriptions to the satisfaction of his judgment, an amendment setting up certain facts in connection with an averment anticipating a plea of payment held material and improperly stricken out.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

In a suit by a judgment creditor of the corporation to subject unpaid stock subscriptions to the satisfaction of his judgment, a cross-bill held demurrable, because showing no liability on the part of the cross-respondent.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

Bill by a judgment creditor of a corporation to subject unpaid stock subscriptions to the satisfaction of his judgment held not to allege that the corporation was bound by certain illegal acts of its president in procuring a nominal payment of the subscriptions.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

By its express terms, Act Feb. 18, 1895, embodied in Code, §§ 823, 1282, has no application to suits pending at the time of its enactment.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

The capital of a corporation is not a trust fund for the payment of corporation debts.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

In view of Code, § 29, the fact that one suing to subject alleged unpaid subscriptions to the stock of a corporation to the satisfaction of the judgment is assignee thereof held not to impede his legal remedy by garnishment, so as to

give him standing in equity.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Judgment creditor of a corporation *held* to have no right in equity to enforce a repayment of certain stock subscription notes, but entitled to sue at law to recover corporate assets paid without authority to induce the payment of the notes.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Judgment creditor of a corporation *held* to have no standing in equity to compel a subscriber to capital stock, who had fraudulently sold his stock to an irresponsible party, to pay his subscription note, because having an adequate remedy at law by garnishment.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Judgment creditor of a corporation *held* not entitled to sue in equity to subject unpaid stock subscriptions to the satisfaction of his judgment, because having a plain and adequate remedy at law by garnishment under Code 1886, § 2972.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

In an action by a judgment creditor of an insolvent corporation against a stockholder, evidence *held* to require the direction of a verdict for defendant.—*American Freehold Mortg. Co. v. Brower* (Miss.) 906.

§ 4. Corporate powers and liabilities.

Where the complaint in an action against a corporation was for money loaned, recovery could not be had upon proof that the money was paid as a stock assessment.—*Stanton v. Baird Lumber Co.* (Ala.) 299.

In an action for money loaned to a corporation, to be refunded after its debts had been paid, plaintiff *held* required to prove that such debts had been paid.—*Stanton v. Baird Lumber Co.* (Ala.) 299.

Under chancery practice rule 32 (Code, p. 1209), *held*, that the answer of a corporation must be sworn to before a motion to dissolve, etc., can be entertained.—*Niehaus v. Cooke* (Ala.) 728.

A mortgage executed by a corporation's agent, covering its property, may be ratified by the corporation, either expressly or by implication; but no ratification can be implied in the absence of knowledge of the mortgage by the corporation.—*First Nat. Bank v. Kirkby* (Fla.) 881.

A corporation, though it cannot bind itself as a partner, may bind itself to share in the profits of contracts it is authorized to perform.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

§ 5. Insolvency and receivers.

That the affairs of a corporation have been irregularly settled constitutes no ground for appointment of a receiver at the instance of the state, where all debts have been paid and all parties in interest are satisfied.—*State v. New Orleans Debenture Redemption Co.* (La.) 102.

Where a stockholder and director made advances to a corporation in good faith, his rank is the same as that of any other creditor of the firm.—*Standard Cotton Seed Oil Co. v. Excelsior Refining Co.* (La.) 221.

An insolvent corporation cannot prefer a creditor stockholder.—*Lamb v. Russel* (Miss.) 916.

A creditor stockholder of an insolvent foreign corporation *held* not entitled to a preference under the laws of the state of the corporation's residence; such law not being statutory.—*Lamb v. Russel* (Miss.) 916.

CORROBORATION.

Of accomplices, see "Criminal Law," § 7.
Of witness in general, see "Witnesses," § 4.

COSTS.

Presumption on appeal as to right to costs, see "Appeal and Error," § 10½.

§ 1. Nature, grounds, and extent of right in general.

Under Code, art. 1326, where, in an action for tort, the judgment for damages is for not more than \$20, and the certificate provided for in the statute is not made, a judgment for more costs than damages is error.—*Guttery v. Boshell* (Ala.) 304.

§ 2. In criminal prosecutions.

A stenographer's report of testimony filed by him at the trial court is no part of the record. The costs in the transcript will not be taxed against the state or county in a criminal case.—*Brown v. State* (Fla.) 107.

CO-SURETIES.

See "Principal and Surety," § 2.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 2.

COUNTERFEITING.

See "Forgery."

COUNTIES.

§ 1. Government and officers.

Board of county commissioners *held* to have no authority to change site of courthouse, especially in view of Const. § 41.—*Marengo County v. Matkin* (Ala.) 669.

Under Code 1857, p. 420, art. 35, Code 1871, § 1385, Act Feb. 7, 1872, Laws 1876, p. 100, Code 1880, § 2176, and Code 1892, § 293, the employment by a county of an attorney to defend civil suits *held* authorized, though there be at the time an attorney employed by the year.—*Board of Sup'rs of Warren County v. Booth* (Miss.) 1000.

§ 2. Property, contracts, and liabilities.

Under Rev. St. § 2448, a debt contracted by a police jury in violation of its provisions is stricken with nullity and incapable of judicial enforcement.—*Citizens' Bank v. Town of Jennings* (La.) 66.

Where relator claims that a contract that should have been let to him by the police jury was improperly let to another, his remedy is by a direct action.—*State ex rel. Prince v. Police Jury* (La.) 363.

A contract whereby the board of supervisors of a county agreed that a city should contribute a certain sum toward a court house and become the owner of a room in it for city purposes *held* void.—*City of Bay St. Louis v. Board of Sup'rs of Hancock County* (Miss.) 54.

The employment of counsel by supervisors by the year, under Code 1892, § 293, *held* not to preclude the employment under chapter 123 of other counsel for the trial of actions in reference to school lands.—*Warren County v. Dabney* (Miss.) 908.

Code 1892, c. 123, providing for the employment by the board of supervisors of a "competent person" to prosecute certain actions, *held* to not necessarily preclude the employment of a lawyer.—*Warren County v. Dabney* (Miss.) 908.

§ 3. Fiscal management, public debt, securities, and taxation.

Rev. St. § 2745, requiring police juries to publish their estimates of expenditures within 30 days before the imposition of taxes, is not sufficiently complied with as to licenses when the license ordinance is adopted at the same meeting as the estimate, although the ad valorem tax law may not be adopted until after 30 days.—*Swords v. Daigle* (La.) 94.

COUNTY SEAT.

See "Counties," § 1.

COURTS.

Clerks, see "Clerks of Courts."

Justices' courts, see "Justices of the Peace."

Mandamus to inferior courts, see "Mandamus," § 2.

Province of court and jury, see "Trial," § 4.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

By trustee in bankruptcy, see "Bankruptcy," § 1.

Criminal prosecutions, see "Criminal Law," § 2.

§ 1. Establishment, organization, and procedure in general.

The circuit court may be held in the sheriff's office at the courthouse.—*Scott v. State* (Ala.) 623.

In a suit involving the principal and a reconventional demand, if three justices of the supreme court concur in rejecting the principal demand and three concur in rejecting the reconventional demand, there is a concurrence of the majority of the court.—*Losecco v. Gregory* (La.) 985.

§ 2. Courts of general original jurisdiction.

Under Rev. St. § 1305, the circuit court has jurisdiction to determine the correctness of any charge of the clerk for costs in cases pending in said court, though the amount involved is less than \$100.—*State v. Reeves* (Fla.) 814.

Const. art. 5, § 11, does not deny the legislature the right to confer jurisdiction in matters of costs, as provided by Rev. St. § 1305, where any officer shall have willfully overcharged, though the amount involved be less than \$100.—*State v. Reeves* (Fla.) 814.

Where a homestead is seized, and the seizure is enjoined, the matter in dispute is the homestead, and the injunction suit must be filed in another court than that of the seizure, if the latter court has not jurisdiction.—*Speyrer v. Miller* (La.) 524.

Under Code, §§ 345, 347, 361, and Laws 1892, p. 365, § 2, the middle line of the Mississippi river marks the jurisdiction of the courts of counties and judicial districts of counties in Mississippi situate thereon.—*Cook v. State* (Miss.) 312.

§ 3. Courts of appellate jurisdiction.

Under Code, § 3826, mandamus cannot issue from the supreme to the probate court; the latter being subject to the writ from the circuit and other courts.—*Christopher v. Stewart* (Ala.) 11.

Under Const. 1901, § 140, and Code, §§ 2825, 2827, the supreme court has no jurisdiction to entertain a petition for mandamus to compel the board of registrars of a county to register the relator as an elector.—*In re Giles* (Ala.) 167.

Where a title set up to property by one claiming possession is contested by the possessor, who sued to annul the title and enjoin eviction, the value of the property being in excess of \$2,000, the supreme court has jurisdiction of an appeal involving the controversy.—*State ex rel. Horter v. Judges of Court of Appeal* (La.) 68.

Where legality of a tax imposed on defendant's property for construction of a sidewalk is in issue, the supreme court has jurisdiction.—*S. D. Moody & Co. v. Chadwick* (La.) 181.

An appeal from an order requiring a sheriff to issue a certificate that a poll tax has been duly paid does not involve the constitutionality or legality of a tax giving the supreme court jurisdiction on appeal.—*McAyeal v. Murrell* (La.) 395.

It is only when the lower court holds a statute unconstitutional that the cause may be appealed to the supreme court, where the matter in dispute is below its appellate jurisdiction.—*State ex rel. McMain v. Town of Pollock* (La.) 538.

Allegations necessary to give the supreme court jurisdiction of a case must be direct and special.—*State ex rel. McMain v. Town of Pollock* (La.) 558.

The supreme court has jurisdiction of an appeal in a suit to restrain the misuse of a public improvement, the value of which is fixed at \$20,000.—*Sugar v. City of Monroe* (La.) 961.

Where an assessment alone is attacked, and the amount in dispute is less than that required to give the supreme court jurisdiction, an appeal thereto will be dismissed.—*Tebault v. City of New Orleans* (La.) 983.

Where an attack is made upon the assessment only, it will not suffice, so as to give the supreme court jurisdiction on appeal as involving the validity of a tax.—*Tebault v. City of New Orleans* (La.) 983.

Jurisdiction of the supreme court on appeal being limited to cases in which the constitutionality or legality "of any tax is at issue, whatever may be the amount" an attack upon the assessment is not an attack upon the tax.—*Tebault v. City of New Orleans* (La.) 983.

COVENANTS.

§ 1. Actions for breach.

A vendee who has been evicted only on paper has no right of action on the warranty of sale.—*Pharr v. Gall* (La.) 418.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 4.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

Of heirs and distributees, see "Descent and Distribution," § 1.

Of intestate, see "Descent and Distribution," § 1.

Rights and remedies of surety, see "Principal and Surety," § 2.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

The lien of a bill, filed pursuant to Code, § 818, by a creditor without a lien to set aside a

conveyance by his debtor, attaches only to property embraced in the conveyance.—*Long v. Campbell* (Ala.) 591.

A bill by a creditor for the discovery of assets, which waives answer under oath as to all except interrogatories as to the character and location of the assets alleged to be concealed, is nevertheless a bill of discovery, under Code, § 819.—*Pollak v. Billing* (Ala.) 639.

Under Code, §§ 819, 821, a bill by a creditor for discovery of assets is sufficient if it allege insufficiency of visible assets, and the existence of concealed assets.—*Pollak v. Billing* (Ala.) 639.

Code 1886, § 3540, held to authorize bills of discovery only, and not to give a judgment creditor standing in equity to subject known choses in action of his judgment debtor to the satisfaction of the judgment.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

Inasmuch as by statutes authorizing garnishment proceedings a judgment creditor is given a legal right to reach choses in action of his judgment debtor, such right may be enforced in equity when, because of some impediment, it cannot be enforced at law.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

In the absence of statute or some recognized basis of equitable jurisdiction, a court of equity has no power to subject choses in action of the judgment debtor to the satisfaction of an execution returned nulla bona.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

CRIMINAL LAW.

See "Witnesses."

Conviction of offense included in that charged, see "Indictment and Information," § 7.

Convicts, see "Convicts."

Costs in criminal prosecutions, see "Costs," § 2.

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Prisons, see "Prisons."

Release of prisoner on habeas corpus, see "Habeas Corpus," § 2.

Particular offenses.

See "Adultery"; "Assault and Battery," § 1; "Burglary"; "Disturbance of Public Assembly"; "Embezzlement"; "False Pretenses"; "Forgery"; "Gaming," § 3; "Homicide"; "Larceny"; "Obstructing Justice"; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Robbery"; "Seduction," § 1.

Bastardy, see "Bastards," § 1.

Carrying concealed weapons, see "Weapons."

Cruelty to or injuring animals, see "Animals."

Removal of mortgaged chattels, see "Chattel

Mortgages," § 3.

Violations of liquor laws, see "Intoxicating Liquors," §§ 3, 4.

Violations of municipal ordinances, see "Municipal Corporations," § 5.

§ 1. Capacity to commit and responsibility for crime.

That phase of insanity known as "irresistible impulse doctrine" is not recognized in Florida.—*Davis v. State* (Fla.) 822.

Under Rev. St. § 2369, the common law, which holds that if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he was punishable, must govern.—*Davis v. State* (Fla.) 822.

On a trial for murder, where insanity is a defense, the proceedings and judgment of the county court adjudging the accused insane, under the provisions of Laws 1895, c. 4357, are admissible in evidence.—*Davis v. State* (Fla.) 822.

§ 2. Jurisdiction.

Under Rev. St. § 2360, a circuit court of a county in which the murder has been committed has jurisdiction of the crime, though the person injured died in another state.—*Davis v. State* (Fla.) 822.

§ 3. Limitation of prosecutions.

An information in a criminal court of record, showing that the offense was committed more than two years before the filing of the information, held bad for failing to allege that it was based on or had any connection with a prior prosecution before a justice.—*Rouse v. State* (Fla.) 784.

Rev. St. § 2357, relating to the limitation of criminal prosecutions, contains no exception on account of an accused absenting himself from the state, and if it appears that the offense was not committed within two years a motion to quash should be sustained.—*Rouse v. State* (Fla.) 784.

Where accused was indicted for burglary, and fled, and was not apprehended for over three years, on a new indictment, held, that a plea of prescription of one year in bar was not good.—*State v. Gibson* (La.) 332.

§ 4. Former jeopardy.

After trial on prosecution for assault and battery, held, that accused might not be bound over to answer charge of assault with intent to rape.—*State v. Blevins* (Ala.) 637.

An acquittal of rape is not a bar to a subsequent prosecution for seduction based on the same single act of sexual intercourse.—*Hall v. State* (Ala.) 750.

§ 5. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

A complaint charging that defendant carried concealed about his "peurson," or "purson," a "pestol," against the peace of the state, etc., held not insufficient.—*Hampton v. State* (Ala.) 230.

Under Const. § 169, an affidavit in a prosecution before a magistrate, omitting to conclude with the words "against the peace and dignity of the state," held bad.—*Miller v. State* (Miss.) 951.

Under Code 1892, § 1438, held, the charge under which defendant was tried before the magistrate could be amended in the circuit court.—*Brown v. State* (Miss.) 952.

§ 6. Arraignment and pleas, and nolle prosequi or discontinuance.

In a capital case it is not required that there shall be an interposition of a plea before the special jurors are drawn.—*Ferguson v. State* (Ala.) 760.

It is discretionary with the court whether it will permit a plea of not guilty to be withdrawn to allow a plea in abatement to be filed.—*Knight v. State* (Fla.) 110.

Defendants, jointly indicted for a felony, may be arraigned either separately or together, though no severance has been granted.—*Moore v. State* (Fla.) 795.

§ 7. Evidence.

The failure of the state, in a prosecution for the sale of intoxicating liquor to an intemperate person, to demand that defendant produce a notice not to sell to such person, held not to preclude proof of the contents of such notice.—*McCormack v. State* (Ala.) 268.

Under Cr. Code, § 5300, on a criminal prosecution, instructions as to corroboration of the testimony of an accomplice held proper.—*Crittenden v. State* (Ala.) 273.

On criminal prosecution, evidence held properly admitted over defendant's objection as bal-

ance of a conversation brought out by defendant.—Allen v. State (Ala.) 318.

Evidence *held* not to lay proper predicate for evidence of testimony of an absent witness.—Watkins v. State (Ala.) 627.

On a prosecution for murder, admission in evidence of diagram of defendant's office, made by him during his examination as a witness, *held* proper.—Mann v. State (Ala.) 704.

Docket entries of the committing magistrate, who conducted the preliminary examination of accused, *held* inadmissible on the ultimate trial of such defendant under any circumstances.—Kirby v. State (Fla.) 836.

Evidence that the general character and reputation of a boat was that of a whisky-boat was inadmissible.—Cook v. State (Miss.) 312.

The contents of a United States liquor license to defendants could not be shown by the state by parol evidence, in the absence of notice to produce.—Cook v. State (Miss.) 312.

§ 8. — Judicial notice, presumptions, and burden of proof.

On a prosecution for larceny, evidence of another offense, a part of the same transaction, *held* admissible.—Lowe v. State (Ala.) 273.

On a prosecution for murder, it was error to refuse to instruct for defendant, where the state failed to prove the venue of the homicide.—Barnes v. State (Ala.) 670.

On a criminal prosecution, *held* not error to sustain objections to questions by defense to witnesses as to whether they had been examined by the state or defense.—Mann v. State (Ala.) 704.

Sanity being the normal condition of man when charged with crime, he is presumed to be sane.—Davis v. State (Fla.) 822.

Courts take judicial cognizance that offenses between the middle line of the Mississippi river and the Mississippi shore are within the jurisdiction of the courts of the districts on the margin east of the place of the offense.—Cook v. State (Miss.) 312.

§ 9. — Facts in issue and relevant to issues, and *res gestæ*.

On a criminal prosecution, evidence of what was said and done while taking the stolen property away *held* admissible as a part of the *res gestæ*.—Crittenden v. State (Ala.) 273.

On a prosecution for assault with intent to kill, evidence *held* irrelevant.—Surginer v. State (Ala.) 277.

On a prosecution for homicide, a physician having described the wounds on defendant *held* proper to admit evidence as to the height of deceased.—Sanders v. State (Ala.) 654.

Where the altercation between deceased and defendant arose while the latter was working on a public road under deceased, it was proper to exclude an act of the legislature providing ways and means to open and improve the roads, etc.—Sanders v. State (Ala.) 654.

On a prosecution for murder, exclusion of evidence as to why defendant's companion carried a pistol *held* proper.—Ragsdale v. State (Ala.) 674.

On criminal prosecution, *held*, that certain declarations of defendant were not admissible.—Cook v. State (Ala.) 696.

On a prosecution for murder, evidence as to how long defendant had lived in the place where the killing occurred, place of his birth, etc., *held* properly excluded as not pertinent.—Mann v. State (Ala.) 704.

On a prosecution for murder, question to witness as to how certain conversation with defendant "came up," etc., *held* properly disallowed.—Mann v. State (Ala.) 704.

A fact pertinent and relevant to the issue, intended to establish the commission of the crime charged, is not rendered inadmissible in evidence because it may have a tendency collaterally to prejudice the defendant with the jury.—Kirby v. State (Fla.) 836.

Declarations of a wounded man, made immediately after the wounding, as to how it was inflicted or by whom, *held* admissible.—State v. Maxey (La.) 206.

One may by sign, he being unable to speak, given two minutes after the shooting, let it be known by whom he was shot, and such declaration by sign is admissible as part of the *res gestæ*.—State v. Maxey (La.) 206.

Declarations, to be a part of the *res gestæ*, must be made shortly after the act, and before time has elapsed to enable the accused to conceive a self-serving narrative.—State v. Blanchard (La.) 397.

On trial for murder, the unsworn statements of the party alleged to have been killed *held* not admissible in evidence as a part of the *res gestæ*.—State v. Williams (La.) 402.

In a prosecution for murder, evidence of a witness present at the time *held* admissible.—Sullivan v. State (Miss.) 2.

§ 9½. — Other offenses, and character of accused.

In prosecution for unlawfully selling liquor on a ferryboat, where the evidence showed that the sale was made in February, 1901, it was error to permit a witness to testify that in April, 1902, he was on the boat and found whisky in a box, etc.—Cook v. State (Miss.) 312.

In a prosecution for selling liquor on a ferryboat in the Mississippi river and on the Mississippi side, it was error to permit the state to show other sales made on the Arkansas side.—Cook v. State (Miss.) 312.

§ 10. — Admissions, declarations, and hearsay.

On a prosecution for murder, a witness may state that accused stated to him before the homicide that deceased had it in for him, and, if he could get accused out of the way, he could do accused's sister as he pleased.—Cawley v. State (Ala.) 227.

Where insanity is pleaded as a defense, the subsequent as well as previous acts and declarations of accused are admissible to show his true mental condition.—Cawley v. State (Ala.) 227.

Where it appeared that at the time of the killing the brother of defendant shot several times at deceased, it was permissible to show any statements by defendant tending to show conspiracy.—Sanders v. State (Ala.) 654.

On prosecution for murder, certain testimony as to what defendant had testified to on the preliminary hearing *held* properly admitted.—Mann v. State (Ala.) 704.

On prosecution for murder, certain declarations and conduct of accused *held* properly excluded.—Ferguson v. State (Ala.) 760.

A statement or declaration of a person charged with crime is not rendered inadmissible against him by the mere fact that it is made after the commission of the crime.—Jones v. State (Fla.) 793.

A witness for the state may testify that he went to the scene of the homicide because of a remark made to him by another party; but it is not proper for him to repeat in evidence the substance of such remark, as it is hearsay.—Kirby v. State (Fla.) 836.

Declarations of prosecuting witness as to his ownership of certain cattle, made when he was not in possession thereof and not in defendant's

presence, are not admissible on a trial for the larceny thereof.—*Long v. State* (Fla.) 870.

§ 11. — Acts and declarations of conspirators and co-defendants.

Declarations of conspirators awaiting trial under separate indictments *held* admissible.—*Thomas v. State* (Ala.) 250.

Evidence of a declaration of a person claimed to be a conspirator *held* admissible against defendants in a homicide case.—*Stevens v. State* (Ala.) 270.

On a prosecution for larceny, where there was evidence of a conspiracy, *held* proper to show acts and declarations of defendant and his accomplices in connection with and in furtherance of the common purpose.—*Crittenden v. State* (Ala.) 273.

Where a man and a woman were separately indicted for living in adultery, the conviction of the man would not be any evidence of the woman's guilt.—*Campbell v. State* (Ala.) 635.

On prosecution for murder, certain evidence offered to show conspiracy *held* properly excluded.—*Ferguson v. State* (Ala.) 760.

The statement of a codefendant, made subsequent to an alleged offense, is admissible against the defendant on trial, where it is shown to have been in his presence and expressly assented to by him.—*Anthony v. State* (Fla.) 818.

§ 12. — Opinion evidence.

On a prosecution for murder, the question whether a witness is an expert, and competent to give his opinion as to whether certain stains are those of blood, is one addressed to the discretion of the trial court.—*White v. State* (Ala.) 139.

On a prosecution for homicide, a witness having been asked as to the character of a wound seen by him, it was competent for him to describe the wound.—*Sanders v. State* (Ala.) 654.

On a prosecution for murder, a question put to defendant as to whether the altercation ended when he picked up his pistol *held* properly disallowed.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, *held* not competent for defendant to testify that in his opinion he had no means of escape from deceased's assault.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, certain question to witness *held* improper as calling for conviction.—*Ferguson v. State* (Ala.) 760.

On a prosecution for murder, the killing having been done by a son of defendant, and it being the state's theory that defendant and the son had conspired, it was proper not to allow defendant to be asked whether he was connected with the killing.—*Ferguson v. State* (Ala.) 760.

A question asked a nonexpert witness, as to what, in his opinion, must have been the necessary position of the hand and pistol of a person who shot another in a particular manner, *held* properly excluded.—*Jones v. State* (Fla.) 793.

Opinion evidence is admissible, except as to a matter regarding which expert testimony may be received.—*Jones v. State* (Fla.) 793.

It is the province of the trial court to determine whether a witness offered as an expert, where the defense is insanity, has such qualification as to make his opinions admissible.—*Davis v. State* (Fla.) 822.

In a prosecution for homicide, where self-defense is pleaded, *held*, that the accused should be permitted to testify to his belief in the actuality of the threatened danger.—*Lane v. State* (Fla.) 896.

Civ. Code, art. 2245, and Code Prac. art. 325, relating to the admission of written instruments to prove handwriting by comparison, does not apply to the prosecution of crimes in which, under Rev. St. § 976, the rules of evidence of the common law of England are to be applied.—*State v. Batson* (La.) 478.

§ 13. — Confessions.

Statements of one to a posse about to arrest him *held* admissible as a confession.—*Christian v. State* (Ala.) 64.

On prosecution for murder, certain statements of accused while in custody *held* admissible.—*White v. State* (Ala.) 139.

Confession of accused *held* admissible.—*McKinney v. State* (Ala.) 726.

The admissibility of a confession is addressed to the court. What weight shall be accorded it, when admitted in evidence, is for the jury.—*McKinney v. State* (Ala.) 726.

Where defendant in a prosecution for rape voluntarily testified, the circumstances under which the testimony was given *held* not to render it inadmissible in a subsequent prosecution for seduction based on the same act.—*Hall v. State* (Ala.) 750.

A conviction for murder may be had on the voluntary confession of the accused, where the corpus delicti is proven by other credible evidence.—*Brown v. State* (Fla.) 107.

A trial court should not permit the introduction of a defendant's confession until sufficient proof of the corpus delicti is first given; but if the confession be admitted without such proof, and additional evidence upon that subject is afterwards introduced, independent of the confession, which would have justified the admission thereof, the error is cured.—*Anthony v. State* (Fla.) 818.

The question whether a proposed confession was voluntarily made is for the court.—*Kirby v. State* (Fla.) 836.

Confession by defendant on the night of the commission of a crime to a friend *held* admissible.—*Mathis v. State* (Miss.) 6.

Confession made by a prisoner after spending several days in a sweat box, during which he obstinately denied commission of the crime, *held* involuntary and inadmissible.—*Ammons v. State* (Miss.) 9.

§ 14. — Evidence at preliminary examination or at former trial.

Where a witness has removed from the state, his testimony on a former trial of the defendant for the same offense *held* admissible against the defendant on subsequent trial.—*Jacobi v. State* (Ala.) 158.

Proof *held* to sufficiently show that witness was permanently or indefinitely out of the state, so as to warrant admission of her testimony given on former trial.—*Jacobi v. State* (Ala.) 158.

Evidence considered, and *held* to sufficiently prove the corpus delicti in a prosecution for seduction to justify the admission of the stenographer's report of defendant's testimony on a former prosecution for rape based on the same act.—*Hall v. State* (Ala.) 750.

Where defendant in a prosecution for seduction had testified on a former trial for rape, and had admitted the intercourse with prosecutrix, the stenographer's report of such former testimony *held* properly admitted in the trial for seduction.—*Hall v. State* (Ala.) 750.

§ 15. — Weight and sufficiency.

On prosecution for murder, requested instructions *held* properly refused, because calling for too high degree of proof.—*Andrews v. State* (Ala.) 665.

On a prosecution for murder, a charge as to "moral certainty" of proof *held* properly refused.—Ragsdale v. State (Ala.) 674.

On criminal prosecution, an instruction, requested by defendant, calling for exclusion of every hypothesis than that of guilt as a prerequisite to conviction, *held* properly refused.—Walker v. State (Ala.) 703.

On a criminal prosecution *held* proper to refuse to charge that, if there be two reasonable constructions to facts proven, one favorable and the other unfavorable to accused, it is the duty of the jury to give that which is favorable.—Walker v. State (Ala.) 703.

The venue within which a crime was committed need not be established beyond a reasonable doubt.—McKinnie v. State (Fla.) 786.

§ 16. Time of trial and continuance.

That 12 of the special venire are engaged in consideration of another case is no ground for objection to going to trial.—Johnson v. State (Ala.) 724.

Denial of an application for continuance for absence of material witness *held* an abuse of discretion.—Gass v. State (Fla.) 109.

An application for a continuance for an absent witness must show due diligence.—Jones v. State (Fla.) 793.

An application for delay for absent witnesses *held* properly refused.—State v. Baptiste (La.) 461.

§ 17. Trial.

An agreement between the solicitor for the state and the defendant's attorney as to the punishment to be inflicted on defendant, pleading guilty, *held* not binding on the jury.—Durrett v. State (Ala.) 234.

Admission of testimony, objectionable because involving the disclosure by a husband of privileged communication from his wife, is not reversible error, when objected to only on untenable grounds.—Campbell v. State (Ala.) 635.

An exception to a charge as a whole will not be sustained, unless the entire charge was erroneous.—Ragsdale v. State (Ala.) 674.

A general exception to the refusal of requested instructions asserting distinct propositions of law will be overruled, if any one was properly refused.—Gass v. State (Fla.) 109.

An objection made to evidence as a whole, part of which is competent, is properly overruled.—Anthony v. State (Fla.) 818.

The court is not compelled to poll the jury unless requested.—State v. Colomb (La.) 351.

Admission of incompetent evidence over objection and exception is not cured by the fact that afterwards evidence was given along the same lines without objection being made.—Cook v. State (Miss.) 312.

§ 17½. — Preliminary proceedings.

Under Cr. Code, §§ 5004, 5273, the venire cannot be quashed because the list of jurors served on accused fails to show what persons had been summoned to serve as petit jurors; the names of all being on the list served.—Cawley v. State (Ala.) 227.

Under Acts 1898-99, p. 69, *held*, that where, in a capital case, there was served on defendant a list of the regular jurors and the names of those who were drawn under the statute, there was no error in not having included in such list the names of talesmen placed on a jury in another case to complete it on a previous day of the week.—Bailey v. State (Ala.) 673.

It is not necessary that the clerk of the court should make a certificate to the effect that the names of the regular jurors summoned for the week in which the case was set for trial served

on the defendant were the jurors drawn and summoned for that week.—Bailey v. State (Ala.) 673.

Service of the list of talesmen *held* in compliance with the law.—State v. Washington (La.) 396.

§ 18. — Course and conduct of trial in general.

An order of the court to the clerk in a criminal case to issue a mandate to the sheriff to summon special jurors involves mere ministerial preparation, so that defendant need not be present.—Milton v. State (Ala.) 653.

Where, on a criminal prosecution, the court allows the solicitor for the state to lead a witness because he appears unwilling, it is proper for the court to state his reason for allowing such an examination.—Mann v. State (Ala.) 704.

In capital case record *held* to show accused was in court.—Ferguson v. State (Ala.) 760.

§ 18½. — Reception of evidence.

On prosecution for murder, certain testimony offered in rebuttal *held* not erroneously admitted.—Mitchell v. State (Ala.) 132.

On prosecution for larceny, certain evidence, irrelevant when offered, *held* relevant in view of subsequent testimony.—Allen v. State (Ala.) 318.

After a criminal case has been closed, and the argument of counsel is being made, it is within the sound jurisdiction of the court to permit the state to introduce additional evidence in furtherance of justice.—Anthony v. State (Fla.) 818.

It is within the discretion of the court to permit the introduction of evidence by the state after the conclusion of defendant's case, if it was admissible in the main case.—Davis v. State (Fla.) 822.

A general objection to evidence, without stating the precise ground of objection, is sufficient, if the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances.—Kirby v. State (Fla.) 836.

Defendant *held* not entitled, before offer of any evidence, to an order that all the testimony of the state thereafter to be taken shall be reduced to writing.—State v. Ella (La.) 476.

§ 19. — Arguments and conduct of counsel.

On prosecution for murder, statement of court that he would instruct jury to disregard certain statements of solicitor for the state in his opening *held* too favorable to defendant.—Mann v. State (Ala.) 704.

On a prosecution for murder, statements of solicitor for the state in his opening to the jury *held* not error.—Mann v. State (Ala.) 704.

On prosecution for murder, *held* proper for solicitor for state to state to jury a certain fact which defendant had testified to.—Mann v. State (Ala.) 704.

Facts *held* to warrant remark of prosecuting attorney to jury: "This oft-repeated criminal should be severely dealt with."—Johnson v. State (Ala.) 724.

§ 20. — Province of court and jury in general.

On the trial of one charged with selling liquor without a license, it was error for the court to state to the jury, "That there was a sale of the liquor in this case appears from the evidence almost without dispute."—Winter v. State (Ala.) 125.

On a prosecution for murder, the value of the opinion of an expert that certain stains are those of blood is a question for the jury, in

connection with all the evidence.—*White v. State* (Ala.) 139.

A requested instruction, that "the proof of suspicious facts against the accused does not even require him to rebut it, and the jury cannot convict on suspicious facts merely," was erroneous.—*Thomas v. State* (Ala.) 250.

On a criminal prosecution, charge as to consideration of animus of an accomplice *held* properly refused.—*Crittenden v. State* (Ala.) 273.

On a criminal prosecution, charge that the testimony of the wife of an accomplice must be viewed with caution *held* properly refused.—*Crittenden v. State* (Ala.) 273.

Requested charges *held* to invade province of jury.—*Watkins v. State* (Ala.) 627.

A requested charge that a certain witness has not been impeached invades the province of the jury.—*Rambo v. State* (Ala.) 650.

Where there was some evidence of a conspiracy between defendant and his brother to kill deceased, it was proper to refuse to charge that no conspiracy was shown.—*Sanders v. State* (Ala.) 654.

On a prosecution for murder, an instruction that there was no evidence, as argued by the solicitor, of an intentional pointing of the pistol at the deceased, was properly refused.—*Barnes v. State* (Ala.) 670.

Where, on a criminal prosecution, the evidence is conflicting, it is proper to refuse defendant a general charge.—*Cook v. State* (Ala.) 696.

On prosecution for murder, *held* proper to sustain an objection to a question to a witness as to how many minutes had elapsed between his demanding an apology from deceased and the fatal shot.—*Mann v. State* (Ala.) 704.

Charge in prosecution for seduction *held* to involve a suggestion as to the court's opinion on disputed facts.—*Hall v. State* (Ala.) 750.

Charge in prosecution for seduction *held* erroneous, because on the effect of the evidence.—*Hall v. State* (Ala.) 750.

In a prosecution for seduction, instruction *held* bad because assuming that any act done for the purpose of enticing the girl to the doing of the sexual act amounted to a temptation.—*Hall v. State* (Ala.) 750.

It is for the jury to determine the credence which shall be attached to alleged confessions and every part thereof, and in so doing they should take the confession as a whole, and give effect to such part as they believe to be true, and reject whatever they find sufficient reason to reject.—*Kirby v. State* (Fla.) 836.

§ 21. — Necessity, requisites, and sufficiency of instructions.

A charge to the jury to convict, "if you believe the defendant guilty from the evidence to a moral certainty," *held* not error.—*Bailey v. State* (Ala.) 57.

On a criminal trial, a request to charge that if the jury have a reasonable doubt growing out of the whole evidence, "or any part of it," of defendant's guilt, they cannot convict, *held* properly refused.—*Winter v. State* (Ala.) 125.

On prosecution for murder, an instruction that there was no evidence of conspiracy *held* properly refused under the evidence.—*Mitchell v. State* (Ala.) 132.

On a prosecution for murder, it was not error to refuse to charge that the jury, in considering the testimony of the children of deceased, should weigh it in view of the fact that they were his children, and of the interest they felt in the case.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, an instruction as to flight of defendant *held* properly refused as misleading.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, an instruction that accused should be acquitted, unless he struck the fatal blow, *held* properly refused in view of the evidence.—*White v. State* (Ala.) 139.

On a criminal prosecution, it is not error to refuse a charge having no other office than to refute arguments of the prosecuting officer.—*White v. State* (Ala.) 139.

On prosecution for murder, instruction calling for acquittal, unless there is no possible conclusion save guilt, *held* properly refused.—*White v. State* (Ala.) 139.

An instruction as to reasonable doubt *held* not erroneous.—*Jimmerson v. State* (Ala.) 141.

A requested instruction that defendant must be acquitted if a single juror has a reasonable doubt of his guilt arising from the evidence *held* erroneous.—*Jimmerson v. State* (Ala.) 141.

A requested instruction, in homicide, that "a reasonable doubt is a doubt growing up out of all the evidence in the case for which you can give a reason," *held* erroneous.—*Jimmerson v. State* (Ala.) 141.

In a prosecution for attempted rape, certain charge *held* to be too favorable to defendant, because authorizing conviction only in case certain facts set out absolutely existed.—*Jacobi v. State* (Ala.) 158.

Fault in an instruction in singling out certain facts to the exclusion of others would not require reversal.—*Jacobi v. State* (Ala.) 158.

In a prosecution for attempted rape, a charge that, if the jury believed from the evidence that the prosecuting witness did anything to impliedly consent to defendant's liberties, etc., he would not be convicted, was properly refused, where not supported by evidence.—*Jacobi v. State* (Ala.) 158.

In a prosecution for attempted rape, a charge that "in a charge to commit rape, the evidence, to be sufficient to justify conviction, must," etc., was properly refused; the prosecution not being for rape.—*Jacobi v. State* (Ala.) 158.

A charge that reasonable doubt is a doubt for which a reason can be given is properly refused as confusing.—*Cawley v. State* (Ala.) 227.

An instruction that, if the jury "have a reasonable doubt as to the conclusions of the proof on any single fact which it is necessary for the state to prove, they must acquit the defendant," was properly refused, not being clear.—*Thomas v. State* (Ala.) 250.

Where the evidence in a criminal case shows that defendant ate his dinner and supper together about 6 p. m. on the day of the commission of the crime, a requested instruction that he must be acquitted if he was at home asleep from 11 a. m. till night is properly refused.—*McCormack v. State* (Ala.) 268.

A requested instruction, in a prosecution for the illegal sale of liquor, that defendant must be acquitted if he was asleep at his home till 6 p. m., was properly refused, where there was evidence that the crime was committed in the evening.—*McCormack v. State* (Ala.) 268.

On a criminal prosecution, charges as to ownership *held* properly refused.—*Crittenden v. State* (Ala.) 273.

On a prosecution for larceny, charge as to acquittal of defendant, if not present when the property was taken, *held* properly refused, as it ignored the evidence of a conspiracy.—*Crittenden v. State* (Ala.) 273.

On a criminal prosecution, charge as to reasonable doubt concerning defendant's presence

in another place *held* properly refused, as ignoring evidence of a conspiracy.—Crittenden v. State (Ala.) 273.

On a criminal prosecution, charge as to corroboration of the testimony of an accomplice *held* properly refused.—Crittenden v. State (Ala.) 273.

On a criminal prosecution, instruction as to joint ownership, not charged, *held* properly refused.—Crittenden v. State (Ala.) 273.

On a criminal prosecution, a charge as to evidence corroborating defendant's confession *held* properly refused, as argumentative and misleading.—Crittenden v. State (Ala.) 273.

On a criminal prosecution, instruction as to the effect of a false alibi *held* proper.—Crittenden v. State (Ala.) 273.

On a criminal prosecution it was proper to refuse to charge that if the jury would not be willing to act on the evidence, if it were in relation to matters of the most solemn importance to their own interest, they must find defendant not guilty.—Allen v. State (Ala.) 318.

Certain explanations by the court of instructions as to reasonable doubt, given at defendant's request, considered, and *held* not error.—Nevill v. State (Ala.) 596.

The refusal of the court to instruct that, before the jury can convict, they must be satisfied to a moral certainty that the proof is wholly inconsistent with every rational conclusion other than that of defendant's guilt, *held* not error.—Nevill v. State (Ala.) 596.

An instruction that, "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," was not error.—Nevill v. State (Ala.) 596.

Requested instruction on good character *held* erroneous.—Scott v. State (Ala.) 623.

A requested charge *held* erroneous, as argumentative and laying stress on a single fact.—Watkins v. State (Ala.) 627.

Instruction as to jury's conviction of guilt *held* properly refused.—Sanders v. State (Ala.) 654.

Instruction restricting the measure of proof required to convict to that furnished by the prosecution *held* erroneous.—Sanders v. State (Ala.) 654.

On prosecution for murder, instructions calling for acquittal if any juror had a reasonable doubt of guilt *held* properly refused.—Andrews v. State (Ala.) 605.

On a prosecution for murder, an instruction as to weight of evidence of good character *held* properly refused.—Barnes v. State (Ala.) 670.

On a prosecution for murder, where the evidence without conflict showed that the killing was intentional, it was not error to refuse to charge as to involuntary manslaughter.—Ragsdale v. State (Ala.) 674.

On a prosecution for murder, an instruction that, if defendant was the aggressor, he could not set up a plea of self-defense, *held* proper.—Ragsdale v. State (Ala.) 674.

A charge which ignores proof of venue in a criminal prosecution is erroneous only when there has been no proof of venue.—Ragsdale v. State (Ala.) 674.

On prosecution for an assault and battery on a child, it was not error to refuse to charge that the jury should weigh the testimony of an immature child with that measure of jury's knowledge of children in the narrative of events during childhood.—Walker v. State (Ala.) 703.

On a prosecution for murder, *held* not error to refuse to charge that the jury must acquit,

unless so convinced of guilt that they would each venture to act upon that decision in matters of highest concern to themselves.—Mann v. State (Ala.) 704.

On prosecution for murder, *held* not error to refuse to charge that if the state's evidence showed guilt, but defendant's showed innocence, so as to leave the minds of the jury in equipoise, they could acquit.—Mann v. State (Ala.) 704.

On a prosecution for murder, it was proper to refuse to charge that the jury should refuse to acquit if the evidence for the defendant was as strong as that for the state.—Mann v. State (Ala.) 704.

On a prosecution for murder, it was not error to refuse to charge that if, after weighing all the evidence, the jury could not say which was the heavier, that for the state or that for the defendant, then they should acquit.—Mann v. State (Ala.) 704.

On a prosecution for murder, it was not error to refuse to charge that the jury should not hesitate to acquit if they found the evidence for the state not the strongest.—Mann v. State (Ala.) 704.

On prosecution for murder, in view of fact that defendant's own testimony afforded ground to find that he had once retired from the difficulty in order to arm himself, certain instructions *held* properly refused.—Mann v. State (Ala.) 704.

On a prosecution for murder, an instruction *held* properly refused, for that it authorized an acquittal on a doubt engendered by the testimony of defendant alone.—Mann v. State (Ala.) 704.

On a prosecution for murder, an instruction *held* properly refused, because its first sentence was an argument.—Mann v. State (Ala.) 704.

On a prosecution for murder, an instruction *held* defective in that its first proposition was an argument.—Mann v. State (Ala.) 704.

On prosecution for murder, an instruction *held* properly refused, in view of the fact that it confined jury to circumstances of killing when there was evidence of prior ill-feeling.—Mann v. State (Ala.) 704.

Requested instruction, which referred to jury the admissibility of confession, *held* properly refused.—McKinney v. State (Ala.) 726.

A charge in a criminal case that the jury may accept or reject all or a part of the evidence of any witness, as they may believe it "just and right," *held* erroneous.—Hall v. State (Ala.) 750.

An instruction that the state must prove every material allegation in the indictment, and that nothing is to be presumed against defendant, and that he will be presumed innocent unless proven guilty beyond a reasonable doubt, and if the evidence leaves any reasonable doubt on the mind of the jury the defendant should be acquitted, was properly refused.—Gass v. State (Fla.) 109.

Where a portion of a charge is excepted to, and assigned as error, if, when read in connection with the balance of the charge, it is not erroneous, the assignment must fail.—Knight v. State (Fla.) 110.

An accused has the right to have the trial court instruct, on request, that the testimony of an accomplice, as well as his own confessions, should be received with great caution; but he cannot require the court to go beyond this and call attention to the nature or weight of such evidence.—Anthony v. State (Fla.) 818.

Where the evidence of defendant's guilt was overwhelming, an instruction on reasonable doubt was not erroneous because not requir-

ing guilt to be established beyond a reasonable doubt by competent evidence. "or the want of evidence."—*Mathis v. State* (Miss.) 6.

An instruction on reasonable doubt *held* not erroneous by reason of its declaring that defendant's guilt must be established beyond a reasonable doubt by competent evidence.—*Mathis v. State* (Miss.) 6.

On a trial for murder, where the only testimony connecting defendant with the crime was that of an accomplice, who stated on cross-examination that such testimony was all false, and given at the request of another, the refusal to give certain instructions as to the right to disregard the testimony of a witness who had sworn falsely *held* error.—*Owens v. State* (Miss.) 152.

On a prosecution for murder, an instruction that the jury, being unable to fix the punishment at imprisonment for life, should return a verdict of guilty, if from the evidence, beyond all reasonable doubt, they believed accused so to be, is correct.—*West v. State* (Miss.) 298.

§ 22. — Requests for instructions.

No error can be predicated on refusal to give an instruction substantially embraced in the charge.—*Winter v. State* (Ala.) 125; *Mitchell v. State* (Ala.) 132; *Jacobi v. State* (Ala.) 158; *State v. Caymo* (La.) 351.

In a prosecution for attempted rape, certain charge *held* properly refused as elliptical and incomplete on its face.—*Jacobi v. State* (Ala.) 158.

A charge that "before the jury can find the defendant of an assault," etc., was properly refused because of the omission of the important word.—*Jacobi v. State* (Ala.) 158.

It is not error to refuse an instruction from which a word is omitted, rendering it incomplete.—*Thomas v. State* (Ala.) 250.

The order in which requested instructions shall be given is a matter within the discretion of the trial court.—*Knight v. State* (Fla.) 110.

§ 23. Motions for new trial and in arrest.

A motion in arrest of judgment in a criminal case should be made and denied after verdict and before sentence.—*Hampton v. State* (Ala.) 230.

Failure of defendant to introduce evidence, for the reason that he did not believe it was called for, *held* no ground for a new trial.—*State v. Miller* (La.) 191.

A new trial is properly denied where no diligence was shown and the evidence was cumulative.—*State v. Maxey* (La.) 206.

Because the name of a juror was by birth different from that by which he was selected as a juror, *held* no ground for setting aside the verdict.—*State v. Caymo* (La.) 351.

Error, to form the basis of a motion in arrest of judgment, must be clear on the face of the record.—*State v. Colomb* (La.) 351.

Application for a new trial for newly discovered impeaching evidence *held* improperly denied.—*State v. Washington* (La.) 396.

A new trial on the ground that a witness had testified as an expert without having qualified will not be granted where no such objection was made at the time.—*State v. McQueen* (La.) 412.

A new trial on the ground of newly discovered evidence *held* properly denied, where the witnesses named fail to furnish such evidence.—*State v. McQueen* (La.) 412.

A new trial on the ground of surprise *held* properly denied.—*State v. McQueen* (La.) 412.

Newly discovered testimony *held* to entitle the defendant, convicted of burglary, to a new trial.—*Bates v. State* (Miss.) 915.

§ 24. Judgment, sentence, and final commitment.

Refusal to suspend the execution of a sentence of imprisonment during the pendency of an appeal from an order denying discharge on habeas corpus *held* not error.—*O'Neil v. State* (Ala.) 667.

§ 25. Appeal and error, and certiorari.

Where a party was convicted of an illegal seizure, made a misdemeanor under a statute, and the seizure was subsequently decreed by the supreme court in a civil cause to have been legal, the conviction will, on certiorari, be set aside.—*State ex rel. Heidingsfield v. Hicks* (La.) 434.

Cumulation for purposes of appeal of all cases relating to similar offenses charged, if the cases are all brought up in one transcript, is not ground for dismissal of the appeal.—*Town of Minden v. McCrary* (La.) 468.

§ 26. — Presentation and reservation in lower court of grounds of review.

Though no objection to the organization of the grand jury be taken below, still, if that it is illegally organized affirmatively appear in the record, the court on appeal will be compelled to consider the question.—*Hall v. State* (Ala.) 750.

On appeal accused cannot avail himself of the objections to questions propounded to witnesses on grounds not raised below.—*Brown v. State* (Fla.) 107.

An exception to the giving of two or more charges asserting distinct propositions of law construed to be a general exception to the giving of the charges, and not entitled to be further considered than to determine that any one charge is correct.—*Jones v. State* (Fla.) 793.

A ruling will not be reviewed on facts not shown by the bill of exceptions to have been called to the attention of the judge at the time of the ruling.—*State v. Baptiste* (La.) 461.

In order to give the supreme court appellate jurisdiction on the ground of the unconstitutionality of a fine under an ordinance, it must appear that the issue was raised below.—*Town of Minden v. McCrary* (La.) 468.

An objection to evidence in a criminal case, not made at the trial, will not be reviewed on appeal.—*Mathis v. State* (Miss.) 6.

§ 27. — Proceedings for transfer of cause, and effect thereof.

Under Code, § 4318, an appeal from a judgment of conviction for felony does not operate to suspend the execution of the sentence, without an order of the court to such effect, till the determination of the appeal.—*White v. State* (Ala.) 320.

Where there was a misunderstanding between counsel for accused and the court as to the time of the court's adjournment, the court, after adjournment, had no authority to grant an order of appeal, which, under the statute, must be applied for and entered in open court prior to adjournment.—*State ex rel. Edwards v. Lee* (La.) 187.

Inaccuracies in a bond on appeal, misdescribing the sentence, will not invalidate the appeal, if the description identifies the sentence and judgment.—*Town of Minden v. McCrary* (La.) 468.

Appeal will not lie, before judgment, on a mere verdict of guilty.—*Hayden v. State* (Miss.) 922.

§ 28. — Record and proceedings not in record.

On a prosecution for murder, a minute entry *held* to sufficiently show the accused's presence at the hearing of his motion to quash the venire.—*Cawley v. State* (Ala.) 227.

A motion in arrest of judgment, the ruling thereon, and the reservation of a question as to such ruling, must be shown by the record proper.—*Hampton v. State* (Ala.) 230.

Action in regard to a motion in arrest of judgment will not be reviewed, where the motion in arrest and the ruling thereon were not in the record.—*Durrett v. State* (Ala.) 234.

Where the time for signing bills of exceptions in the criminal court of a county is limited to a certain number of days from trial, when not extended, an agreement for an extension, made after the time has expired, is of no avail.—*Brown v. State* (Ala.) 256.

An agreement of counsel for a postponement of the time for signing a bill of exceptions should be exhibited in the record.—*Brown v. State* (Ala.) 256.

In passing on exceptions to a charge in a criminal case, the court *held* limited to the charge as copied in the transcript.—*Ragsdale v. State* (Ala.) 674.

Whenever the record is silent as to any material point tending to show an abuse of discretion in refusing a continuance to the accused, the presumption is in favor of the correctness of the court's rulings.—*Gass v. State* (Fla.) 100.

A writ of error in a criminal case will be dismissed, where no final judgment is shown.—*Jackson v. State* (Fla.) 926.

Where a writ of error in a criminal case is not certified in the form prescribed by rule 103 of the circuit courts, it will be dismissed.—*Jackson v. State* (Fla.) 926.

Where the record fails to show that accused was arraigned, or that he pleaded or was called upon to plead, the verdict and sentence must be set aside.—*State v. Preston* (La.) 67.

Bills of exception should be submitted to district attorney for inspection before being handed to the court for signature.—*State v. Johnson* (La.) 74.

Where there is no bill of exceptions and no assignment of error, and the inspection of the record shows no error, the conviction will be affirmed.—*State v. Stafford* (La.) 83.

Where the record failed to show that defendant, convicted of murder, was asked as to any statement prior to sentence, and the minutes were thereafter amended *nunc pro tunc*, and the part of the record in which that fact appears was supplied by certiorari, there was no error.—*State v. Stafford* (La.) 83.

The statement of the trial judge in the bill of exceptions that there was a case pending in which defendant attempted to bribe a witness will be accepted as correct, in the absence of testimony.—*State v. Williams* (La.) 172.

Bills of exceptions in criminal cases must be complete, to put a disputed question at issue, so that the court can pass upon it on appeal.—*State v. Blanchard* (La.) 397.

On disagreement between counsel for the accused, as to a certain ruling, and the trial court, in the per curiam part of the bill reserved, the court will accept and act upon the statement of the judge.—*State v. Meaux* (La.) 398.

A bill of exceptions will not be considered, when it only appears by entry in the minutes that the bill was taken.—*Town of Minden v. McCrary* (La.) 468.

The question whether accused has been denied his right to have sufficient testimony taken

down to enable the supreme court on appeal to understand the objections made must be raised by bill of exceptions.—*State v. Elia* (La.) 476.

A ruling that a question asked a state witness on cross-examination was intended to impeach a witness previously examined, and that no foundation was laid, will not be reviewed, when the testimony on the examination in chief is not brought up.—*State v. Batson* (La.) 478.

§ 29. — Assignment of errors and briefs.

A question as to the admissibility of evidence cannot be raised by an assignment that the verdict is contrary to law.—*Anthony v. State* (Fla.) 818.

Where a single assignment of error is made to embrace refusals to give two or more requested instructions that state separate and distinct propositions of law, the appellate court will go no further in the consideration thereof than to find that any one of the instructions so assigned was properly refused, and such assignment will then be overruled.—*Kirby v. State* (Fla.) 836.

An averment that a verdict is contrary to the law and evidence brings up no ground for review.—*State v. Williams* (La.) 172.

§ 30. — Review.

On prosecution for murder, production of certain evidence *held* no ground for reversal, under Code, § 4333.—*White v. State* (Ala.) 139.

Overruling of a motion for a new trial in a criminal case is not reviewable on appeal.—*Hampton v. State* (Ala.) 230.

The ruling on a motion for a new trial in a criminal case is not revisable on appeal.—*Durrett v. State* (Ala.) 234.

The giving of an instruction in a criminal case, which is erroneous in being too favorable to defendant, does not authorize the reversal of a conviction.—*McCormack v. State* (Ala.) 268.

Where exceptions to refusal to give patently bad charges are not insisted on in the brief of appellant in a criminal case, they will not be discussed.—*Campbell v. State* (Ala.) 635.

On prosecution for murder, admission of evidence *held* not prejudicial to defendant.—*Sanders v. State* (Ala.) 654.

Under Cr. Code, § 4922, where, on error, an indictment is found fatally defective, it will not be quashed; but the conviction will be reversed, and the cause remanded, with direction to the trial court to quash.—*Dunklin v. State* (Ala.) 666.

Where the number of grand jurors drawn was decreased to 14, and 6 more were summoned, but the jury as finally organized was composed of 17 men, it will be presumed that only 3 of the 6 appeared.—*Hall v. State* (Ala.) 750.

On objection that the names of those drawn to complete a grand jury were not drawn by lot, as required by Code, § 5023, it cannot be presumed that the statute was not complied with.—*Hall v. State* (Ala.) 750.

Where a ruling on demurrer to a plea in abatement was held to be free from error on writ of error, the ruling is law of case on the second trial.—*Knight v. State* (Fla.) 110.

Where the evidence wholly fails to show in what county or state the crime was committed, a judgment of conviction will be reversed.—*McKinnie v. State* (Fla.) 786.

A statement made in the order of a trial court as to a matter in pais will be presumed to be correct, unless the contrary clearly appears.—*Jones v. State* (Fla.) 793.

Denial of a continuance will not be reversed, except for a palpable abuse of discretion.—*Jones v. State* (Fla.) 793.

Where a special charge announces a patently erroneous proposition, it must affirmatively and clearly appear that the presumptive harm has been entirely removed.—*Lane v. State* (Fla.) 806.

Where, in a criminal case, the state's evidence is in parol and almost wholly circumstantial, and no part of the testimony is reduced to writing, and no specific facts are admitted on the record, defendant's demurrer to the evidence, in which the state attorney does not join, should not be considered by the court.—*Lowe v. State* (Fla.) 956.

Error in overruling a demurrer to the evidence in a criminal case *held* nonprejudicial.—*Lowe v. State* (Fla.) 956.

Though the character of the defendant had not been in issue, comments of the prosecuting officer in discussing his character were not grounds for setting aside the verdict.—*State v. Williams* (La.) 172.

Where the district court, on a motion for a new trial in a criminal case, *held* that the verdict was justified, its conclusion cannot be reviewed.—*State v. Miller* (La.) 191.

Argument of district attorney, where trial judge did not interfere on objection raised, *held* cause for reversal.—*State v. Blackman* (La.) 334.

The supreme court has no jurisdiction to review questions of fact in criminal cases.—*State v. Colomb* (La.) 351.

Error, in an immaterial matter, working no prejudice is not ground for reversal.—*State v. Charles* (La.) 354.

The matter of continuance is in the discretion of the court, which will not be interfered with unless abuse is shown.—*State v. Charles* (La.) 354.

Where accused is found guilty of larceny, motions for a new trial and in arrest of judgment on the ground that the offense proved was "severing from the soil," but unaccompanied by any evidence, presents no question of law on appeal.—*State v. Broussard* (La.) 361.

§ 31. Punishment and prevention of crime.

Detention of a convict from the penitentiary, after sentence, for the purpose of quarantine, *held* not unreasonable, entitling him to a discharge.—*O'Neil v. State* (Ala.) 667.

A detention of a convict from the penitentiary, after sentence, even if unreasonable, *held* not to entitle him to an absolute discharge.—*O'Neil v. State* (Ala.) 667.

CROSS-EXAMINATION.

See "Witnesses," § 3.

CRUELTY.

To animals, see "Animals."

CURATORS.

Of absentees, see "Absentees."

CURTESY.

A sale of trees for purpose of profit by a tenant by the curtesy is not binding on the life tenant.—*Learned v. Ogden* (Miss.) 278.

A tenant by the curtesy commits waste by cutting and selling trees for profit.—*Learned v. Ogden* (Miss.) 278.

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DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Damages for particular injuries.

See "Death," § 2; "Trespass," § 1.

Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 3.

Carrying passenger beyond destination, see "Carriers," § 2.

Failure to take goods for shipment, see "Carriers," § 1.

Wrongful attachment, see "Attachment," § 3.

Wrongful claim to property levied on under attachment, see "Attachment," § 2.

Wrongful ejection of passenger, see "Carriers," § 2.

Recovery in particular actions or proceedings.

On injunction bonds, see "Injunction," § 4.

§ 1. Grounds and subjects of compensatory damages.

Hospital fees for the expense of a nurse and a ward in the hospital are proper elements of damage in a personal injury action.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

The duty of preventing a loss about to occur through negligence rests on the party whose negligence is about to cause the loss, and he cannot say that the injured party might have lessened the damages by performing the duty for him.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 451.

It is the duty of one suffering from the wrongful acts of another to protect himself from the consequences, if he can do so by ordinary care or at a moderate expense.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

Where, after a wrong has been committed, the damaged party increases the injury by willful acts, he cannot recover therefor.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

§ 2. Liquidated damages and penalties.

A stipulation in contract for \$300 liquidated damages, in case of failure to perform, even if regarded as one for a penalty, is sufficient evidence to authorize a finding of that amount of damages.—*Elston v. Roop* (Ala.) 129.

§ 3. Exemplary damages.

Under Code, § 1749, a master is liable to exemplary damages for a wanton injury to a servant, where death does not ensue.—*Southern Ry. Co. v. Bunt* (Ala.) 507.

§ 4. Measure of damages.

Where the evidence shows that the plaintiffs bought at a stipulated price a mortgage note, the measure of the damages for failure to deliver is the difference between the contract price and the value of the note when it should have been delivered.—*Kory v. Layman* (La.) 441.

Where defendant's bridge obstructed plaintiff's boat in the navigation of a stream, certain anticipated profits *held* too uncertain to serve as a basis for a judgment for damages.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

Where plaintiff chartered a boat to convey cotton seed to his mill, and defendant's bridge obstructed its passage, *held*, that he could recover expected profits.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

§ 5. Inadequate and excessive damages.

A verdict of \$12,500, given a brakeman for the loss of his leg, will be reduced to \$6,000.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

§ 6. Pleading, evidence, and assessment.

In an action by a servant against his master for injuries, it was error to permit plaintiff to show that he was poor.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

DEATH.

Revival of action on death of party, see "Abatement and Revival," § 1.

§ 1. Evidence of death and of survivorship.

Where a husband left his home, where his family resided, in 1867, and neither the boat on which he went nor the man ever returned or were ever heard of again, the lapse of time justifies presumption of death.—*Sterrett v. Samuel* (La.) 428.

§ 2. Actions for causing death.

A judgment for \$2,000 for the negligent killing of a railroad yard master *held* not excessive.—*McGhee v. Willis* (Ala.) 801.

The right of action of a mother, having control of minor children after divorce, to recover for the death of one, under St. 1884, No. 71, is not affected by the fact that she remarried prior to the action.—*Wilson v. Banner Lumber Co.* (La.) 460.

Under St. 1884, No. 71, where the wife has before the death of her child obtained a divorce from her husband, and has the care of the minor children, she can sue for his wrongful death without authority or consent of husband.—*Wilson v. Banner Lumber Co.* (La.) 460.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

DECEDENTS.

Declarations against interest, see "Evidence," § 7.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECLARATION.

In pleading, see "Pleading," § 1.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 10.

As part of *res gestae*, see "Criminal Law," § 9.

Dying declarations, see "Homicide," §§ 6-8.

DECREE.

In equity, see "Equity," § 6.

DEEDS.

Alteration, see "Alteration of Instruments."

Cancellation, see "Cancellation of Instruments."

Covenants in deeds, see "Covenants."

Deed or will, see "Wills," § 1.

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

Parol or extrinsic evidence, see "Evidence," § 9.

Registers, see "Registers of Deeds."

Deeds by or to particular classes of parties.

See "Husband and Wife," § 1; "Infants," § 2.

Married women, see "Husband and Wife," § 2.

Deeds of particular species of property.

Separate property of married women, see "Husband and Wife," § 2.

Particular classes of deeds.

Of trust, see "Mortgages."

Tax deeds, see "Taxation," § 9.

§ 1. Requisites and validity.

In the description in a deed an error in the number of the range *held* immaterial, where the description otherwise identifies the property.—*Willis v. Ruddock Cypress Co.* (La.) 386; *In re Willis*, *Id.*

§ 2. Construction and operation.

A limitation in a deed of trust construed to create remainders, and not estates tail.—*Findley v. Hill* (Ala.) 497.

The word "heirs," as used in a limitation of real and personal property, construed to mean "children," as a limitation of personality on indefinite failure of issue was void at common law.—*Findley v. Hill* (Ala.) 497.

The word "heirs," as used in a deed of trust *held* to mean "children."—*Findley v. Hill* (Ala.) 497.

DEFAMATION.

See "Libel and Slander."

DELAY.

In delivering telegram, see "Telegraphs and Telephones," § 2.

DELEGATION OF POWER.

To impose tax on sale of liquors, see "Intoxicating Liquors," § 1.

DELIVERY.

Of goods to carrier, see "Carriers," § 1.

DEMURRER.

In pleading, see "Equity," § 2; "Pleading," § 3. To indictment, see "Indictment and Information," § 4.

DEPOSITIONS.

See "Witnesses."

Where, in an action for divorce, after a decree pro confesso, the cause is submitted on complainant's evidence, under Acts 1898-99, p. 1118, the chancellor requires the testimony of defendant to be taken, complainant is entitled to notice.—*Wilkinson v. Wilkinson* (Ala.) 124.

A deposition taken by one of two commissioners to whom the commission was jointly issued is invalid, in the absence of a waiver of the presence of the other commissioner.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

Depositions taken in a suit in equity *held* to have been taken before the cause was at issue, in violation of chancery rule 49 (Code, p. 1211).—*Henderson v. Hall* (Ala.) 640; *Hall v. Henderson*, *Id.*

DEPOSITS.

In bank, see "Banks and Banking," § 2.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Executors and Administrators"; "Wills."

§ 1. Rights and liabilities of heirs and distributees.

Recital of names of the minor children and heirs of W., in an act authorizing them to sell

their interest in land, *held* not to overcome recital in the deed that the persons therein named were, at date of its execution, his only children and heirs.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

A ratification by a widow of an invalid tax sale of the property of succession *held* to extend only to her undivided half.—*Levy v. Levy* (La.) 117.

Years after property of the succession has, without objection, passed into the hands of third persons, an heir, who has a complete remedy as to his own interest, cannot champion the rights of his coheirs to reinstate the property of the succession.—*Sallier v. Rosteet* (La.) 383.

A family meeting may recommend that specially designated property, held in indivision with owners who are not heirs, be partitioned.—*Sallier v. Rosteet* (La.) 383.

Persons who owe a succession may be proceeded against by a complaining heir without making all the heirs parties to the suit and without to that end reopening the succession.—*Sallier v. Rosteet* (La.) 383.

After 10 years the transfer by heirs of a succession to the usufructuary of the property will not be disturbed.—*Sallier v. Rosteet* (La.) 383.

Where defendant died after rendition of a tax judgment before a justice, and his heirs were unrepresented or unknown, the justice could appoint a curator ad hoc, on whom notice of seizure could be served.—*Willis v. Ruddock Cypress Co.* (La.) 386; *In re Willis*, *Id.*

Parties who purchase land from the heirs of a deceased surety on a duly recorded guardian's bond, take with constructive notice of the liability of the land if the decedent's personal estate is insufficient to meet the claims.—*Savings Building & Loan Ass'n v. Tart* (Miss.) 115.

The liability of a surety on a guardian's bond is a debt, within Code 1890, § 2025, providing that the lands of a decedent's estate shall be chargeable with his debts which his personal estate is insufficient to pay.—*Savings Building & Loan Ass'n v. Tart* (Miss.) 115.

Heirs cannot sue for trespass on the lands of an ancestor, committed during his lifetime; Code 1892, §§ 1916, 1917, giving such right to executors and administrators.—*Conklin v. Alabama & V. Ry. Co.* (Miss.) 820.

DESCRIPTION.

In deed, see "Deeds," § 1.

Of devisees or legatees in will, see "Wills," § 3.

DETINUE.

Plea in detinue for certain articles, alleging that the title is partly based on a mortgage, presents no material issue.—*Elston v. Roop* (Ala.) 129.

Plea in detinue for certain articles, alleging fraud in the procuring of a mortgage, without showing that plaintiff's title to, or right to recover, the property depends on, or is affected by, the fraud, is bad.—*Elston v. Roop* (Ala.) 129.

Where, in detinue, there was evidence to support plaintiff's allegations, and the evidence as to defendant's special plea was conflicting, it was error to give the general affirmative charge for defendant.—*Martin Mach. Works v. Miller* (Ala.) 305.

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," § 8.

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 2.

Of infants, see "Infants," § 1.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, see "Compromise and Settlement."

DISCOUNTS.

Right of factor to discount notes of principal, see "Factors."

DISCRETION OF COURT.

As to examination of witnesses, see "Witnesses," § 3.

Review, see "Criminal Law," § 80.

DISCRIMINATION.

By carrier, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 7; "Criminal Law," § 25.

Dismissal of suit in equity, see "Equity," § 4.

DISORDERLY CONDUCT.

See "Disturbance of Public Assemblage."

DISQUALIFICATION.

Of insurance arbitrator, see "Insurance," § 7.

DISSEISIN.

Of co-tenant, see "Tenancy in Common," § 1.

DISSOLUTION.

Of building association, see "Building and Loan Associations."

Of injunction, see "Injunction," § 3.

Of partnership, see "Partnership," § 3.

DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 3.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 5.

Of proceeds of foreclosure, see "Mortgages," § 6.

DISTRICT AND PROSECUTING ATTORNEYS.

Argument at trial, see "Criminal Law," § 19.

Effect of failure of district attorney to sign indictment, see "Indictment and Information," § 1.

Participation in deliberations of grand jury, see "Grand Jury."

DISTURBANCE OF PUBLIC ASSEMBLAGE.

Where, on a prosecution for disturbing a religious assemblage, in violation of Cr. Code, §

4654, the only evidence of any disturbance was of people without the meeting house, the question whether such persons were a part of the religious assemblage was for the jury.—*Adair v. State* (Ala.) 326.

On a prosecution for disturbing a religious assemblage, in violation of Cr. Code, § 4654, it was proper to allow the state to show the conduct and declarations of defendant during the time the worship was going on, tending to show willfulness on his part.—*Adair v. State* (Ala.) 326.

On prosecution under Cr. Code, § 4654, for disturbing a religious assemblage, it was proper to refuse to charge that persons sitting on the outside of a house in which an assemblage is met for the purpose of religious worship are presumed not to be a part of the assemblage.—*Adair v. State* (Ala.) 326.

One may be guilty of violating Cr. Code, § 4654, making it an offense to disturb a religious assemblage, though the persons disturbed are not actually taking part in the services at the time.—*Adair v. State* (Ala.) 326.

A meeting of persons for the purpose of instruction in the singing of religious songs is not a religious assemblage, within Cr. Code, § 4654, making it an offense to disturb a religious assemblage.—*Adair v. State* (Ala.) 326.

Persons who have separated from those within a house where a religious meeting is being held, and who are no longer participating in the meeting, though just without the house, are not a portion of such meeting, within Cr. Code, § 4654, making it an offense to disturb a religious assemblage.—*Adair v. State* (Ala.) 326.

On a prosecution under Cr. Code, § 4654, for disturbing a religious assemblage, certain charges *held* to have been properly refused as misleading.—*Adair v. State* (Ala.) 326.

DITCHES.

See "Drains."

DIVORCE.

Separate maintenance, see "Husband and Wife," § 4.

§ 1. Grounds.

A defendant against whom a judgment for separation has been had may after two years obtain a judgment of divorce.—*Ellerbusch v. Kogel* (La.) 191.

Under Act No. 25 of 1898, a married person against whom a separation from bed and board has been rendered may at the expiration of two years, if there has been no reconciliation, obtain a judgment of divorce.—*Ellerbusch v. Kogel* (La.) 191.

§ 2. Alimony, allowances, and disposition of property.

A decree in divorce awarding alimony to complainant renders her a creditor of defendant from the time of its rendition.—*McFadden v. McFadden* (Ala.) 719.

A conveyance *held* fraudulent and void as against complainant's decree for alimony in divorce.—*McFadden v. McFadden* (Ala.) 719.

Where a wife recovered judgment of separation, with an allowance of alimony, which was suspended, and no domicile was appointed by the court, she had no right to alimony on subsequent divorce.—*Ellerbusch v. Kogel* (La.) 191.

§ 3. Operation and effect of divorce, and rights of divorced persons.

A foreign decree in divorce, awarding alimony, *held* conclusive evidence of a debt due from defendant at time of rendition.—*McFadden v. McFadden* (Ala.) 719.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8. As evidence in criminal prosecutions, see "Criminal Law," § 7.

DOMICILE.

As qualification of right of suffrage, see "Elections."

Of parties as affecting venue, see "Venue," § 1.

DONATIONS.

See "Gifts."

DOUBLE TAXATION.

See "Taxation," § 1.

DOWER.

See "Curtesy."

DRAINS.

In cities, see "Municipal Corporations," § 6.

§ 1. Establishment and maintenance.

Where a canal, which was to form part of the southern line of a drainage district, was proposed at the time that the ordinance in relation to the drainage district was adopted, and its course was well known, *held*, it was a sufficiently definite boundary.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Where a drainage district is organized under Acts 1894, No. 37, it may levy the tax and issue the bonds authorized by article 281 of the constitution, under the combined provisions of the act of 1894 and said article of the constitution, without recourse to the provisions of Act No. 12 of 1900.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

The police jury has the power to divide a parish into drainage districts.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Boundaries of drainage districts into which a parish is divided by the police jury are sufficiently definite if they will enable a surveyor properly to trace the lines.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Where a tax district established under the drainage laws is authorized to impose a property tax, and such tax must be voted for, the limits of the tax district must be fixed with certainty.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Drainage districts established under laws in existence at the time of the adoption of article 281 of the constitution, relating to issue of bonds, may take advantage of the provisions of that article without reorganizing under Acts 1900, No. 12.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Drainage districts established under laws existing at the time of the passage of Acts 1900, No. 12, cannot take advantage of the privileges of such act without first reorganizing under its provisions.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Drainage districts organized under Acts 1894, No. 37, must conform to section 3 of that act in respect to the necessity of consulting the taxpayers when new drains are to be cut and opened.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

In the notice of an election under the drainage law, given by the police jury, *held*, that the boundaries of the district to be created were sufficiently shown.—*Richard v. Cypremort Drainage Dist.* (La.) 27.

Any taxpayer of a taxing district organized for drainage purposes may urge the uncertainty in respect to its boundaries in resistance of a property tax or in prevention of the issuance of bonds.—*Richard v. Cypremort Drainage Dist. (La.)* 27.

DUPLICITY.

In indictment, see "Indictment and Information," § 3.

DYING DECLARATIONS.

See "Homicide," §§ 6-8.

EJECTION.

Of passenger, see "Carriers," § 2.

EJECTMENT.

See "Real Actions."

To recover land held under defective condemnation proceedings, see "Eminent Domain," § 4.

§ 1. Pleading and evidence.

Evidence in ejectment held sufficient to sustain a judgment for defendant.—*Laster v. Blackwell (Ala.)* 166.

§ 2. Trial, judgment, enforcement of judgment, and review.

Where, on the death of the owner of land, one of his heirs denied possession to the other heirs, each of them was entitled to sue, and it was not material whether all of the excluded heirs joined.—*Butler v. Butler (Ala.)* 579.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 3.

ELECTION OF REMEDIES.

Where one by contract binds himself to compensate for any negligence resulting in injury to another, because the injured party has an action in damages as for a quasi offense, he should be denied the right to sue on his contract if he prefers that remedy.—*Gordon v. Stanley (La.)* 531.

ELECTIONS.

§ 1. Qualifications of voters.

The provision of Code 1892, § 3028, requiring an elector to vote in the ward of his residence, held not invalid under Const. §§ 241, 242, 245.—*State v. Kelly (Miss.)* 909.

Code 1892, § 3028, adding as a qualification to a right to vote in a municipal election a residence in the municipality of one year prior to registration held invalid, under Const. §§ 241, 242, 251.—*State v. Kelly (Miss.)* 909.

§ 2. Nominations and primary elections.

Laws 1902, p. 105, c. 68, relating to primary elections, held not unconstitutional.—*McInnis v. Thames (Miss.)* 286.

§ 3. Contests.

Where a demurrer to a petition to contest an election was filed within the time prescribed by Rev. St. § 199, and sustained, with leave to amend, and an amendment was filed after the time for filing an original petition, a motion to strike the entire petition because a new ground of contest was incorporated by the amendment held properly denied.—*Southerland v. Sandlin (Fla.)* 786.

ELECTRICITY.

Injunction to compel removal of electric light poles, see "Injunction," § 3.

EMBEZZLEMENT.

In a prosecution for embezzlement, under Code, § 4659, evidence that defendant, a traveling salesman, made a false charge in an account for expenses rendered to his employer, was insufficient.—*Grider v. State (Ala.)* 254.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 4.

§ 1. Nature, extent, and delegation of power.

Where a foreign corporation is authorized to construct telegraph lines in certain named counties only in the foreign state, it does not come within the meaning of Act No. 124 of 1880, relating to the expropriation of property in the state by foreign corporations.—*Southwestern Tel. Co. v. Kansas City, S. & G. Ry. Co. (La.)* 958.

§ 2. Compensation.

Under Const. 1875, art. 14, § 7, held, that a city, taking up a sidewalk in front of premises for the purpose of putting down a new one, has no right to injure a stone wall inclosing the lot without compensation.—*Niehaus v. Cooke (Ala.)* 728.

The questions of value and damages in expropriation proceedings will not be disturbed, save in a clear case.—*Texas & P. Ry. Co. v. Wilson (La.)* 173.

City held authorized to erect electric light poles in its streets without making additional compensation to abutting owners.—*Gulf Coast Ice Mfg. Co. v. Bowers (Miss.)* 118.

§ 3. Proceedings to take property and assess compensation.

In an action by a foreign corporation to expropriate property under Act No. 124 of 1880, a denial held sufficient to put in issue the capacity of the plaintiff to enter the state for the purpose of carrying on its business.—*Southwestern Tel. Co. v. Kansas City, S. & G. Ry. Co. (La.)* 958.

§ 4. Remedies of owners of property.

Owner of premises held entitled to injunction to restrain work that would injure a wall inclosing premises without compensation having been given under Const. 1875, art. 14, § 7.—*Niehaus v. Cooke (Ala.)* 728.

Denials of answer to bill to restrain injury to a wall before compensation therefor, under Const. 1875, art. 14, § 7, held not to warrant dissolution of injunction.—*Niehaus v. Cooke (Ala.)* 728.

Answer sworn to under chancery practice rule 32 (Code, p. 1209), in suit for injunction to restrain injury to a wall, for which no compensation had been made, under Const. 1875, art. 14, § 7, held not sufficiently verified to warrant dissolution of injunction.—*Niehaus v. Cooke (Ala.)* 728.

That the spur track wrongfully placed by a railroad on plaintiff's premises was not an essential part of the main line did not, in ejectment, entitle plaintiff to a portion of such freights as had been earned in carriage over the spur.—*Illinois Cent. R. Co. v. Hoskins (Miss.)* 150.

When a railroad has reason to believe that its possession of land is rightful under condemnation proceedings, it is not liable in punitive damages for its trespasses on the land.—*Illinois Cent. R. Co. v. Hoskins (Miss.)* 150.

Where a railroad built a spur over plaintiff's land in ejectment, plaintiff was entitled to a reasonable compensation for any use to which plaintiff might have put the land.—*Illinois Cent. R. Co. v. Hoskins* (Miss.) 150.

Where land is wrongfully occupied by a railroad, the owner in ejectment is entitled to damages to the land from the construction of the roadbed.—*Illinois Cent. R. Co. v. Hoskins* (Miss.) 150.

Though a railroad, in taking possession of land and placing structures thereon, is a trespasser because the condemnation proceedings were not in conformity with law, it is entitled to remove such structures.—*Illinois Cent. R. Co. v. Hoskins* (Miss.) 150.

Where a railroad company is in possession of land under a defective condemnation, it may be dispossessed by ejectment.—*Illinois Cent. R. Co. v. Hoskins* (Miss.) 150.

When a railroad, in the condemnation of land, fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.—*Illinois Cent. R. Co. v. Hoskins* (Miss.) 150.

EMPLOYES.

See "Master and Servant."

ENTRY, WRIT OF.

See "Ejectment"; "Real Actions."

EQUITY.

Equitable estoppel, see "Estoppel," § 2.
Equitable mortgages, see "Mortgages," § 1.
Relief against judgment, see "Judgment," § 3.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Creditors' Suit"; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Trusts."

§ 1. Jurisdiction, principles, and maxims.

A bill to set aside a fraudulent conveyance and for a receiver was objectionable, where it failed to offer to do equity in respect to paying off a debt secured by a mortgage on the property proposed to be subjected to complainant's judgment.—*Taylor v. Dwyer* (Ala.) 509.

A complaint in an action to quiet title *held* not objectionable because complainant did not offer to accept the amount of the judgment under which she acquired title.—*Worthington v. Miller* (Ala.) 748.

Jurisdiction of a cause cannot be conferred by estoppel.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Action of respondents to a bill in equity in requiring an election, whereby complainants dismissed an action at law involving the same matters embraced in the bill, *held* not to estop respondent from thereafter objecting to the jurisdiction of the court over the matters contained in the bill.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Several actions against a defendant *held* such that equity would restrain the actions and consolidate them.—*Illinois Cent. R. Co. v. Garrison* (Miss.) 996.

§ 2. Pleading.

Where a bill for equitable relief also alleges matter of purely legal cognizance, such allegations do not render the bill multifarious or affect the jurisdiction of the court to grant the

equitable relief.—*Letohatchie Baptist Church v. Bullock* (Ala.) 58.

A motion to strike out pleas not tried or submitted to be passed on will be deemed abandoned.—*Adair v. Feder* (Ala.) 165.

A bill may be amended before final decree in respect of amount claimed as attorney's fees.—*American Freehold Land Mortg. Co. v. Pollard* (Ala.) 630; *Pollard v. American Freehold Land Mortg. Co.*, *Id.*

A demurrer to a bill for the appointment of a receiver to preserve rents pending an action of ejectment *held* properly overruled.—*Hereford v. Hereford* (Ala.) 651.

An amended bill *held* no departure from the one originally filed.—*Metcalf v. Arnold* (Ala.) 763.

Bill by a judgment creditor of a corporation to subject unpaid subscriptions to capital stock to the satisfaction of the judgment *held* not multifarious or objectionable for a misjoinder of parties respondent.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

An amendment to a bill in equity, alleging facts which would cure a variance between the proof and the bill as originally filed, is material, and should not be stricken out.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

In a bill against several respondents, whose liabilities were separate and distinct as among themselves, material facts denied by any of the respondents should be proven, though admitted by most of the respondents.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, *Id.*

Where a plea in equity is allowed upon argument, the complainant is entitled to file a replication and contest its truth.—*Anstie v. Hoxsie* (Fla.) 878.

Where a sworn answer has been filed in response to a demand therefor in the original bill, the bill cannot be afterwards amended, at least as to the matter set up in the original bill, so as to waive the sworn answer.—*Springfield Co. v. Ely* (Fla.) 892.

The fact that an amended bill undertakes to waive an answer under oath, while the original bill required a sworn answer, is not ground for demurrer.—*Springfield Co. v. Ely* (Fla.) 892.

An answer in chancery, setting forth that certain railroads were constructed under charters allowing them exemption from taxation, *held* to permit evidence without any replication as to what company constructed the road.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

§ 3. Evidence.

Where, in equity, complainant introduces in evidence the answer of defendant, the court must consider the denials of the answer, as well as the admissions.—*Scott v. Brassell* (Ala.) 694.

In foreclosure of mortgage, complainant's proof *held* insufficient against unsworn answer of defendant, introduced in evidence by complainant.—*Scott v. Brassell* (Ala.) 694.

§ 4. Dismissal before hearing.

A bill by creditors to set aside alleged fraudulent attachments should be dismissed as to nonresident defendants.—*Adair v. Feder* (Ala.) 165.

Where a bill was capable of amendment by striking out a defective disjunctive averment, a motion to dismiss it for want of equity was properly overruled.—*Taylor v. Dwyer* (Ala.) 509.

Whether motion to dismiss cross bill for want of equity should be granted is to be determined by inspection of cross bill alone, assuming its statements to be true.—*Woodruff v. Adair* (Ala.) 515.

Where the answer to a bill contains a set-off not purely of equitable cognizance, or such as would support an original bill, dismissal of the bill carries with it the cross-bill.—*Ex parte Jones* (Ala.) 648.

Under Code, § 703, a bill cannot be dismissed after answer filed averring a set-off, where the dismissal would prejudice the defendant.—*Ex parte Jones* (Ala.) 648.

§ 5. Masters and commissioners, and proceedings before them.

Instead of the chancellor recommitting a matter to the register for an account, the court may state the account.—*American Freehold Land Mortg. Co. v. Pollard* (Ala.) 630; *Pollard v. American Freehold Land Mortg. Co.*, *Id.*

§ 6. Decrees and enforcement thereof.

Where, on overruling demurrer, the court grants time to answer, and no answer is filed, held, that decree pro confesso was properly answered.—*Ray v. Frank* (Fla.) 925.

ERROR, WRIT OF.

See "Appeal and Error"; "Criminal Law," §§ 25-30.

ESTABLISHMENT.

Of drains, see "Drains," § 1.

Of public schools, see "Schools and School Districts," § 1.

Of trusts, see "Trusts," § 2.

Of will, see "Wills," § 2.

ESTATES.

See "Curtesy"; "Remainders."

Created by deed, see "Deeds," § 2.

Decedents' estate, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

Tenancy in common, see "Tenancy in Common."

ESTOPPEL.

By judgment, see "Judgment," § 4.

Of creditor to set aside sale of debtor's property, see "Assignments for Benefit of Creditors," § 2.

Of tenant to dispute title of landlord, see "Landlord and Tenant," § 1.

To object to jurisdiction of equity, see "Equity," § 1.

§ 1. By deed.

As between the parties to a deed of ratification of a tax sale, the grantors are estopped from attacking and setting aside their own deeds on parol evidence.—*Levy v. Levy* (La.) 117.

§ 2. Equitable estoppel.

Where, in an action to require a mortgage to be surrendered, defendant claims solely through plaintiff under the mortgage, plaintiff's interest need not be proved.—*Sheats v. Scott* (Ala.) 573.

In trial of right of property under Code, § 4141, held, that the affidavit and claim bond of a claimant estops him to deny a proper levy.—*Eldridge v. Grice* (Ala.) 683.

Defendants, having introduced oral evidence of a judgment and payment thereof, were precluded from questioning collaterally the jurisdiction of the court rendering the judgment.—*Beyer v. Fields* (Ala.) 742.

EVIDENCE.

See "Depositions"; "Witnesses."

Applicability of instructions to evidence, see "Trial," § 4.

Harmless error in admission, see "Appeal and Error," § 11.

Production of documents by witness, see "Witnesses," § 1.

Questions of fact for jury, see "Trial," § 3.

Reception at trial, see "Criminal Law," § 18½; "Trial," § 1.

Review on appeal or writ of error, see "Appeal and Error," § 9.

Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See "Adverse Possession," § 2; "Damages," § 6; "Death," § 1; "Fraudulent Conveyances," § 3; "Judgment," § 8.

Deed absolute or mortgage, see "Mortgages," § 1.

Right to homestead, see "Homestead," § 2.

Suicide of insured, see "Insurance," § 9.

Successfulness of vaccination of insured, see "Insurance," § 9.

In actions by or against particular classes of parties.

See "Carriers," § 1; "Corporations," § 4.

Remaindermen, see "Remainders."

In particular civil actions or proceedings.

See "Ejectment," § 1; "Libel and Slander," § 2; "Mandamus," § 3; "Malicious Prosecution," § 2; "Trespass," § 1.

Accounting by administrator, see "Executors and Administrators," § 8.

Equity, see "Equity," § 3.

For breach of contract, see "Contracts," § 4.

For fires caused by operation of railroad, see "Railroads," § 6.

For injuries to animals, see "Railroads," § 5.

For personal injuries, see "Master and Servant," § 8; "Municipal Corporations," § 7.

For waste, see "Waste."

For wrongful attachment, see "Attachment," § 3.

Motion for new trial, see "New Trial," § 2.

On account stated, see "Account Stated."

On bill or note, see "Bills and Notes," §§ 2, 3.

Probate proceedings, see "Wills," § 2.

Trial of right to property levied on, see "Execution," § 3.

In criminal prosecutions.

See "Adultery"; "Burglary," § 2; "Criminal Law," §§ 7-22; "Disturbance of Public Assemblage"; "Embezzlement"; "Homicide," §§ 6-8; "Larceny," § 2; "Perjury," § 1; "Receiving Stolen Goods."

Bastardy proceedings, see "Bastards," § 1.

For illegal sale of liquor, see "Intoxicating Liquors," § 4.

§ 1. Judicial notice.

The court will take judicial notice that it is the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

The courts of the state will take judicial notice of the prevalence of common law in a sister state.—*Rush v. Landers* (La.) 95.

The courts will not take judicial notice of statutory modifications of the common law.—*Rush v. Landers* (La.) 95.

The courts will take judicial notice that under the common law a married woman cannot possess personal property independent of her husband, unless a trust has been created for her separate benefit.—*Rush v. Landers* (La.) 95.

§ 2. Presumptions.

Where a judgment was rendered by a justice more than 25 years ago, in the absence of proof that defendant was dead when the suit was prosecuted, the presumption will be that he was living.—*Willis v. Ruddock Cypress Co.* (La.) 386; *In re Willis*, *Id.*

§ 3. Burden of proof.

Plaintiff is entitled to a charge that the burden of proof is on defendant to establish his set-off.—*O'Neal v. Curry* (Ala.) 697.

§ 4. Relevancy, materiality, and competency in general.

Where the evidence showed that plaintiff had suffered from an injury from the time of its infliction to the trial, evidence that after the injury witness had heard plaintiff give expression to pain and suffering was proper.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

In malicious prosecution against a corporation, statement of servant of defendant *held* not subject to objection that it was not part of *res gestæ*.—*Southern Car & Foundry Co. v. Adams* (Ala.) 503.

Declarations *held* admissible as part of the *res gestæ* of a taking.—*Carter v. Fulgham* (Ala.) 684.

Relevance of evidence on issue whether defendant sold guano to plaintiff's tenant on plaintiff's credit considered.—*O'Neal v. Curry* (Ala.) 697.

Defendants, having introduced oral evidence of a judgment and payment thereof, were precluded from objecting to similar evidence of amount and nonpayment of the judgment.—*Beyer v. Fields* (Ala.) 742.

In action by servant for injuries, his statement that no one was to blame for the accident *held* erroneously excluded.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

§ 5. Best and secondary evidence.

In an action for wrongful attachment, evidence *held* to warrant secondary evidence of the contents of the writ of *venditioni exponas* issued in compliance with judgment for plaintiff in the original suit.—*Hamilton v. Maxwell* (Ala.) 13.

Oral evidence that the officers of a corporation were duly authorized to execute a transfer of its property *held* improperly excluded as hearsay.—*Martin Mach. Works v. Miller* (Ala.) 305.

§ 6. Admissions.

In an action against a corporation, declarations by a stockholder and an officer as to a loan, when not acting for it, *held* inadmissible.—*Stanton v. Baird Lumber Co.* (Ala.) 299.

Where, in an action against the indorsers of a note, they denied having induced the holder to delay suing the maker by promises to pay the note, testimony that they afterwards told witnesses of such promises that they had made was properly received.—*Brown v. Fowler* (Ala.) 584.

On an issue as to whether defendants had promised to pay a note on which they were indorsers, a letter subsequently written by one of them, containing an individual promise to pay and stating that they wanted the plaintiff to hold the same paper, was admissible.—*Brown v. Fowler* (Ala.) 584.

§ 7. Declarations.

A declaration made by the prosecuting witness, in a prosecution for attempted rape, that she would "rather die than come back to another trial and go through the same ordeal," *held* admissible on an issue whether she was permanently absent from the state.—*Jacobi v. State* (Ala.) 158.

Where defendant and his father lived together on his father's land until his death, when defendant claimed the land by adverse possession as against the other heirs, evidence of declarations of the father that he had given the land to defendant *held* inadmissible.—*Butler v. Butler* (Ala.) 579.

Where defendant, with his family and his father, lived on the father's land by his permission until his death, evidence that defendant told third persons that he claimed the land as his own *held* properly excluded.—*Butler v. Butler* (Ala.) 579.

In an action to recover the penalty imposed by Code, § 4137, declarations of defendant to his employes, at the time he directed the cutting, to the effect that he had obtained permission from the owner, were properly excluded.—*Jernigan v. Clark* (Ala.) 686.

§ 8. Documentary evidence.

A writing, though signed by mark, may be attested by one who did not see the parties sign it; they appearing before him and acknowledging the signature as theirs, and requesting him to attest.—*Elston v. Roop* (Ala.) 129.

Under Code, § 992, *held*, that in a suit to foreclose a mortgage, the original being lost, a certified copy of the record was properly admitted.—*Scott v. Brassell* (Ala.) 694.

An instrument of writing, though *res inter alios acta*, may be admitted in evidence as part of the same transaction or as a memorandum.—*Pharr v. Gall* (La.) 418.

§ 9. Parol or extrinsic evidence affecting writings.

Parol evidence as to the property insured *held* admissible, where the application for the policy was written by the company's agent and the description was erroneous.—*Alabama Mut. Fire Ins. Co. v. Minchener* (Ala.) 225.

Parol evidence *held* admissible to show the point of beginning, where deed describes land conveyed as beginning at north corner of a lot, which has two north corners.—*Hereford v. Hereford* (Ala.) 620.

Where the owner ratified by notarial act a tax sale of her property as legal, if there was an ulterior purpose in the ratification, the purpose cannot be shown by oral evidence.—*Levy v. Levy* (La.) 117.

Where an instrument in writing is admitted as part of the transaction, for what it is worth, its presence cannot serve as a ground for objection to parol evidence.—*Pharr v. Gall* (La.) 418.

A conversation at the time of the sale of a railroad ticket *held* not to impair the passenger's rights under such ticket.—*Illinois Cent. R. Co. v. Harris* (Miss.) 309.

A conversation of a passenger with a flagman, at the time the passenger got on the train, *held* not to impair the passenger's rights under his ticket.—*Illinois Cent. R. Co. v. Harris* (Miss.) 309.

§ 10. Opinion evidence.

In detinue, statement of witness as to whether transactions amounted to an absolute sale *held* properly excluded.—*Ward v. Shirley* (Ala.) 489.

Where the owner of land which has been occupied by a tenant for several years seeks to defeat an execution sale thereof on the ground that it is his homestead, and the only issue is whether when leasing he reserved a part of the dwelling for his use as a residence, he should not be permitted to testify that he reserved a part of the house "to live in."—*Bland v. Putman* (Ala.) 616.

Opinion of experienced engineer that locomotive, properly equipped, should not emit sparks of a certain size, *held* admissible.—*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.) 745.

Men without scientific knowledge or practical experience in moving cars, employed as car inspectors, do not thereby become qualified as experts in the matter of the causes which may op-

erate to derail a car.—*Budge v. Morgan's L. & T. R. & S. S. Co. (La.)* 535.

§ 11. Weight and sufficiency.

Charge *held* to place too high a degree of proof on plaintiff.—*Carter v. Fulgham (Ala.)* 684.

Where immovable property conveyed by the husband to the wife without sufficient consideration is seized on a claim against the husband, and the wife intervenes, and the seizing creditor propounds to her interrogatories on facts and articles, under Code, art. 347, her answers thereto are entitled to no greater effect against such creditor than her oral testimony.—*Rush v. Landers (La.)* 95.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS.

Taking exceptions at trial, see "Criminal Law," §§ 17, 28.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 28.

Necessity for purpose of review, see "Appeal and Error," § 6.

§ 1. Nature, form, and contents in general.

That a bill of exceptions is prepared pursuant to the wishes of the trial judge is no excuse for violation of Code, p. 1201, § 33, forbidding the insertion of the testimony in extenso.—*Louisville & N. R. Co. v. Hall (Ala.)* 603.

Code, p. 1201, § 33, subd. 1, authorizing the insertion of the testimony in extenso in a bill of exceptions, where the general charge is asked, does not authorize the insertion of a stenographic record of the trial.—*Louisville & N. R. Co. v. Hall (Ala.)* 603.

A statement in a bill of exceptions that a deed attached to interrogatories to a witness was the original *held* sufficient to show that the original was before the witness when he was examined.—*Harper v. Reaves (Ala.)* 721.

§ 2. Settlement, signing, and filing.

A paper in the transcript, purporting to be a bill of exceptions, but not signed by the judge, cannot be considered.—*Nashville, C. & St. L. Ry. Co. v. Bates (Ala.)* 589.

Where the record does not show an order authorizing the signing of a bill of exceptions in vacation, a bill so signed cannot be considered on appeal.—*Massillon Engine & Thresher Co. v. Arnold (Ala.)* 594.

Under Code, p. 1201, § 33, a bill of exceptions containing a complete stenographic record of the trial should be stricken.—*Louisville & N. R. Co. v. Hall (Ala.)* 603.

EXCESSIVE DAMAGES.

See "Damages," § 5.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 4.

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions."

§ 1. Property subject to execution.

Under Code, § 1890, subd. 2, where personally sold on credit is delivered to the buyer, the seller reserving title, such property is subject to levy against the buyer, and the seller cannot, before the expiration of the credit, assert his reserved title as paramount to such levy.—*Ivey v. Coston (Ala.)* 664.

§ 2. Stay, quashing, vacating, and relief against execution.

Application for an injunction against execution process, based on the prescription of the debt, should not be refused where on the face of the proceedings the debt is prescribed.—*State ex rel. Alexis v. Gaudet (La.)* 328.

The practice of including in one injunction separate seizures made by several creditors can be sanctioned only where no inconvenience can be occasioned and no complication can arise.—*Speyrer v. Miller (La.)* 524.

§ 3. Claims by third persons.

Under Code, § 4141, an affidavit by a claimant of property seized under execution certified by the officer before whom made is sufficient, though not signed by the claimant.—*Albritton v. Williams (Ala.)* 686.

Under Code, § 4145, a mortgagee cannot recover the mortgaged property as against a levy thereon, where he fails to state the nature of his claim in his affidavit.—*Ivey v. Coston (Ala.)* 664.

On trial of right of property, under Code, § 4141, burden of proof determined.—*Eldridge v. Grice (Ala.)* 683.

In trial of right of property, under Code, § 4141, the claimant must recover on the strength of his own title, and not on the want or weakness of title in the defendant in execution; nor can he show, to support his claim, a title paramount to that of defendant in a third person, a stranger to the proceeding.—*Eldridge v. Grice (Ala.)* 683.

In trial of right of property, under Code, § 4141, *held*, that claimant could not recover, as the evidence showed the goods the property of the witness.—*Eldridge v. Grice (Ala.)* 683.

On trial of right of property, under Code, § 4141, fact that defendant had possession of property of another by his own breach of trust *held* of no prejudice to plaintiff.—*Eldridge v. Grice (Ala.)* 683.

§ 4. Sale.

Where the complaint in an action to quiet title alleged the invalidity of a prior sheriff's deed for want of consideration, it was not necessary to offer to redeem.—*Worthington v. Miller (Ala.)* 748.

One claiming title under an invalid sheriff's deed cannot complain of the inadequacy of the price paid by a subsequent execution purchaser.—*Worthington v. Miller (Ala.)* 748.

Title to realty acquired under a judicial sale cannot be collaterally assailed for inadequacy of the purchase price.—*Worthington v. Miller (Ala.)* 748.

Before a sheriff's deed is admissible in evidence to prove title thereunder, a valid judgment and execution must be shown.—*Clem v. Meserole (Fla.)* 815.

Sheriff's sale *held* not void, if, by consent of the parties, the purchaser is allowed to retain the price pending a suit to determine right to proceeds.—*Marx v. Sanders (La.)* 381.

Where a sheriff's term of office expires pending the trial of a suit to determine who is entitled to the proceeds of an execution sale, his successor should carry the suit to completion.—*Marx v. Sanders* (La.) 331.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 2.

§ 1. Appointment, qualification, and tenure.

The validity of plaintiff's appointment as administrator *held* not subject to collateral attack in an action for the wrongful killing of decedent.—*McGhee v. Willis* (Ala.) 301.

The probate court may hear a petition for the revocation of letters testamentary previously granted by it, notwithstanding that a city court has assumed jurisdiction of the administration of the estate.—*Pruett v. Pruett* (Ala.) 638.

Under Code, §§ 52, 53, where within 30 days after probate of the will letters testamentary are granted to several coexecutors, the court had no jurisdiction to grant letters to another coexecutor on application made after the expiration of the 30 days.—*Pruett v. Pruett* (Ala.) 638.

Where application for letters de bonis non showed the applicant had been former administrator, and that his final account had been approved, but did not show his discharge, an appointment was not invalid.—*Henley v. Johnston* (Ala.) 1009.

Where an administrator was afterwards appointed as administrator de bonis non, there was a relinquishment of his former letters.—*Henley v. Johnston* (Ala.) 1009.

A person without pecuniary interest is without standing to oppose the appointment of an administrator.—*Succession of Williams* (La.) 65.

§ 2. Collection and management of estate.

Administrators have no authority to contract to mortgage all the crops grown on the estate to pay a mortgage on the land given by their intestate and future advances.—*Jones v. Peables* (Ala.) 60.

§ 3. Allowances to surviving wife, husband, or children.

Civ. Code, art. 3252, giving a widow left in necessitous circumstances a right to \$1,000 from her husband's succession, does not apply to a faithless wife who has abandoned her husband.—*Richard v. Lazard* (La.) 559.

§ 4. Allowance and payment of claims.

Though an administrator may be bound in his representative capacity on an account stated by him, his mere silence, or failure to object when an account is presented to him, *held* not sufficient to show that he has stated the account.—*Withers v. Sandlin* (Fla.) 829.

A claim of a physician against the estate of a decedent *held* properly reduced from \$803 to \$300.—*Succession of Lacoste* (La.) 181.

A belated creditor, asserting his claim after the homologation of the administrator's account, must prove his claim contradictorily with the heirs or other creditors, and is not entitled to proceed summarily and by rule, or to a trial in the district court during vacation.—*Succession of Jamison* (La.) 381.

Claim for the services of a physician, rendered deceased for six months previous to his death, will be amended so as to allow him a larger compensation.—*Succession of Schmidt* (La.) 413.

Claim for services of a physician for a decedent is privileged, as coming under the head of expenses of a last illness.—*Succession of Schmidt* (La.) 413.

The liability of a surety on a guardian's bond is not a probatable claim, and barred by any limitations relating to such claims.—*Savings Building & Loan Ass'n v. Tart* (Miss.) 115.

§ 5. Distribution of estate.

After a final account of executors showing an amount ready for distribution, they have no interest sufficient to appeal from an order directing distribution.—*Succession of Marks* (La.) 958.

§ 6. Sales and conveyances under order of court.

A public sale of land under order of court by an administrator, properly reported under Code, § 2154, is sufficiently evidenced in writing to constitute a valid sale; and the fact that the auctioneer makes no memorandum is immaterial.—*Culli v. House* (Ala.) 254.

An administrator's sale by order of court is a judicial sale, and therefore misrepresentations by the administrator are no defense to an action by him against a bidder for damages for failing to keep the bid good, as the rule of caveat emptor applies to judicial sales.—*Culli v. House* (Ala.) 254.

The want of confirmation of an administrator's sale of real estate *held*, in consideration of Code, §§ 175, 177, not to be a defense to an action under section 149 against a bidder, failing to keep his bid good.—*Culli v. House* (Ala.) 254.

Under Code, § 158, an application for the sale of lands, failing to indicate with accuracy the section, township, and range in which the lands are located, *held* to invalidate the petition.—*Henley v. Johnston* (Ala.) 1009.

A petition by an administrator for sale of lands *held* to sufficiently show that his deceased had an interest in the lands sought to be sold.—*Henley v. Johnston* (Ala.) 1009.

Under the direct provisions of Code, § 326, the decree of insolvency makes a prima facie case of necessity for a sale of the lands of a decedent.—*Henley v. Johnston* (Ala.) 1009.

In support of the validity of an order of the probate court appointing an administrator de bonis non, it is presumed that the administration was vacant; the probate court being, as to such appointment, a court of general and unlimited jurisdiction.—*Henley v. Johnston* (Ala.) 1009.

Under Code, § 155, an issue as to the validity of an order permitting an administrator de bonis non to sell land involves the validity of his appointment.—*Henley v. Johnston* (Ala.) 1009.

§ 7. Insolvent estates.

Under the express provisions of Code, §§ 2817, 2818, the running of limitations as to a claim against an insolvent estate is suspended at the time of its presentation.—*Christopher v. Stewart* (Ala.) 11.

Statement accompanying objections to claim against a decedent's estate *held* not to show that the objections accrued after the time for filing objections had expired, so as to authorize filing thereof after the time allowed by Code, § 313.—*Christopher v. Stewart* (Ala.) 11.

Failure to file objections to claims against decedent's estate within the time allowed by Code, § 313, cuts off right to object to it except for defenses arising after the time allowed for filing objections has expired.—*Christopher v. Stewart* (Ala.) 11.

An order striking out objections to claims against an insolvent estate on the ground that

the objections had not been filed within the prescribed time is not appealable, within Code, § 453, subd. 6.—*Christopher v. Stewart* (Ala.) 11.

§ 8. Accounting and settlement.

In publication of 10 days' notice of tableau of administrator of a succession, neither the first nor the last day of publication counts.—*Succession of Miller* (La.) 80.

Though a succession was not regularly administered, a judgment to reopen it will not be rendered, where nothing could be accomplished thereby.—*Sallier v. Rosteet* (La.) 383.

On opposition to the account of an administrator, evidence that the judgment of one of the opponents was for a community debt was admissible, when offered to ascertain whether the debt was a community debt or not.—*Frank v. Frank* (La.) 414.

Opposition to a provisional account filed by administrators of a succession must be confined to issues legally arising from the account.—*Succession of Oteri* (La.) 423.

A person is not made party to an accounting by the administrator by calling him as a witness.—*Succession of Oteri* (La.) 423.

§ 9. Sales and conveyances under order of court.

A mortgage creditor, purchasing at succession sale of property on which his mortgage is a lien, can retain the amount of his mortgage, but must give bond to pay to the representative of the succession the amount, if ordered to do so pending the settlement of the succession.—*Succession of Bellow* (La.) 618.

EXEMPLARY DAMAGES.

See "Damages," § 8.

EXEMPTIONS.

See "Homestead."

From license tax, see "Licenses," § 1.

From taxation, see "Taxation," § 2.

Reservation of exempt property affecting validity of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

§ 1. Nature and extent.

A plea of exemption was not available against a judgment creditor in tort seeking to have a transfer of property set aside as fraudulent.—*Taylor v. Dwyer* (Ala.) 500.

The exemption to seizure from debt protects laborers on farms, factories, and other places where workmen possess no particular skill.—*State ex rel. I. X. L. Grocery Co. v. Land* (La.) 433.

Mechanical engineers, electrical engineers, clerks, cashiers, and bookkeepers held not laborers, within St. 1876, No. 79, amending Code Prac. art. 644, exempting from seizure for debt the wages of laborers.—*State ex rel. I. X. L. Grocery Co. v. Land* (La.) 433.

EXHIBITS.

Annexed to pleading, see "Pleading," § 3½.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 10.

In criminal prosecutions, see "Criminal Law," § 12.

FACTORS.

See "Principal and Agent."

When notes given a factor by his principal remain in his hands, and he advances the mon-

ey, he is not entitled to discount.—*Kahn v. Bechel* (La.) 444.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil liability.

A count of a complaint held one in trespass for false imprisonment.—*Davis v. Sanders* (Ala.) 490.

A count of a complaint held not one in case for malicious prosecution.—*Davis v. Sanders* (Ala.) 490.

In an action for false imprisonment, evidence as to the character of plaintiff is immaterial.—*Davis v. Sanders* (Ala.) 490.

FALSE PRETENSES.

Information for obtaining money by false pretenses must describe the property obtained with the same fullness as in an information for larceny of the same property.—*Sullivan v. State* (Fla.) 106.

An information for obtaining property by false pretenses is bad, on motion to quash or in arrest of judgment, for insufficient description of the property.—*Sullivan v. State* (Fla.) 106.

FALSE SWEARING.

See "Perjury."

FEDERAL QUESTIONS.

Ground for removal of cause, see "Removal of Causes," § 1.

FEEES.

Of particular classes of officers or other persons.

See "Clerks of Courts"; "Witnesses," § 1.

Tutor of absentee, see "Absentees."

FELLOW SERVANTS.

See "Master and Servant," § 5.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FIRES.

Caused by operation of railroad, see "Railroads," § 6.

Liability of waterworks company for losses from insufficient water supply, see "Waters and Water Courses," § 2.

FISH.

Under Acts 1808, c. 90, conferring on all persons the right to dredge for oysters in all waters 14 feet deep, an ordinance of a county denying the right of dredging for oysters in such waters with a steam dredge is void.—*Eaton v. State* (Miss.) 2.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 2.

FORCIBLE DEFILEMENT.

See "Rape."

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 2.
Of mortgage, see "Mortgages," §§ 5, 6.

FOREIGN JUDGMENTS.

See "Judgment," §§ 6, 7.

FORGERY.

Under Rev. St. § 863, an indictment charging the altering and uttering of a "bond" will not justify conviction for the uttering of an instrument not in fact a bond.—*State v. Leo (La.)* 447.

Where the alleged falsely altered instrument is not complete on its face, but requires evidence of extrinsic facts to make it such, they must be set out in the indictment.—*State v. Leo (La.)* 447.

FORMER ADJUDICATION.

See "Judgment," § 4.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.
Ground for quashing indictment, see "Indictment and Information," § 4.

FORMS OF ACTION.

See "Detinue"; "Ejectment"; "Trespass," § 1;
"Trove and Conversion."

FORNICATION.

See "Seduction," § 1.

FRANCHISES.

Corporate franchises, see "Corporations," § 1.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

In particular classes of conveyances, contracts, or transactions.

See "Assignments for Benefit of Creditors," § 1;
"Insurance," § 3.

FRAUDS, STATUTE OF.

§ 1. **Promises to answer for debt, default, or miscarriage of another.**

Contracts within statute of frauds (Code, § 2152) are not relieved therefrom by section 1800, creating a prima facie presumption that a contract sued on is supported by a consideration.—*Speer v. Crowder (Ala.)* 658.

§ 2. **Pleading, evidence, trial, and review.**

The failure of the complaint in an action against a railroad company for breach of contract to maintain fences and cattle guards, resulting in the killing of plaintiff's hogs, to allege that the contract was in writing, does not render it subject to demurrer.—*Evans v. Southern Ry. Co. (Ala.)* 138.

Neither objections to evidence nor instructions to the jury are available to give a defendant the benefit of a defense under the statute of frauds.—*Speer v. Crowder (Ala.)* 658.

A plea of statute of frauds *held* to present a material issue, and hence that it should not have been stricken, though it was defective; demurrer being the proper remedy for reaching such defects.—*Speer v. Crowder (Ala.)* 658.

FRAUDULENT CONVEYANCES.

By mortgagor of chattels, see "Chattel Mortgages," § 3.

Conveyances in fraud of wife's right to alimony, see "Divorce," § 2.

§ 1. **Transfers and transactions invalid.**

Where property transferred in consideration of a bona fide debt was not substantially all the property belonging to the debtor, the transaction could not be attacked by creditors.—*Taylor v. Dwyer (Ala.)* 509.

A conveyance *held* to show a fraudulent intent.—*Metcalf v. Arnold (Ala.)* 763.

§ 2. **Rights and liabilities of parties and purchasers.**

Transferees *held* not liable to creditor of transferor.—*Metcalf v. Arnold (Ala.)* 763.

A deed between husband and wife *held* valid as between them, though made to avoid the husband's obligation as an official bondsman.—*Wyatt v. Wyatt (Miss.)* 317.

§ 3. **Remedies of creditors and purchasers.**

In a suit by creditors to set aside attachments by other creditors as fraudulent, evidence *held* insufficient to sustain the averments of fraud.—*Adair v. Feder (Ala.)* 165.

In detinue, presumption of fraud, under Code, § 2150, owing to retention of possession by seller of property sold, *held* not overcome.—*Ward v. Shirley (Ala.)* 489.

A judgment creditor could maintain a bill in equity to set aside a fraudulent transfer of property, which was an impediment to her legal remedy, though she could, by indemnifying the sheriff, take the property from the one to whom it had been transferred.—*Taylor v. Dwyer (Ala.)* 509.

The fact that creditors generally could come into chancery and have a transfer of property made a general assignment did not give one creditor the right to have the transfer declared fraudulent.—*Taylor v. Dwyer (Ala.)* 509.

Averments of a complaint as to want of consideration for a transfer of property by a debtor *held* insufficient, in view of other averments as to the amount of the property.—*Taylor v. Dwyer (Ala.)* 509.

Averments of a complaint *held* sufficient to present a case for relief against a transfer of property by an insolvent debtor to another in secret trust for himself.—*Taylor v. Dwyer (Ala.)* 509.

Averments of a complaint *held* insufficient to support a general averment that the consideration for a transfer of property was inadequate.—*Taylor v. Dwyer (Ala.)* 509.

A complaint averring that an alleged sale was in fact a mortgage to secure a pre-existing debt, and therefore fraudulent as to creditors, *held* sufficient.—*Taylor v. Dwyer (Ala.)* 509.

Answer to bill to set aside conveyance of land as fraudulent *held* too indefinite and insufficient.—*Killian v. Cox (Ala.)* 738.

Under Code, § 818, *held*, that a bill by a creditor to compel fraudulent transferees and their grantees to account need not allege the grantors insolvent.—*Metcalf v. Arnold (Ala.)* 763.

GAME.

See "Fish."

GAMING.

Conclusiveness of award based on gambling contract, see "Arbitration and Award," § 2.

§ 1. Gambling contracts and transactions.

An agreement stipulating a sale of all oranges "my trees may produce in the years 1899, 1900," is not an aleatory contract, within Civ. Code, art. 1778.—*Losecco v. Gregory* (La.) 985.

§ 2. Penalties and forfeitures.

Rev. St. § 2644, prescribing a penalty against one maintaining a gambling apparatus, was not repealed by Act May 28, 1896, § 3.—*Dardem v. State* (Fla.) 924.

§ 3. Criminal responsibility.

Evidence by the state that another person, said to have been in the game of dice, for participating in which defendant was being prosecuted, was summoned as a witness, but was absent from the county, was irrelevant.—*James v. State* (Ala.) 237.

The back yard of a house where intoxicating liquor is sold, and entrance to which is through the back door of the house, is within the prohibition of gaming in Code, §§ 4792, 4797, prohibiting gaming "at" stores where liquor is retailed.—*James v. State* (Ala.) 237.

Evidence held to warrant a conviction for betting at a game of cards played at a place where intoxicating liquors were sold.—*Kicker v. State* (Ala.) 253.

GARNISHMENT.

See "Attachment."

To recover unpaid subscription to corporate stock, see "Corporations," § 3.

§ 1. Persons and property subject to garnishment.

Evidence held insufficient to authorize recovery on foreign attachment.—*Rothrock Const. Co. v. Port Gibson Mfg. Co.* (Miss.) 484.

§ 2. Claims by third persons.

A garnishee, failing to aver in its answer notice of a claim of a third party, held liable.—*Bessemer Sav. Bank v. Anderson* (Ala.) 716.

After ancillary attachment and judgment thereon, trial of an interposed claim held premature, because the record showed no service of the writ of attachment.—*Lamb v. Russel* (Miss.) 916.

§ 3. Operation and effect of garnishment, judgment, or payment.

In an action against a bank for money deposited by plaintiff's husband for her benefit, a defense that the money was paid to a justice in garnishment proceedings in an action against the husband held not good.—*Bessemer Sav. Bank v. Anderson* (Ala.) 716.

GAS.

Where a gas consumer has one set of pipes and a meter, he may, after proper notice to the gas company and compliance with its regulations, discontinue the use of the illuminating gas entirely and use fuel gas.—*State ex rel. Kells v. New Orleans Gaslight Co.* (La.) 179.

GIFTS.

Charitable gifts, see "Charities."

§ 1. Inter vivos.

To constitute a valid gift, there must be a delivery of the thing given.—*Ross v. Walker* (Fla.) 934.

Where an alleged gift consists of a debt evidenced by duebills, and no receipt for the debt

is given, and the duebills are not destroyed or delivered, no valid gift is made.—*Ross v. Walker* (Fla.) 934.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 2; "Vendor and Purchaser," § 2.

GRAND JURY.

See "Indictment and Information."

Under Code, § 5023, the court may, in order to complete a grand jury, summon any number that would increase the jury to not less than 15 nor more than the statutory limit.—*Hall v. State* (Ala.) 750.

Under Code, § 5023, there is no necessity of a drawing by lot, where the number drawn to complete a grand jury would not increase it beyond the statutory limit.—*Hall v. State* (Ala.) 750.

That the prosecuting attorney and presiding judge advised the grand jury to find an indictment, or gave information concerning the law of the case, is not a proper subject for a plea in abatement.—*Hall v. State* (Ala.) 750.

Conduct of prosecuting attorney and presiding judge in advising grand jury to return indictment held not ground for quashing the same.—*Hall v. State* (Ala.) 750.

In view of Code, §§ 5024, 5025, a grand juror may not testify, in support of a motion to quash, that the prosecuting attorney and presiding judge were present in the jury room and urged the jury to find the indictment.—*Hall v. State* (Ala.) 750.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Construction and operation.

Where a party assigns and transfers a promissory note for value, and "guaranties its prompt payment at maturity," the guaranty is an unconditional promise on his own account to pay a sum certain at a definite time.—*Fegley v. Jennings* (Fla.) 873.

An unconditional guarantor of a note cannot compel the guarantee to first resort to the maker for payment.—*Fegley v. Jennings* (Fla.) 873.

Neither presentation of a note to the maker when due, request of him to pay, nor notice of dishonor need be accorded an unconditional guarantor of the note.—*Fegley v. Jennings* (Fla.) 873.

§ 2. Discharge of guarantor.

It is no defense to an unconditional guarantor of a note that a mortgage given to secure the note is not first foreclosed before resort is had to him.—*Fegley v. Jennings* (Fla.) 873.

GUARDIAN AND WARD.

§ 1. Appointment, qualification, and tenure of guardian.

Where a minor marries without the consent of her tutrix, she cannot compel an accounting by the tutrix.—*Guillebert v. Grenier* (La.) 238.

§ 2. Custody and care of ward's person and estate.

Where an undertutor obtains rule against the tutrix to show that proper investment has been made of a minor's funds, the tutrix should

clearly show that the law has been complied with.—*Succession of Buddig* (La.) 361.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

A sheriff, illegally confining a prisoner in the county jail after his conviction of felony, instead of sending him to the penitentiary, cannot justify in habeas corpus by showing that the person was retained in jail at his own wish.—*White v. State* (Ala.) 320.

§ 2. Jurisdiction, proceedings, and relief.

A defendant, convicted of a felony, whose sentence is not suspended, is not entitled to an absolute release on habeas corpus, because he is wrongfully confined in the jail, instead of the penitentiary; but he will be ordered confined in the latter place.—*White v. State* (Ala.) 320.

The court, on proper exercise of discretion, may, on habeas corpus by a father for possession of his child, leave him with another then having his custody.—*Neville v. Reed* (Ala.) 659.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 11. In criminal prosecutions, see "Criminal Law," § 30; "Homicide," § 18.

HEALTH.

§ 1. Boards of health and sanitary officers.

In an action by a physician to recover \$800 per annum for services as county health officer, a verdict against him was held a finding that the reduction of his salary to \$50 was not void as an attempted abolition of the office.—*Perkins v. Panola County* (Miss.) 316.

HEARING.

In probate proceedings, see "Wills," § 2. On appeal or writ of error, see "Appeal and Error," § 8.

HEARSAY EVIDENCE.

In criminal prosecutions, see "Criminal Law," § 10.

HEIRS.

See "Descent and Distribution."

Construction of word as used in deed, see "Deeds," § 2.

HIGHWAYS.

See "Municipal Corporations," §§ 6, 7; "Navigable Waters," § 1.

Accidents at railroad crossings, see "Railroads," § 3.

§ 1. Regulation and use for travel.

Evidence in action against defendant for injuries received by plaintiff's child by a runaway horse owned by defendant held to sustain verdict for defendant.—*Hausser v. Ader* (La.) 366.

HOMESTEAD.

§ 1. Abandonment, waiver, or forfeiture.

Where the owner of land on which he has been living rents it for a series of years, and moves away, without reservation of any part of the dwelling for use as his residence, and without filing a claim of homestead exemption, as provided by Code, § 2065, he thereby aban-

dons his homestead in the premises.—*Bland v. Putman* (Ala.) 616.

§ 2. Protection and enforcement of rights.

On the trial of an issue between the owner of land which has been rented for several years and a judgment creditor to determine whether at the time of renting the owner reserved a part of the dwelling for his use as a residence, his testimony as to the physical condition of his wife is not pertinent and should be excluded.—*Bland v. Putman* (Ala.) 616.

Where land and movables are claimed as a homestead and seized in a justice court, and an injunction is sued out in the district court, the movables may be included in the injunction.—*Speyrer v. Miller* (La.) 524.

HOMICIDE.

§ 1. Murder.

Where the evidence, on a prosecution for murder in the second degree, tended to show a reckless firing by the defendant, a charge that there must have been an intent to kill a human being was properly refused.—*Bailey v. State* (Ala.) 57.

Where insanity is relied on as a defense to murder, the court cannot properly instruct that, though accused could distinguish between right and wrong, he was not guilty, if he was moved to the action by an insane impulse, controlling his will.—*Cawley v. State* (Ala.) 227.

An instruction, on a prosecution for murder, that accused was not guilty if the killing was the product of mental disease, and accused committed the act under circumstances which would be unlawful if he were sane, held properly refused.—*Cawley v. State* (Ala.) 227.

On a prosecution for murder, a charge as to premeditation held proper.—*Ragsdale v. State* (Ala.) 674.

§ 2. Manslaughter.

On a prosecution for murder, under the evidence, an instruction that defendant could not be convicted of second-degree murder or first-degree manslaughter held properly refused.—*Barnes v. State* (Ala.) 670.

On a prosecution for murder, an instruction as to unintentional killing held properly refused, under Cr. Code, § 4342.—*Barnes v. State* (Ala.) 670.

On a prosecution for murder, under the evidence, an instruction to acquit held properly refused.—*Barnes v. State* (Ala.) 670.

On prosecution for murder, an instruction as to conspiracy held properly refused.—*Ferguson v. State* (Ala.) 760.

§ 3. Assault with intent to kill.

On prosecution for assault with intent to murder, instruction making actual deadly potency of weapon a requisite to guilt held properly refused.—*Christain v. State* (Ala.) 64.

Act No. 44 of 1890, providing that whoever shall shoot, stab, cut, or strike any person with a dangerous weapon, with intent to kill, shall be deemed guilty of a crime, is not obnoxious as denouncing as a crime an act which might be an innocent one.—*State v. Sonier* (La.) 175.

An indictment of shooting with a dangerous weapon includes assault with a dangerous weapon.—*State v. Colomb* (La.) 351.

An indictment held to sufficiently charge the offense of assault with intent to commit murder.—*Knight v. State* (Fla.) 110.

Under Rev. St. § 2408, relating to assault with intent to commit any other felony, neither a battery nor a wounding is an essential element of the offense.—*Knight v. State* (Fla.) 110.

§ 4. Excusable or justifiable homicide.

On prosecution for murder, an instruction on self-defense *held* properly refused, because inculcating the repudiated doctrine that if a defendant is in a position of advantage over his adversary, who is about to assault him, he may hold his position, even to the point of slaying his adversary, and make no effort to retreat, although his danger is not increased thereby.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, under the evidence, an instruction *held* properly refused, because open to a construction not placing duty of retreat on defendant.—*Mitchell v. State* (Ala.) 132.

Instruction as to effect of apprehension of imminent danger caused by demonstrations of the deceased, or by threats coupled with his acts or declarations, *held* properly refused.—*Jimmerson v. State* (Ala.) 141.

A requested charge in homicide that defendant had the same right to act in self-defense as if he had been first attacked, even though the evidence shows that deceased had attacked defendant's brother, and defendant had interfered to prevent a further attack, is erroneous.—*Stevens v. State* (Ala.) 270.

Where the defense is self-defense, it is proper to charge that, if the defendant fought to gratify his passion, he could not be acquitted on the plea of self-defense.—*Sanders v. State* (Ala.) 654.

On a prosecution for murder, an instruction *held* bad, in that it charged in effect that a probable belief in a necessity to kill would constitute self-defense.—*Mann v. State* (Ala.) 704.

While the danger justifying homicide may be apparent only, yet, unless the circumstances are such as to induce a reasonably cautious man to believe that the killing was necessary, the apparent danger is no defense, though the slayer acted in good faith.—*Lane v. State* (Fla.) 896.

Instruction in a homicide case on self-defense *held* erroneous.—*Lane v. State* (Fla.) 896.

A homicide is justifiable when there is a reasonable ground to apprehend a design to commit a felony or do great personal injury, and imminent danger of such design being accomplished.—*Lane v. State* (Fla.) 896.

§ 5. Indictment and information.

An indictment charging in one count the murder of six persons *held* not bad for duplicity.—*State v. Batson* (La.) 478.

§ 6. Evidence—Admissibility in general.

On a prosecution for murder in the second degree, examination in rebuttal *held* competent to show surrounding facts and circumstances.—*Bailey v. State* (Ala.) 57.

When defendant introduces no evidence of the bad character of deceased, evidence of his threats to kill defendant, and that deceased had illicit intercourse with defendant's wife, does not entitle the state to show the good character of deceased.—*Jimmerson v. State* (Ala.) 141.

Evidence of former difficulties between defendant and deceased *held* not admissible on trial for homicide.—*Jimmerson v. State* (Ala.) 141.

The defendant, against whom deceased is claimed to have made threats, may be asked on cross-examination if he had not heard, prior to the killing, that deceased was going to leave the neighborhood.—*Jimmerson v. State* (Ala.) 141.

Where defendant testifies that he had sworn out a warrant against deceased prior to the homicide, and that deceased was placed under bonds to appear before the grand jury, evidence

that defendant so acted under advice of counsel is inadmissible.—*Jimmerson v. State* (Ala.) 141.

On a prosecution for murder, *held* error to exclude testimony by accused that deceased was in the habit of carrying a pistol.—*Cawley v. State* (Ala.) 241.

On a prosecution for murder, *held* competent to question a witness as to obstructions preventing a person leaving deceased's house from being seen, as showing that accused saw deceased as he went along the road from his house.—*Cawley v. State* (Ala.) 227.

In a prosecution for murder, evidence that a few days before the killing defendant threatened to kill deceased is admissible to show malice.—*Richardson v. State* (Ala.) 249.

Evidence that an assault with intent to kill was made in defense of a third person *held* inadmissible, where such third person had voluntarily entered into the quarrel.—*Surginer v. State* (Ala.) 277.

Where the evidence was circumstantial, the state could show that the deceased had had a difficulty with defendant's brother on the day previous to the killing.—*Sanders v. State* (Ala.) 654.

The state could show that, after a difficulty on the day previous between defendant and deceased, defendant and his brother had returned to the place where deceased was shot, armed with pistols.—*Sanders v. State* (Ala.) 654.

On a prosecution for murder, evidence of a statement by defendant that he would kill deceased if she did not do what he wanted her to, was admissible.—*Barnes v. State* (Ala.) 670.

On a prosecution for murder, where defendant was the aggressor, evidence that deceased had previously threatened him *held* inadmissible.—*Ragsdale v. State* (Ala.) 674.

On prosecution for murder, *held* proper to exclude evidence that defendant had said something to his wife about her not associating with the wife of deceased.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, certain testimony *held* admissible in the rebuttal of defendant's testimony.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, certain testimony *held* admissible, as showing malice and formed design, and that the shooting had not been in self-defense.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, testimony tending to account for defendant's not being a more robust man *held* properly excluded.—*Mann v. State* (Ala.) 704.

Where accused, on trial for murder, had left certain things in the hands of a citizen and disappeared, and among them was a vest supposed to belong to the accused, in the pocket of which was a document signed in accused's name, *held*, that the vest and the document were properly admitted as circumstantial evidence, without proof of the handwriting or signature of such instrument.—*State v. Batson* (La.) 478.

On a prosecution for murder, *held* error to admit evidence relative to a pair of overalls in the possession of the state, said to have been found near defendant's place of business, and to bear blood stains and have the appearance of having been washed.—*Johnson v. State* (Miss.) 49.

On the trial of defendant, accused of the murder of a revenue officer, the admission of evidence that he stated, a year before, after an officer had been shot, that, "if they didn't quit bothering out there, there would be more of them shot; that he didn't mean that he would do it, but it would be done," *held* error.—*Owens v. State* (Miss.) 152.

§ 7. — Dying declarations.

Declarations of one in extremis *held* admissible as dying declarations.—*Milton v. State* (Ala.) 653.

A dying declaration must go in as a whole, and is not inadmissible because some of its statements of themselves would be inadmissible.—*State v. Carter* (La.) 183.

§ 8. — Proceedings at inquest.

The *procès verbal* of the coroner's inquest is admissible in evidence on a trial for murder, to show the death and the cause thereof.—*State v. Baptiste* (La.) 371.

§ 9. Trial.

Evidence *held* to require submission of the question of defendant's guilt to the jury.—*Richardson v. State* (Ala.) 249.

Evidence *held* not to show as a matter of law that defendant acted in self-defense.—*Richardson v. State* (Ala.) 249.

On a prosecution for murder, an instruction that defendant was entitled to an acquittal on his own testimony *held* properly refused.—*Mann v. State* (Ala.) 704.

On prosecution for murder, question of conspiracy *held* one for jury.—*Ferguson v. State* (Ala.) 760.

On prosecution for murder, an instruction *held* properly refused, because, as applicable to the case, it assumed the slayer free from fault in bringing on the difficulty.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, an instruction on self-defense *held* properly refused, because it did not hypothesize the belief of defendant that he was in imminent peril.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, an instruction *held* properly refused, as not clearly stating the doctrine of imminency of peril.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, an instruction *held* properly refused, if for no other reason, because it ignored any reference to defendant's part in commencing the difficulty.—*Mitchell v. State* (Ala.) 132.

On prosecution for murder, instructions that, under certain facts hypothesized, defendant was not the aggressor, *held* properly refused.—*Mitchell v. State* (Ala.) 132.

A requested instruction as to reasonable doubt *held* erroneous.—*Jimmerson v. State* (Ala.) 141.

An instruction as to self-defense, which ignores the doctrine of escape, is erroneous.—*Jimmerson v. State* (Ala.) 141.

A requested instruction as to self-defense *held* erroneous, as argumentative, misleading, ignoring the doctrine of escape, and not hypothesizing the reasonable belief of defendant that he was in peril.—*Jimmerson v. State* (Ala.) 141.

§ 10. — Instructions.

Requested instructions on self-defense *held* erroneous.—*Jimmerson v. State* (Ala.) 141; *Scott v. State* (Ala.) 623.

On a prosecution for murder, *held* proper to refuse an instruction that under certain circumstances accused was authorized to anticipate deceased and fire first.—*Cawley v. State* (Ala.) 227.

On a prosecution for murder, an instruction *held* erroneous as assuming that certain postulated facts created imminent peril, and so invading the province of the jury.—*Cawley v. State* (Ala.) 227.

Where there is evidence of a conspiracy between defendants in homicide, who were armed with pistols, and their father, who used a

rifle, a requested charge that defendant must be acquitted if deceased was killed with a rifle ball is erroneous for omitting any reference to the conspiracy.—*Stevens v. State* (Ala.) 270.

A requested charge on self-defense *held* not to sufficiently hypothesize freedom from fault in bringing on the difficulty.—*Watkins v. State* (Ala.) 627.

A requested charge on self-defense *held* erroneous in ignoring freedom from fault in bringing on the difficulty.—*Watkins v. State* (Ala.) 627.

A requested charge on self-defense *held* erroneous in not submitting to the jury whether the facts were sufficient to show imminent peril to life or limb.—*Watkins v. State* (Ala.) 627.

Instruction, on a prosecution for murder, that if defendant's brother shot deceased defendant was not guilty, *held* properly refused.—*Sanders v. State* (Ala.) 654.

Held proper to charge that, if defendant unlawfully and with malice aforethought killed deceased, defendant was guilty.—*Sanders v. State* (Ala.) 654.

Instruction as to self-defense *held* faulty.—*Sanders v. State* (Ala.) 654.

On a prosecution for murder, an instruction *held* properly refused, in that it charged on the right to kill in self-defense, without instructing as to the constituents thereof.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, *held* proper to refuse an instruction because it pretermitted all reference to the duty of retreat, where retreat will not increase the peril.—*Mann v. State* (Ala.) 704.

On prosecution for murder, certain instructions *held* properly refused, for that they pretermitted the doctrine of retreat.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, an instruction *held* properly refused, in that it pretermitted the doctrine of retreat.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, an instruction *held* properly refused, because it required an acquittal unless the jury should believe that defendant provoked the difficulty.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, an instruction *held* properly refused, for that it would have authorized an acquittal on the ground of self-defense, though the jury might have found that defendant could have retreated in safety.—*Mann v. State* (Ala.) 704.

Instruction in a homicide case on self-defense *held* not cured by other instructions.—*Laue v. State* (Fla.) 896.

Instruction, in prosecution for homicide, as to the effect of proof of threats by deceased prior to the killing, *held* erroneous.—*Lane v. State* (Fla.) 896.

An instruction that, to establish self-defense, the accused must "satisfy the jury" that his action was necessary, etc., is erroneous as imposing on the accused too great a burden of proof.—*Lane v. State* (Fla.) 896.

The giving of an instruction in a prosecution for murder, and refusal of an instruction requested, which limited the jury to the fact that deceased was shot in the back, without allowing them to consider how he came to be so shot, *held* reversible error.—*Sullivan v. State* (Miss.) 2.

Facts *held* to call for an instruction on manslaughter.—*Strickland v. State* (Miss.) 921.

An instruction that it is murder to kill under certain circumstances, though there was no design to kill any particular person, *held* inappli-

cable to the facts.—*Strickland v. State* (Miss.) 921.

An instruction, in a prosecution for homicide, that the jury should find defendant guilty of manslaughter, unless they convicted him of murder, *held* erroneous.—*Woods v. State* (Miss.) 998.

§ 11. — Verdict.

The verdict in a prosecution for murder, though not in proper form, *held* sufficient to support the judgment.—*Durrett v. State* (Ala.) 234.

A written verdict in homicide, considered in connection with an oral examination of the jury, *held* sufficient to sustain a judgment of conviction.—*Stevens v. State* (Ala.) 270.

A verdict *held* to sufficiently find defendant guilty of manslaughter in the first degree.—*Watkins v. State* (Ala.) 627.

§ 12. New trial.

Newly discovered evidence *held* to entitle defendant, convicted of murder, to a new trial.—*Buckner v. State* (Miss.) 920.

§ 13. Appeal and error.

On appeal from a conviction of manslaughter under an indictment for murder, the refusal of instructions having reference to murder requires no consideration.—*Mitchell v. State* (Ala.) 132.

On a prosecution for murder, an instruction as to burden of proof of self-defense, though erroneous, *held* harmless, where defendant was the aggressor.—*Ragsdale v. State* (Ala.) 674.

§ 14. Sentence and punishment.

Prior to sentencing defendant in a capital case, he should be asked whether he had anything to say why sentence should not be pronounced against him.—*State v. Ikenor* (La.) 74.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Curtesy"; "Divorce"; "Marriage."

Adultery, see "Adultery."

Competency as witnesses, see "Witnesses," § 2. Rights of survivor, see "Executors and Administrators," § 3.

§ 1. Conveyances, contracts, and other transactions between husband and wife.

Where immovable property purports to have been sold by a husband to his wife for a certain sum, the title is invalid on its face, the apparent consideration not being within the exceptions provided by Civ. Code, art. 2446, and the property is liable for the husband's debts.—*Rush v. Landers* (La.) 95.

The validity of a conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other in respect thereto, are to be determined by the laws of Louisiana.—*Rush v. Landers* (La.) 95.

A sale of immovables between husband and wife can be made only in the cases and for the consideration as provided in Civ. Code, art. 2446, and the burden of proof rests upon the party seeking to maintain the validity of the sale.—*Rush v. Landers* (La.) 95.

Where, on conveyance of immovables by a husband to his wife, the claim is made that the consideration was a debt for money belonging to the wife used by the husband, it must be shown, where the parties are domiciled in another state, that by reason thereof the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that

the property was conveyed in consideration of such debt.—*Rush v. Landers* (La.) 95.

Where a husband, domiciled in another state, conveys property to his wife for a debt, whether the husband becomes the debtor of the wife by taking and using her property depends upon the law of the domicile.—*Rush v. Landers* (La.) 95.

Under the provisions of Code 1880, Const. 1890, and Code 1892, a contract is valid whereby a wife for a sufficient consideration releases all claims on her husband's estate.—*Wyatt v. Wyatt* (Miss.) 817.

§ 2. Wife's separate estate.

Where a wife executed a mortgage of her property to secure her husband's debt, believing that the mortgage was on his property, she is not estopped to assert the invalidity of the mortgage.—*Russell v. Peavy* (Ala.) 492.

A mortgage by a married woman of her property to secure her husband's debt *held* void.—*Russell v. Peavy* (Ala.) 492.

Under facts, *held*, that husband's creditor was entitled to subject to his debt substituted certificates belonging to the wife; the wife having consented to the original pledge in the manner prescribed by Const. 1895, art. 11, § 1.—*Springfield Co. v. Ely* (Fla.) 892.

Under the express provisions of Const. 1885, art. 11, § 1, a married woman's consent that her separate property shall be liable for her husband's debts must be in writing and executed according to the law respecting married women's conveyances.—*Springfield Co. v. Ely* (Fla.) 892.

The presence of the husband temporarily in the state is not the presence of the wife, required by Civ. Code, art. 2437, to enable her to sue for separation of property.—*Carter v. Morris Building & Land Imp. Ass'n* (La.) 473.

Where a wife has never returned to the place of matrimonial domicile, she is not authorized to sue her husband for separation of property; she not having complied with Rev. Civ. Code, art. 2437.—*Carter v. Morris Building & Land Imp. Ass'n* (La.) 473.

The courts are without jurisdiction to grant to husband and wife, not residing within the state, a decree of separation of property.—*Carter v. Morris Building & Land Imp. Ass'n* (La.) 473.

§ 3. Community property.

A policy of life insurance, issued to a married man during the existence of the community, *held* to fall into the community, and not into the separate, estate at his death.—*Succession of Buddig* (La.) 361.

§ 4. Separation and separate maintenance.

The amount received by a wife in consideration of release of all claims on her husband's estate *held* sufficient to support the transaction.—*Wyatt v. Wyatt* (Miss.) 317.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

IMPANELING JURY.

See "Jury," § 5.

IMPEACHMENT.

Of witness, see "Witnesses," § 4.

IMPLIED CONTRACTS.

See "Account Stated"; "Money Paid"; "Work and Labor."

IMPRISONMENT.

See "False Imprisonment."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 4.

INCOMPETENT PERSONS.

See "Insane Persons."

INDEMNITY.

See "Guaranty"; "Principal and Surety."

INDICTMENT AND INFORMATION.

See "Grand Jury."

For particular offenses.

See "False Pretenses"; "Forgery"; "Homicide," § 5; "Larceny," § 2; "Perjury," § 1; "Rape," § 2; "Receiving Stolen Goods"; "Robbery."

Assault with intent to kill, see "Homicide," § 3.

Injuring animals, see "Animals."

§ 1. Finding and filing of indictment or presentment.

The weight of the evidence on which the grand jury acted in finding an indictment cannot be inquired into.—Hall v. State (Ala.) 750.

The oversight of a district attorney in not signing an indictment was not fatal to it.—State v. Williams (La.) 172.

§ 2. Requisites and sufficiency of accusation.

An indictment for larceny was not bad, because it failed to aver the Christian name of the owner of the stolen property.—Lowe v. State (Ala.) 273.

An indictment for larceny was not bad because it failed to aver the Christian name of the owner of the stolen property, and that such Christian name was unknown to the grand jury.—Crittenden v. State (Ala.) 273.

Where, in an indictment, the name of accused is given, followed by "alias" and another name, "alias" stands for "alias dictum," and indicates, not that the person referred to is called by both names, but that he is called by one or the other.—Ferguson v. State (Ala.) 760.

An indictment must state the county within which the offense was committed.—McKinnie v. State (Fla.) 786.

Where a statute creates an offense, and sets out the facts constituting it, it may be sufficiently charged in the language of the statute.—State v. Sonier (La.) 175.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

An indictment which charged two offenses, both a part of the same transaction, was not bad for duplicity.—Crittenden v. State (Ala.) 273.

Under Code, § 4913, an indictment for larceny charging two offenses of the same character held not bad for duplicity.—Lowe v. State (Ala.) 273.

Where an indictment for robbery contained three counts, charging the taking in the first of 30 cents, in the second of a bunch of keys, and in the third of a knife, the state could not be required to elect.—Nevill v. State (Ala.) 596.

An indictment against two for homicide, charging that "each of his malice aforethought" did then and there kill deceased, held sufficient.—Woods v. State (Miss.) 998.

§ 4. Motion to quash or dismiss, and demurrer.

A motion to quash an indictment on the ground that it was found upon illegal and incompetent evidence, and that the witnesses were not sworn according to law, was properly overruled, where no evidence was offered to sustain such allegations.—Edson v. State (Ala.) 308.

Former jeopardy furnishes no ground for quashing an indictment, but should be specially pleaded, before the plea of not guilty.—Johnson v. State (Ala.) 724.

Motion to quash should be before plea to indictment.—Johnson v. State (Ala.) 724.

§ 5. Amendment.

An amendment of a count in an indictment so as to charge the offense against the defendant in the same name as used in the first count, held properly granted, under Code, § 1435.—Orr v. State (Miss.) 998.

§ 6. Issues, proof, and variance.

On prosecution for assault and battery, held proper to refuse certain instructions, requested by defendant, relative to alleged variance between indictment and proof.—Walker v. State (Ala.) 703.

On prosecution for assault and battery, held proper to deny a motion to exclude testimony of one assaulted on ground she was not one named in indictment.—Walker v. State (Ala.) 703.

Facts held to show no variance between indictment for perjury and evidence.—Bradford v. State (Ala.) 742.

Under an information charging defendant with receiving stolen property, acts and declarations of the thief, made at the time of, and in connection with, and tending to prove, the larceny, are admissible.—Anthony v. State (Fla.) 818.

§ 7. Conviction of offense included in charge.

Under an indictment for robbery, there may be a conviction for assault with intent to rob, for larceny, for attempt to rob, for assault, or for an assault and battery.—Rambo v. State (Ala.) 650.

On a prosecution for robbery, accused may be convicted of an assault with intent to rob.—Cook v. State (Ala.) 696.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Guardian and Ward."

Competency as witnesses, see "Witnesses," § 2.

§ 1. Disabilities in general.

A minor's marriage without the consent of her tutrix, though in every respect legal, will not emancipate her from disabilities of minority.—Guillebert v. Grenier (La.) 238.

§ 2. Property and conveyances.

Mere silence, without any positive act, does not amount to an affirmation of a deed executed by an infant.—Shipp v. McKee (Miss.) 281.

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

Review of order of dissolution, see "Appeal and Error," § 1.

Restraining particular acts or proceedings.

Execution, see "Execution," § 2.

Taking or injury to property for public use, see "Eminent Domain," § 4.

§ 1. Nature and grounds in general.

On appeal from refusal to dissolve temporary injunction against encroachment on a city street by a building, relative degree of injury to parties from grant or refusal of injunction held immaterial.—*First Nat. Bank v. Tyson* (Ala.) 144.

§ 2. Subjects of protection and relief.

Pending action by the state to determine the validity of a corporate organization, it has the right to have all matters held in abeyance by an injunction.—*State v. New Orleans Debenture Redemption Co.* (La.) 102.

Where a contractor undertakes to build a railroad, the fact that he has assembled materials which he contemplates using gives the other contracting party no right to enjoin him from moving it elsewhere.—*Cameron v. Orleans & J. Ry. Co.* (La.) 208.

The fact that a contractor has assembled certain material for the purposes of the contract does not entitle the other party to an injunction to prohibit the contractor from removing the same.—*Orleans & J. Ry. Co. v. International Const. Co.* (La.) 218.

§ 2½. Actions for injunctions.

An affidavit for injunction in the words, "I swear that all the facts contained in the foregoing petition are true," is sufficient.—*Speyrer v. Miller* (La.) 524.

§ 3. Preliminary and interlocutory injunctions.

Where the amount in which bond should be given has not been fixed by the judge, the injunction must be dissolved.—*Speyrer v. Miller* (La.) 524.

Statutory damages on dissolution will not be allowed, where the court cannot say that the equitable remedy of injunction has been abused.—*Speyrer v. Miller* (La.) 524.

An order requiring a bond to be given each of the defendants is not complied with by giving bond in favor of the defendants jointly.—*Speyrer v. Miller* (La.) 524.

Under Code 1892, § 557, a preliminary mandatory injunction requiring an electric light company to remove its poles from a public thoroughfare should not issue, unless there can be no reasonable doubt of its propriety.—*Gulf Coast Ice Mfg. Co. v. Bowers* (Miss.) 113.

§ 4. Liabilities on bonds on undertakings.

Under Code, § 788, a right of action on an injunction bond accrues on dissolution of the preliminary injunction.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

Attorney's fees for resisting an effort to have a decree dissolving an injunction set aside are recoverable on the injunction bond.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INQUEST.

Of coroner, see "Homicide," §§ 6-8.

INSANE PERSONS.

Insanity as defense in criminal prosecution, see "Criminal Law," § 1; "Homicide," § 1.

§ 1. Actions.

Where a curator for a co-owner, who is interdicted, refuses to qualify, the other co-owners may, for the purpose of partition, provoke the appointment of a special curator to represent his interests.—*Sallier v. Rostet* (La.) 388.

INSANITY.

Effect on criminal responsibility, see "Criminal Law," § 1; "Homicide," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporation, see "Corporations," § 5.

Of decedent, see "Executors and Administrators," § 7.

INSTRUCTIONS.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 21; "Homicide," § 10.

INSURANCE.**§ 1. The contract in general.**

Facts stated under which held, that an insurance policy would be reformed in equity, so as to make it payable to the insured's heirs, and that recovery could be had thereon in equity as part of the reformation suit.—*Taylor v. Glens Falls Ins. Co.* (Fla.) 887.

Where a fire insurance policy is made payable to the holder of the legal title, who is dead at the time of its execution, no recovery can be had at law by his heirs without a reformation in equity.—*Taylor v. Glens Falls Ins. Co.* (Fla.) 887.

Facts stated under which held, that a limitation in an insurance policy on bringing suit was avoided, and that suit in equity to reform the policy could be maintained.—*Taylor v. Glens Falls Ins. Co.* (Fla.) 887.

The failure of an insured to read the policy, even though he has an opportunity therefor, is not such laches as will preclude him from having the policy reformed for mistake.—*Taylor v. Glens Falls Ins. Co.* (Fla.) 887.

§ 2. Cancellation, surrender, abandonment, or rescission of policy.

Facts stated under which held, that an attempted cancellation of an insurance policy was a nullity, and the insurance company liable.—*Taylor v. Glens Falls Ins. Co.* (Fla.) 887.

§ 3. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Plea held not to show that statements of insured were made warranties.—*Mutual Ben. Life Ins. Co. v. Lehman* (Ala.) 733.

§ 4. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Conditions under which part payment of insurance money is waiver of breach of warranty considered.—*Mutual Ben. Life Ins. Co. v. Lehman* (Ala.) 733.

§ 5. Extent of loss and liability of insurer.

Under Laws 1894, c. 63, § 1, as amended by Laws 1896, c. 56, when a stock of goods is burned, insured may recover the full amount of the loss, not exceeding the face of the policy, notwithstanding stipulations to the contrary in the policy.—*Hartford Fire Ins. Co. v. Shlenker (Miss.)* 155.

§ 6. Notice and proof of loss.

By unconditionally denying any liability whatsoever on its policy, a fire insurance company, on the destruction of the property, waives the proofs of loss required by the policy.—*Taylor v. Glens Falls Ins. Co. (Fla.)* 887.

§ 7. Adjustment of loss.

The burden of proving that an arbitrator appointed by the insurer was not disinterested *held* to be on the insured in an action on a policy containing an arbitration clause.—*Hall v. Western Assur. Co. (Ala.)* 257.

The question whether an insurer knew of the disqualification of an arbitrator at the time he appointed him, and of the insured's knowledge thereof, *held* for the jury under the evidence.—*Hall v. Western Assur. Co. (Ala.)* 257.

Evidence *held* to require the submission to the jury of the question whether an arbitrator appointed by the insurer was disinterested.—*Hall v. Western Assur. Co. (Ala.)* 257.

§ 8. Actions on policies.

An agreement between insurer and insured to submit differences to a board of arbitration *held* not to preclude an action on the policy.—*Hall v. Western Assur. Co. (Ala.)* 257.

Under Code, c. 85, §§ 2323, 2327, service of process on a soliciting agent *held* good service on a foreign insurance company.—*Pervanger v. Union Casualty & Surety Co. (Miss.)* 909.

§ 9. Mutual benefit insurance.

Where a benefit certificate was for the payment of \$3,000 to the wife and \$100 for a monument for insured, without specifying to whom the \$100 was payable, but the rules of the society required it to be paid to the contractor employed to do the work, it was error, in an action by the wife, to award her a judgment for \$3,100.—*Sovereign Camp Woodmen of the World v. Woodruff (Miss.)* 4.

An insured, who had waived claims for death from smallpox, *held* entitled to an amendment in the constitution making the waiver binding only until successful vaccination; the insured meanwhile having been successfully vaccinated.—*Sovereign Camp Woodmen of the World v. Woodruff (Miss.)* 4.

The term "successful vaccination," in an insurance policy, *held* to mean only vaccination which had "taken," and not only such as had rendered the insured absolutely immune from smallpox.—*Sovereign Camp Woodmen of the World v. Woodruff (Miss.)* 4.

Where defendant insurance company called as witness a physician who testified that insured had been successfully vaccinated, and he was not questioned further on that point, and there was no evidence to the contrary, it was sufficient to support a finding of successful vaccination.—*Sovereign Camp Woodmen of the World v. Woodruff (Miss.)* 4.

In action on life policy, evidence *held* to show party was over 54 when he made his application, contrary to his representations, and that a peremptory instruction should have been given for defendant.—*Supreme Conclave Knights of Damon v. Saylor (Miss.)* 50.

Evidence of suicide *held* such as to make direction of verdict for defendant in action on a benefit certificate proper.—*Fletcher v. Sovereign Camp Woodmen of the World (Miss.)* 923.

INTENT.

As element of crime, see "Burglary," § 1; "Homicide," § 1.

INTEREST.

See "Usury."

Effect as to credibility of witness, see "Witnesses," § 4.

On unpaid license tax, see "Licenses," § 1.

§ 1. Rights and liabilities in general.
A debt payable out of a fund yet to be collected *held* not due, in the sense that it draws interest from the time when it is due until the fund is collected.—*Begué v. Hubert (La.)* 333.

§ 2. Time and computation.

Where duebills are given for money loaned, with no time of payment or rate of interest mentioned, *held*, that interest should be computed from the time of demand.—*Ross v. Walker (Fla.)* 984.

Where legal tender has been made of the true amount due as alleged by defendant, no interest is owing thereafter on such amount.—*Frey v. Fitzpatrick-Cromwell Co. (La.)* 437.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.
Review on appeal or writ of error, see "Appeal and Error," §§ 9-12.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTERVENTION.

In attachment proceedings, see "Attachment," § 2.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Evidence of other offenses, see "Criminal Law," § 9½.

Laws prohibiting gaming where intoxicating liquor is sold, see "Gaming," § 3.

§ 1. Power to control traffic.

Acts 1900-01, p. 288, establishing a dispensary in Florence, *held* unconstitutional, because the commissioners and managers had a pecuniary interest in the business.—*Mitchell v. State (Ala.)* 687; *Powers v. City of Florence, Id.*

A city ordinance prohibiting the sale of liquor, except as provided in an invalid dispensary act, is also invalid.—*Mitchell v. State (Ala.)* 687; *Powers v. City of Florence, Id.*

Acts 1900-01, p. 288, establishing a dispensary in Florence, *held* unconstitutional as being an unlawful delegation of legislative power.—*Mitchell v. State (Ala.)* 687; *Powers v. City of Florence, Id.*

§ 2. Licenses and taxes.

Under Acts 1893, c. 4115, § 9, *held*, that money voluntarily paid to tax collectors by a liquor dealer on account of a license tax could not be recovered from the officer, though no license was ever issued, and the dealer ceased business before the expiration of the license year.—*Johnson v. Atkins (Fla.)* 879.

Where, under the law, license may be imposed on retail liquor business, either for revenue, or as a police regulation, where it is imposed by the same ordinance as licenses for revenue, it will not be held to constitute a police regulation, and valid, while the others will be held intended for revenue, and invalid for sufficient notice.—*Swords v. Daigle* (La.) 94.

Under Acts 1894, p. 29, state revenue agent held to be the proper party to bring certain suit against sureties on liquor dealer's bond.—*Adams v. Cox* (Miss.) 117.

Certain compromise of suit on liquor dealer's bond held void, under Code 1892, § 1582.—*Adams v. Cox* (Miss.) 117.

§ 3. Offenses.

A conviction for selling liquors to a person of known intemperate habits cannot be had, unless defendant is shown to have made the sale with knowledge that the purchaser was intemperate.—*McCormack v. State* (Ala.) 268.

One who purchases whisky for another in a quantity less than a gallon held guilty of the illegal sale.—*Wortham v. State* (Miss.) 50.

One who purchases whisky for another in a quantity less than a gallon held to act as a principal, both as to him and the seller; the act of delivery making him guilty of the sale.—*Wortham v. State* (Miss.) 50.

On a prosecution for selling whisky in a quantity less than a gallon, an instruction which failed to refer to the spirit with which the acts constituting the sale were done was not erroneous.—*Wortham v. State* (Miss.) 50.

§ 4. Criminal prosecutions.

On the trial of one charged with selling liquor without a license, a request to charge that there is no presumption that defendant was a man who had liquor to sell held properly refused.—*Winter v. State* (Ala.) 125.

On the trial of one charged with selling liquor without a license, an instruction as to defendant's conduct being a subterfuge to sell his own whisky, or as to his acting as agent for another, considered, and held not error.—*Winter v. State* (Ala.) 125.

Certain evidence in a prosecution for the sale of liquor to an intemperate person held admissible, as showing his habits and the defendant's knowledge thereof.—*McCormack v. State* (Ala.) 268.

An instruction, in a prosecution for the illegal sale of liquor, that the sale must be shown to the satisfaction of the jury, is erroneous, as requiring too high a degree of proof.—*McCormack v. State* (Ala.) 268.

IRRIGATION.

See "Waters and Water Courses," § 2.

ISSUES.

In civil actions, see "Equity," § 2.

In criminal prosecutions, see "Indictment and Information," § 6.

JAILS.

See "Prisons."

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 4.

JOINDER.

Of causes of action, see "Action," § 1.

Of offenses in indictment, see "Indictment and Information," § 3.

Of parties in indictment, see "Indictment and Information," § 3.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

JUDGMENT.

Decisions of courts in general, see "Courts," § 1. Enforcement by creditors' suit, see "Creditors' Suit."

Presumptions as to validity, see "Evidence," § 2. Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

In particular civil actions or proceedings.

See "Attachment," § 1; "Divorce," § 8; "Ejectment," § 2.

Decree in equity, see "Equity," § 6.

On appeal or writ of error, see "Appeal and Error," § 13.

On insurance policy, see "Insurance," § 9.

In criminal prosecutions.

See "Criminal Law," § 24.

§ 1. On consent, offer, or admission.

Where defendant in his answer admits part of the account, plaintiff may take judgment for such amount and prosecute his suit for the remainder.—*Frey v. Fitzpatrick-Cromwell Co.* (La.) 437.

Where defendants admit a certain amount due and allege a legal tender, which was refused, held error to include in the judgment for the amount admitted interest until paid.—*Frey v. Fitzpatrick-Cromwell Co.* (La.) 437.

§ 2. On trial of issues.

Any error in taking judgment against the "A. F. O. Co., Limited," instead of the "F. C. Co., Limited," will not vitiate the judgment, where that was the name given the corporation by its counsel in the indorsement on their answer.—*Frey v. Fitzpatrick-Cromwell Co.* (La.) 437.

§ 3. Equitable relief.

Defendant held not entitled to enjoin the execution of a judgment in favor of plaintiff in a petitory action, which is unconditional as to ownership and right of possession.—*City of New Orleans v. Bilgery* (La.) 429.

§ 3½. Merger and bar of causes of action and defenses.

To sustain *res judicata*, the cause of action must be identical with that declared on in the former suit, whose judgment is pleaded in bar.—*Baer v. Terry* (La.) 353.

A judgment in an action on a petition, alleging that certain money was paid to R. and wife in paying certain claims, is a bar to a judgment in a second action, where the petition states that the money was advanced to R., acting on his own behalf and in behalf of his wife.—*Aiken v. Robinson* (La.) 415.

§ 4. Conclusiveness of adjudication.

Judgment in garnishment proceedings held *res judicata* of the right of a judgment creditor of the corporation to subject certain unpaid stock subscriptions to the satisfaction of his judgment.—*Henderson v. Hall* (Ala.) 840; *Hall v. Henderson*, Id.

No alienee, grantee, assignee, or mortgagee is bound or affected by judgment or decree rendered in a suit by or against his alienor, grantor, etc., commenced subsequent to the alienation, grant, etc., and to which he is not a party.—*Austin v. Hoxsie* (Fla.) 878.

A writ of error to review denial of mandamus to compel public officers to perform an alleged

contract will be dismissed, where in other cases the court has decided that no valid contract exists.—*Camp v. Jennings* (Fla.) 984.

Under Civ. Code, art. 2286, an action by the state to recover a license from the defendant for carrying on a business as a sugar refiner in the years 1898 and 1899 was a different action from one to collect the license for the years 1900 and 1901, so that the judgment in the first case was not res judicata in second.—*State v. American Sugar Refining Co.* (La.) 965.

The principles involved in an action seeking to subject certain railroads to taxation for certain years *held* not to have been rendered res judicata by previous decisions on the same legal questions, in litigation involving the taxes for other years.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 987.

§ 5. Lien.

Under Acts 1898-99, pp. 34, 35, the registry in the office of the probate judge of a certificate of the clerk of court of the entry of a judgment, specifying the date, parties, amount, and attorneys, though not stating who is the owner, is sufficient to create a lien on the real estate of the judgment debtor.—*Bland v. Putman* (Ala.) 616.

Where land is sold to one who fails to record his title, the judgment creditors of the vendor acquire judicial mortgages on the property by recording their judgments after the date of such sale and before its registry.—*Baker v. Atkins* (La.) 69; *Pratt v. Same, Id.*; *Matthews v. Pullin, Id.*

Where the real estate owner sells his land to one who fails to record the deed, judgments recorded against the vendor before the registry of the sale are prior to mortgages recorded against the vendee, whether before or after the judgments against the vendor.—*Baker v. Atkins* (La.) 69; *Pratt v. Same, Id.*; *Matthews v. Pullin, Id.*

§ 6. Foreign judgments.

Where a citizen is sued and served with process in another state, on being found temporarily within the jurisdiction of the court, in a suit in the state on the judgment authenticated according to the act of congress, the court is not precluded by Const. U. S. art. 4, § 1, from ascertaining whether the claim was one unenforceable under the laws of the state.—*Lum v. Fauntleroy* (Miss.) 290.

§ 7. Actions on judgments.

A replication *held* calling in question a former ruling on demurrer to plea.—*Lum v. Fauntleroy* (Miss.) 290.

§ 8. Pleading and evidence of judgment as estoppel or defense.

A judgment entry alone, unaccompanied by any other part of the record of such judgment, *held* inadmissible on objection, though the judgment emanated from a court of general jurisdiction, or contained general recitals of jurisdictional facts, if offered prior to Acts 1899, c. 4723.—*Clem v. Meserole* (Fla.) 815.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.
In criminal prosecutions, see "Criminal Law," § 8.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 6.
On execution, see "Execution," § 4.

Under a decree of confirmation of a judicial sale the rights of the purchaser relate back to the date of the sale, so that he is not affected with notice by record of a deed after the sale,

but before the decree.—*Tennessee Coal, Iron & R. Co. v. Gardner* (Ala.) 622.

Code, § 1005, providing that a conveyance of real estate is void as to subsequent purchasers for value, unless recorded, affords the same protection to a purchaser at judicial sale as to a purchaser at private sale.—*Tennessee Coal, Iron & R. Co. v. Gardner* (Ala.) 622.

Complaint in an action against a purchaser at a judicial sale to recover deficiency caused by a resale *held*, after the striking out of certain allegations, to state a cause of action, without any allegation of notice of proceedings to set the sale aside and order a resale.—*Oakley v. Howison* (Ala.) 644.

Purchaser of land at judicial sale, fraudulently failing to comply with the terms of the sale, *held* not entitled to notice of proceedings to set the sale aside and order a resale.—*Oakley v. Howison* (Ala.) 644.

Purchaser of land at a judicial sale, who complied with the requirements of the sale to the extent of giving required note, but with insufficient sureties, *held* not liable for deficiency caused by resale, in the absence of notice of proceedings to set the first sale aside.—*Oakley v. Howison* (Ala.) 644.

In an action against a purchaser at a judicial sale to recover a deficiency caused by a resale, allegation of notice of proceedings to set aside the sale and order of resale *held* insufficient.—*Oakley v. Howison* (Ala.) 644.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 1; "Courts," § 2.

Jurisdiction of particular actions or proceedings.

By trustee in bankruptcy, see "Bankruptcy," § 1.

Criminal prosecutions, see "Criminal Law," § 2.

To establish wife's separate estate, see "Husband and Wife," § 2.

Special jurisdictions.

See "Equity," § 1.

Appellate jurisdiction, see "Appeal and Error," § 5.

Justices' courts in civil cases, see "Justices of the Peace," § 1.

Particular courts, see "Courts."

JURY.

See "Grand Jury."

Instructions in civil actions, see "Trial," § 4.
Instructions in criminal prosecutions, see "Criminal Law," § 21.

Questions for jury in civil actions, see "Trial," § 3.

Questions for jury in criminal prosecutions, see "Criminal Law," § 20.

Service of list of jurors on accused, see "Criminal Law," § 17½.

Taking case or question from jury at trial, see "Trial," § 3.

§ 1. Right to trial by jury.

Acts 1894-95, p. 98, § 8, relating to trial without a jury, *held* not to apply to a suit commenced in a justice court and removed by appeal to the circuit court.—*Alabama Midland Ry. Co. v. Thompson* (Ala.) 672.

The constitutional provision that the right of trial by jury shall remain inviolate guarantees such right only in those cases where at the time of the adoption of the constitution the law gave that right.—*Hathorne v. Panama Park Co.* (Fla.) 812.

Rev. St. § 1744, providing for enforcement of mechanics' liens by bill in equity, is not in

derogation of the constitutional provision that the right of trial by jury shall remain inviolate.—*Hathorne v. Panama Park Co. (Fla.)* 812.

§ 2. Qualifications of jurors and exemptions.

Under Cr. Code, § 5016, subd. 3, in a prosecution for murder, a challenge of a juror against whom is pending an indictment for assault with intent to murder, preferred within the last 12 months, is properly allowed.—*Charleston v. State (Ala.)* 259.

§ 3. Summoning, attendance, discharge, and compensation.

Where persons appear both on a special venire and on the list of jurors served and summoned for the week, the venire is quashable.—*Cawley v. State (Ala.)* 227.

Under Cr. Code, § 5007, where a mistake of name is made in transcribing the name of a special juror on the list served on accused, it is no ground to quash the venire that the court directed such juror to be discarded.—*Cawley v. State (Ala.)* 227.

Where the court restored names previously drawn from the jury box, and the same names were subsequently drawn as special jurors, the venire is quashable.—*Cawley v. State (Ala.)* 227.

Where the state, on a prosecution for larceny, had peremptorily challenged three jurors, it was not error to require the defendant to pass upon the remainder before summoning others to fill the places of those challenged.—*Crittenden v. State (Ala.)* 273.

Under Cr. Code, § 5012, and Acts 1900-01, pp. 1994, 2000, § 9, defendant, charged with larceny, held not entitled to have deficiency in jury made up by drawing from the jury box.—*Crittenden v. State (Ala.)* 273.

On a criminal prosecution, held prejudicial error to draw names to complete the jury, after the venire was exhausted, from a box prepared by the board of revenue, instead of from a box prepared by the board of jury commissioners, as provided by Act March 2, 1901 (Acts 1900-01, p. 1994).—*Edson v. State (Ala.)* 308.

Where, in a criminal prosecution, the state challenged 1 of the 12 jurymen, leaving 11, it was not error to refuse to have the jury filled to 12 men before requiring defendant to pass on any of them.—*Allen v. State (Ala.)* 318.

Under Cr. Code, § 5004, one special venire may not be ordered for trial of two or more capital cases.—*Rambo v. State (Ala.)* 650.

On a prosecution for murder, that there was not put into the box from which the drawing was had the names of those jurors drawn on the special venire who could not be found held no ground for quashing the venire.—*Sanders v. State (Ala.)* 654.

On a prosecution for murder, a motion to quash the venire because a special juror was "not found" held properly overruled.—*Barnes v. State (Ala.)* 670.

List of jurors on special venire, under Code, § 5004, should, in view of section 4993, show residence, etc., of venireman.—*Cook v. State (Ala.)* 696.

Under Code, § 4997, drawing of jury under section 5004 held not open to attack on the absence of fraud.—*Cook v. State (Ala.)* 696.

Drawing of special venire, under Code, § 5004, held erroneous.—*Cook v. State (Ala.)* 696.

Under St. 1898, No. 135, where the names placed in the general venire box are written by the clerk and the jury commissioners, instead of by the clerk alone, and the name of one juror is by accident duplicated, it does not justify setting aside the venire.—*State v. Batson (La.)* 478.

Under Acts 1898, No. 185, § 6, it is not necessary, except when the jury box is supplemented, that it should contain 280 names; but it should at all times, barring accidents, contain that number less the number legally drawn since it was last supplemented.—*State v. Batson (La.)* 478.

Method of selecting names of special veniremen on prosecution for murder held not prejudicially erroneous.—*West v. State (Miss.)* 298.

Where, on a criminal prosecution, there being no names in the jury box, a special venire facias was issued, a notification of the jurors by mail, instead of by personal service of summons, does not affect the legality of the proceeding.—*West v. State (Miss.)* 298.

§ 4. Competency of jurors, challenges, and objections.

Return of names of jurors on quashing special venire for trial of defendant to the jury box held not ground for quashing subsequent venire, where none of them were drawn on the trial.—*Jimmerson v. State (Ala.)* 141.

Under Code, § 5016, a juror not related to defendant, but to a person awaiting trial under a separate indictment for complicity in the same offense, might be challenged for cause.—*Thomas v. State (Ala.)* 250.

On criminal prosecution, defendant held to have waived a challenge for cause.—*Allen v. State (Ala.)* 318.

The court may of its own motion excuse from sitting on the jury a person who is on defendant's bail for his appearance.—*Scott v. State (Ala.)* 623.

Venire held not subject to be quashed because one whose name was on the list was dead at the time of the drawing.—*Watkins v. State (Ala.)* 627.

On a prosecution for murder, held not error to hold a juror competent, though he first stated he had formed a fixed opinion which would bias his verdict.—*Ragsdale v. State (Ala.)* 674.

On a prosecution for murder, questions put to a venireman held properly allowed.—*Mann v. State (Ala.)* 704.

Defendant not entitled to have list of jurors served on him containing names of talesmen.—*Johnson v. State (Ala.)* 724.

In view of Code 1892, § 4370, and the facts, defendant, on prosecution for murder, held not entitled to reversal because of retention of certain jurors.—*West v. State (Miss.)* 298.

§ 5. Impaneling for trial and oath.

Where, after a civil case is begun, a jurymen falls sick, the judge can, in the absence of a demand that the whole jury be discharged or the case be continued, have another jurymen substituted; neither side objecting.—*Lindsey v. Tioga Lumber Co. (La.)* 464.

JUSTICES OF THE PEACE.

§ 1. Civil jurisdiction and authority.

In 1873 a justice of the peace had jurisdiction of a suit by the tax collector to recover an amount less than \$100 due for state taxes.—*Willis v. Ruddock Cypress Co. (La.)* 386; *In re Willis, Id.*

§ 2. Procedure in civil cases.

Code, § 1883, requiring executions from the circuit court to be accompanied by an itemized bill of costs, is not made applicable to justice courts by section 2673.—*Albritton v. Williams (Ala.)* 636.

§ 3. Review of proceedings.

On an appeal from a justice there is no necessity for a new complaint, where there is a good one among the papers sent up.—*Hardee v. Abraham (Ala.)* 596.

Under Code, § 484, it is sufficient if a justice of the peace on appeal returns all the papers, with the statement required by the statute.—*Hardee v. Abraham* (Ala.) 595.

An appeal bond taken in a justice court, showing the parties and reciting the judgment, is sufficient to give the court to which the appeal is taken jurisdiction to try it.—*Hardee v. Abraham* (Ala.) 595.

One of two defendants against whom justice of peace renders judgment may, under Code 1896, § 481, remove the cause by certiorari to the circuit court.—*Ex parte Bogatsky* (Ala.) 727.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

LACHES.

As ground for dismissal of appeal or writ of error, see "Appeal and Error," § 7.
Of insured in failing to read policy, see "Insurance," § 1.

LAKES.

See "Waters and Water Courses," § 1.

LANDLORD AND TENANT.

Lease of homestead, see "Homestead," § 1.

§ 1. Landlord's title and reversion.

Though a lessee is estopped from contesting his lessor's title, if the lease itself was the result of force, the facts connected with the same should be examined into.—*Harvin v. Blackman* (La.) 452.

§ 2. Tenancies at will and at sufferance.

City occupying room in court house held a mere tenant at will of the county, and subject to the remedy against tenants holding over provided in Code, § 2547, though it claimed to own the room.—*City of Bay St. Louis v. Board of Supr's of Hancock County* (Miss.) 54.

§ 3. Rent and advances.

The landlord has a privilege on the property that remains on his premises after the lease has expired, under Civ. Code, art. 3218.—*Villere v. Succession of Shaw* (La.) 196.

Where a lessor knows nothing of an intended sale by his lessee to another of property on which he has a lien, he in no way abandons his right to the property when the purchaser thereafter becomes his tenant.—*Villere v. Succession of Shaw* (La.) 196.

§ 4. Re-entry and recovery of possession by landlord.

Under Code 1892, §§ 81, 2557, held, on appeal to circuit court in proceedings to dispossess a tenant holding over, error not to allow the filing of affidavit provided for in section 2552.—*Harvey v. Clark* (Miss.) 906.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement"; "False Pretenses"; "Receiving Stolen Goods"; "Robbery."

§ 1. Offenses and responsibility therefor.

Where one having no actual or constructive possession of the property of another points it out to a third person, gives the latter a bill of sale therefor, and receives in payment a sum

of money, he does not commit larceny, in the absence of some act constituting an asportation.—*Long v. State* (Fla.) 870.

To constitute larceny there must exist both a felonious intent and a carrying away of the property, and a charge eliminating either of these elements of the offense is improper.—*Long v. State* (Fla.) 870.

A taking by the voluntary consent of the owner or his authorized servant or agent, even though with a felonious intent, does not constitute larceny.—*Lowe v. State* (Fla.) 956.

§ 2. Prosecution and punishment.

On a prosecution for larceny, charge as to what constituted the offense held properly refused, as misleading.—*Crittenden v. State* (Ala.) 273.

On prosecution for larceny, certain testimony held properly excluded as immaterial.—*Allen v. State* (Ala.) 318.

Where a railroad is in possession of property as a bailee, holding it for the consignee, at the time it is stolen, an indictment for the crime properly lays ownership in the road.—*Allen v. State* (Ala.) 318.

Rule that, where the taking is open and avowed, and there is no subsequent attempt to conceal the property, a strong presumption arises against a felonious intent, held not a rule of law to be incorporated in an instruction in a prosecution for larceny.—*Long v. State* (Fla.) 870.

Certain facts held not to amount to a consent by the owner of stolen property to the taking of property.—*Lowe v. State* (Fla.) 956.

Under an indictment for stealing "fertilizer," it is competent to prove the larceny of "phosphate fertilizer" or "fertilizer of phosphate."—*State v. Elia* (La.) 476.

LAW OF THE CASE.

See "Criminal Law," § 30.

LEADING QUESTIONS.

See "Witnesses," § 3.

LEASES.

See "Landlord and Tenant."

Of homesteads, see "Homestead," § 1.

LEGACIES.

See "Wills."

LETTERS PATENT.

For public lands, see "Public Lands," § 1.

LEVEES.

Under Acts 1892, No. 74, creating the Caddo levee district, held, that a contract by such district for the building of a levee was within the power of such board, and was not affected by Rev. St. § 2448.—*Hughes v. Board of Com'rs of Caddo Levee Dist.* (La.) 218.

The levee district is a state local benefit tax or assessment district, upon which the general assembly has authority to confer rights and powers and charge with duties which it may not be authorized sometimes to itself perform.—*Hughes v. Board of Com'rs of Caddo Levee Dist.* (La.) 218.

LEVY.

Of taxes, see "Taxation," § 4.

LIBEL AND SLANDER.

Speaking of slanderous words as ground for removal of councilmen, see "Municipal Corporations," § 2.

§ 1. Privileged communications, and malice therein.

Reports made by detective officers to their superiors, and inscribed in books kept for that purpose, *held* not privileged.—*Billet v. Times-Democrat Pub. Co. (La.)* 17.

§ 2. Actions.

In an action for libel, where privilege is set up as a defense, the evidence should be confined to the question of privilege *vel non*.—*Billet v. Times-Democrat Pub. Co. (La.)* 17.

In an action for libel, where defendant pleads privilege, an amendment setting up the truth of the alleged libel in justification, offered in a reasonable time, should be allowed.—*Billet v. Times-Democrat Pub. Co. (La.)* 17.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 2.

License tax interfering with interstate commerce, see "Commerce," § 1.

§ 1. For occupations and privileges.

The purchase of the business of a domestic corporation did not authorize a foreign corporation to do business under a license tax issued to the former company.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

Under Code, § 4008, providing that all delinquent taxes shall bear interest at 8 per cent., interest on an unpaid license tax was recoverable.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

Under Acts 1898-99, p. 202, § 16, limitations of one and two years do not apply to a suit by the state to recover a license tax from a foreign corporation.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

In an action to recover a license tax from a corporation, a plea that a proper license had been procured was bad for failure to aver that it had been paid for.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

A foreign corporation was not entitled to a credit for the amount of a license tax paid by a domestic corporation whose business it had purchased.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

Under Code, § 4122, subd. 55, the amount of a license tax on a corporation is regulated by the amount of the entire paid-up capital stock, and not by the amount actually employed in the business.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

The extent of a license tax upon corporations is entirely within the discretion of the taxing power.—*Southern Car & Foundry Co. v. State (Ala.)* 235.

A corporation *held* not exempted from paying the privilege tax under Code, § 4122, subd. 55, though having paid the license tax required by section 379 of dealers in fertilizers, and the tag tax required by section 386.—*Troy Fertilizer Co. v. State (Ala.)* 618.

Complaint to recover license tax provided by ordinance need not set out the ordinance, but merely state its substance and aver its violation.—*Nashville, C. & St. L. Ry. Co. v. Alabama City (Ala.)* 731.

A railroad company's liability to pay a license tax, required of a company running cars through city for transporting freight or passengers to or from it, is not affected by its not having an agent or office in the city.—*Nash-*

ville, C. & St. L. Ry. Co. v. Alabama City (Ala.) 731.

A privilege tax required of railroads *held* not unreasonable.—*Nashville, C. & St. L. Ry. Co. v. Alabama City (Ala.)* 731.

A statute authorizing a city to levy license taxes on the business of millinery establishments *held* not to authorize the levy of a license tax on one selling hats, ribbons, etc., but who did not trim any hats.—*City of Tuscaloosa v. Holczstein (Ala.)* 1007.

Where business is carried on at both a principal and branch establishment separately, a license is required from both, under Acts 1898, No. 171, § 30.—*Murrell v. Bokenfohr (La.)* 176.

One having more than one place of business owes a license on each under Acts 1898, No. 171, § 30.—*Murrell v. Bokenfohr (La.)* 176.

Under Acts 1898, No. 171, § 30, one who carries on transactions at a branch establishment, separate from his home mercantile enterprise, is conducting two places of business within the law.—*Murrell v. Bokenfohr (La.)* 176.

A sugar refiner is a manufacturer, and as such exempt from license taxation, by Const. 1898, art. 229.—*State v. American Sugar Refining Co. (La.)* 965.

The question as to whether a refiner of sugar is a manufacturer, and therefore exempt from license tax, under Const. 1898, art. 229, is one of law for the court.—*State v. American Sugar Refining Co. (La.)* 965.

The right to collect an annual license tax from commercial agencies ceased with the repeal of Code 1892, § 3336, imposing the tax, by Laws 1896, p. 54, § 13.—*Bradstreet Co. v. City of Jackson (Miss.)* 990.

LIENS.

Liens acquired by particular remedies or proceedings.

See "Creditors' Suit"; "Judgment," § 5.

Particular classes of liens.

See "Mechanics' Liens."

For wages, see "Master and Servant," § 2.

Landlord's lien for rent, see "Landlord and Tenant," § 3.

Mortgage, see "Mortgages," § 2.

Pledge, see "Pledges."

LIFE ESTATES.

See "Curtesy"; "Remainders."

LIMITATION OF ACTIONS.

See "Adverse Possession."

Particular actions or proceedings.

See "Partition," § 1.

Criminal prosecutions, see "Criminal Law," § 3.

For recovery of license tax, see "Licenses," § 1.

On claims against decedents' estates, see "Executors and Administrators," § 7.

§ 1. Statutes of limitation.

An agreement waiving limitations *held* sufficiently broad to cover obligations as indorser from which the debtor has been released by reason of failure to protest.—*Pollak v. Billing (Ala.)* 639.

An agreement by a creditor not presently to sue is sufficient consideration for a waiver of limitations by the debtor.—*Pollak v. Billing (Ala.)* 639.

The general assembly has the constitutional right to fix a period beyond which actions attacking special elections held by the taxpayers to determine the question of incurring a debt under Const. arts. 232, 281, shall be barred.—*Gray v. Bourgeois* (La.) 42.

Acts 1899, No. 5, § 17, providing that, after six months from the date of the result of an election by the taxpayers of a town to determine the question of increasing its debt, no one can contest the regularity of the election, was not repealed by Acts 1900, Nos. 12, 114.—*Gray v. Bourgeois* (La.) 42.

Even prior to the constitution of 1890, limitation did not run against a county's right to recover possession of public property, such as a court house, etc.—*City of Bay St. Louis v. Board of Sup'rs of Hancock County* (Miss.) 54.

§ 2. Computation of period of limitation.

The statutory pledge of a lessor while in possession suspends prescription.—*Villere v. Succession of Shaw* (La.) 196.

A bond given by a register of conveyances, under Rev. St. § 3153, is breached by an act of omission authorizing an action thereon *ex contractu*, which is not barred by the prescription of one year.—*Gordon v. Stanley* (La.) 531.

A joint action by several heirs against an assignee of the tenant by the curtesy in possession, for waste, was barred as to acts of waste committed after the eldest child attained his majority, where the period of limitation has elapsed between that time and the time when the action was commenced.—*Learned v. Ogden* (Miss.) 278.

The fact that a tenant by the curtesy is guardian of his minor children, entitled to the remainder, does not cause the statute of limitations to run against their right of action for waste.—*Learned v. Ogden* (Miss.) 278.

Under the provisions of Code 1880, Const. 1890, and Code 1892, claims due a wife by a husband held barred by limitations, so as to authorize him to disregard them in a separation settlement.—*Wyatt v. Wyatt* (Miss.) 317.

§ 3. Acknowledgment, new promise, and part payment.

A promise by a debtor to pay all notes held against him by his creditor on a certain date, and acknowledging that such notes are just and unpaid, specifies the amount of the indebtedness with sufficient definiteness to remove the bar of limitations.—*Pollak v. Billing* (Ala.) 639.

An expression of ability to pay a prescribed debt followed by a partial payment, held not a renunciation of an acquired prescription.—*Succession of Slaughter* (La.) 379.

A mere acknowledgment of the existence of a debt held not a renunciation of an acquired prescription.—*Succession of Slaughter* (La.) 379.

§ 4. Pleading, evidence, trial, and review.

A complaint alleging a waiver of limitations by the debtor as to all outstanding obligations held not subject to demurrer on the ground of limitations.—*Pollak v. Billing* (Ala.) 639.

LIMITATION OF LIABILITY.

Of insurance company, see "Insurance," § 5.

LIQUIDATED DAMAGES.

See "Damages," § 2.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Preservation of property pending suit as ground for appointment of receiver, see "Receivers," § 1.

LIVE STOCK.

Injuries from operation of railroads, see "Railroads," § 5.

LOAN COMPANIES.

See "Building and Loan Associations."

LOST INSTRUMENTS.

Lost certificate of corporate stock, see "Corporations," § 2.

LUNATICS.

See "Insane Persons."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 4.

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. Nature and commencement of prosecution.

Defendant may be liable for a malicious prosecution commenced by another, where the commencement is instigated by defendant through its agent, though the agent lacks authority to actually install defendant as prosecutor.—*Southern Exp. Co. v. Couch* (Ala.) 167.

§ 2. Actions.

In malicious prosecution against an express company, where plaintiff claimed defendant had instigated the commencement of proceedings by the prosecutor, it was error not to allow defendant to show that the prosecutor had taken the advice of counsel, and been advised that there was evidence to justify a conviction.—*Southern Exp. Co. v. Couch* (Ala.) 167.

Where, in an action for malicious prosecution, plaintiff claimed that defendant had through its agent induced the prosecutor to commence the prosecution, a question asked the prosecutor on his cross-examination whether a detective employed by defendant had expressed the opinion that the prosecutor had sufficient evidence to convict, was properly allowed.—*Southern Exp. Co. v. Couch* (Ala.) 167.

In an action against defendant for malicious prosecution commenced by a third party, where plaintiff claimed that the prosecution was instigated by defendant's agent, evidence as to instigations made by the agent relative to plaintiff's acts held admissible.—*Southern Exp. Co. v. Couch* (Ala.) 167.

In malicious prosecution, an instruction held properly refused as misleading.—*Southern Car & Foundry Co. v. Adams* (Ala.) 503.

In action for malicious prosecution, evidence as to statements of defendant's servant held not subject to objection that no authority in him to bind defendant by the statement was shown.—*Southern Car & Foundry Co. v. Adams* (Ala.) 503.

In an action for malicious prosecution, it is error to admit evidence to show defendant's financial standing, as bearing on the amount of punitive damages that might be awarded.—*Southern Car & Foundry Co. v. Adams* (Ala.) 503.

Complaint in malicious prosecution *held* not demurrable for not alleging the prosecution "judicially investigated."—*Southern Car & Foundry Co. v. Adams* (Ala.) 503.

Where, in malicious prosecution, it is shown that defendant had probable cause to make the affidavits resulting in the arrest of the plaintiff, it is sufficient, though the plaintiff was innocent of the act charged.—*Lang v. De Luca* (La.) 329.

MANDAMUS.

Original jurisdiction of supreme court, see "Courts," § 3.

§ 1. Nature and grounds in general.

Mandamus *held* properly denied, where the petition failed to show demand on respondents for such action on their part as was sought to be enforced by the writ.—*Moseley v. Collins* (Ala.) 131.

On mandamus to compel the elders of a church to strike from its memorials a writing purporting to have been made by the corporation canceling relator's name on the membership roll, which writing is alleged to be the unauthorized act of respondents, petition *held* not to show relator deprived of any rights.—*Moseley v. Collins* (Ala.) 131.

The purchaser of a decree in the chancery court of Montgomery county *held* not entitled to mandamus from the city court of the city of Montgomery to compel the sheriff to release a levy of execution issued on the decree and to return the execution.—*State v. Waller* (Ala.) 163.

An order of the chancellor vacating an order dismissing a bill made by the register in vacation, not being appealable, the only remedy left to complainant is by mandamus to compel the chancellor to vacate the order made by him.—*Ex parte Jones* (Ala.) 643.

§ 2. Subjects and purposes of relief.

Where a circuit court refuses to exercise jurisdiction that it clearly possesses, mandamus is the proper remedy.—*State v. Reeves* (Fla.) 814.

A member of a city council, expelled after trial in which he was without witnesses, will be restored to his office by mandamus.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

Where a charge for the removal of a municipal officer is insufficient to justify such removal, or, being sufficient, is not sustained by the evidence, the officer is entitled to a mandamus to restore him.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

Mandamus runs to a corporation to compel the performance of an act which the law especially enjoins as a duty.—*State ex rel. Kells v. New Orleans Gas Light Co.* (La.) 179.

Where one to whom a bid was awarded by the police jury for a public ferry went into possession, and had worked for two months prior to relator's application for mandamus to compel the letting of the contract to him, mandamus will not be granted.—*State ex rel. Prince v. Police Jury* (La.) 363.

§ 3. Jurisdiction, proceedings, and relief.

In mandamus to compel the issuance of a certificate of stock in place of one that was lost, evidence *held* not objectionable, after more than ten years, because it fails to show the particulars of the loss.—*State ex rel. Benedict v. Southern Mineral & Land Imp. Co.* (La.) 174.

An oath for a mandamus taken by the attorney *held* sufficient on objection raised for the first time on appeal.—*State ex rel. Benedict v. Southern Mineral & Land Imp. Co.* (La.) 174.

MANDATE.

See "Mandamus."

MANSLAUGHTER.

See "Homicide," § 2.

MARRIAGE.

See "Divorce"; "Husband and Wife."

Emancipation of minor by marriage, see "Infants," § 1.

Where in 1854 two slaves, with the consent of their owners, were married by a minister, and after being freed lived together as husband and wife, the marriage was lawful.—*Sterrett v. Samuel* (La.) 428.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Employés of municipal corporation, see "Municipal Corporations," § 3.

§ 1. The relation.

In an action for a breach of the contract of hiring, averment of readiness and willingness on the part of plaintiff to perform *held* not necessary.—*Marx v. Miller* (Ala.) 765.

In an action for breach of the contract of hiring, *held* not necessary that the complaint should allege that plaintiff used reasonable diligence to obtain the same or similar employment.—*Marx v. Miller* (Ala.) 765.

Discharge of servant *held* a breach of the contract by the master.—*Marx v. Miller* (Ala.) 765.

§ 2. Services and compensation.

A servant *held* not required by her contract to do work of a seamstress.—*Marx v. Miller* (Ala.) 765.

Under Rev. St. § 1732, certain employés of a sawmill corporation *held* entitled to liens on the timber produced.—*First Nat. Bank v. Kirkby* (Fla.) 881.

Under Rev. St. § 1742, *held*, that persons entitled to liens for wages, whether in possession or not, may enforce them against purchasers and creditors with notice.—*First Nat. Bank v. Kirkby* (Fla.) 881.

Under Rev. St. § 1742, *held*, that creditors without notice are only those who have, without notice of a lien for wages, acquired liens by judgments or otherwise, and are not merely general creditors.—*First Nat. Bank v. Kirkby* (Fla.) 881.

Certain property of a sawmill corporation *held* subject to its employés' lien for wages under Rev. St. § 1732, conferring liens for wages on employés.—*First Nat. Bank v. Kirkby* (Fla.) 881.

§ 3. Master's liability for injuries to servant.

In an action by a servant for personal injuries, defendant's superintendent *held* not to have been guilty of negligence.—*Coosa Mfg. Co. v. Williams* (Ala.) 232.

Where laborers are returned by an employer to their homes by a hand car after working hours, the employer is liable for an accident to an employé due to the negligence of the foreman in charge of the men.—*Wilson v. Banner Lumber Co.* (La.) 460.

Where an employer places an inexperienced youth around machinery at a dangerous place

without warning, he is liable in damages for resulting injuries.—*Lindsey v. Tioga Lumber Co.* (La.) 464.

The unskillful method of doing an act may be imputable as the fault of the employer, who is charged with the legal duty of guarding against it by proper instructions.—*Lindsey v. Tioga Lumber Co.* (La.) 464.

§ 4. — Tools, machinery, appliances, and places for work.

The duty of a master to see that the appliances for the servants are kept in repair must be continually performed by him or by one selected by him for that purpose.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

A railroad company, drawing cars of another company over its road, is responsible for defects which would have been disclosed by ordinary inspection.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

The opinions of car inspectors, not experts in the running of cars, do not prove that it is as safe to operate a freight car with a hanger pin out of its socket and a nut missing from a bolt which holds a friction plate in position as if those parts were properly adjusted.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

Masters are liable to their servants, injured by defective appliances, where there was a failure to exercise due care that the appliances were maintained in a safe condition.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

Due care requires a master, in the use of dangerous appliances, to inspect such appliances and see that they are kept in repair.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

§ 5. — Fellow servants.

The doctrine of fellow servant cannot defeat recovery against the master, where the mill where the accident occurred was being run with a force insufficient to secure safety to the employees.—*Hill v. Big Creek Lumber Co.* (La.) 372.

A master is responsible for failure to employ enough competent persons to do the work safely as respects their fellow servants.—*Hill v. Big Creek Lumber Co.* (La.) 372.

A master is responsible for such reasonably constant supervision of his workmen as will prevent them from becoming grossly negligent.—*Hill v. Big Creek Lumber Co.* (La.) 372.

A water boy is not a fellow servant of a section foreman, within the meaning of the law governing the negligence of employés.—*Wilson v. Banner Lumber Co.* (La.) 460.

§ 6. — Risks assumed by servant.

The risk of being injured by an electric wire imperfectly insulated was not assumed by a workman engaged in carrying rails for the reconstruction of overhead electric lines.—*Thompson v. New Orleans & C. R. Co.* (La.) 177.

A flagman, injured by falling over a tie alongside the railroad track, held to have assumed the risk as an incident of his employment.—*Neider v. Illinois Cent. R. Co.* (La.) 366.

§ 7. — Contributory negligence of servant.

An employé in a coal mine, whose duty it was to see that the ceiling of his working place was safe, held not entitled to recover for an injury caused by his failure to perform such duty.—*Pioneer Min. & Mfg. Co. v. Thomas* (Ala.) 15.

Evidence in an action by a coal mine employé for injuries caused by the falling of a rock held to show that the injury was caused by the joint negligence of plaintiff and another miner.—*Pioneer Min. & Mfg. Co. v. Thomas* (Ala.) 15.

A servant in a personal injury case held to have been guilty of contributory negligence in obeying a command to work in a place he knew to be dangerous.—*Coosa Mfg. Co. v. Williams* (Ala.) 232.

Evidence in action for injury to employé held insufficient to show him guilty of contributory negligence.—*Thompson v. New Orleans & C. R. Co.* (La.) 177.

Evidence in an action by an employé for personal injuries held to show plaintiff guilty of contributory negligence.—*McKinney v. McNeely* (La.) 199.

Where an inspector without scientific knowledge undertakes to decide that an appurtenance for which scientific knowledge has provided a particular place will discharge its function as well somewhere else, he places himself in antagonism to the position to which his employer, with greater knowledge, is committed.—*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.) 535.

§ 8. — Actions.

In an action for personal injuries, a so-called "count" in the complaint held a mere averment of special damages.—*Coosa Mfg. Co. v. Williams* (Ala.) 232.

Whether a yard master, in charge of a switching train, caught between car bumpers was guilty of negligence, held a question for the jury.—*McGhee v. Willis* (Ala.) 301.

The question whether the negligence of a locomotive engineer, resulting in the death of a yard master, would authorize a recovery from the company, held for the jury.—*McGhee v. Willis* (Ala.) 301.

In an action for the wrongful killing of a yard master while coupling cars, the court cannot say that an allegation in the complaint that coupling such cars was a part of his duties is false.—*McGhee v. Willis* (Ala.) 301.

A requested instruction in an action for the negligent killing of a railroad yard master, in charge of a switching train, by being caught between cars by the engineer backing without signal, held erroneous in omitting to submit the question as to decedent's right to assume that the engine would remain stationary.—*McGhee v. Willis* (Ala.) 301.

A complaint alleging that an engineer wantonly or intentionally caused or allowed his engine to propel a car against other cars with too great force, "with knowledge or notice" that plaintiff was between the cars and in great danger from the car being so propelled, does not state a cause of action for wantonness.—*Southern Ry. Co. v. Bunt* (Ala.) 507.

Count in an action for injuries held not to allege acts making master liable, under Code, § 1749, subds. 2, 3.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

Allegation of defendant's negligence, in an action for injuries received in coupling cars caused by the negligence of the engineer, held sufficient.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

Allegation of defendant's negligence, in an action for injuries received in coupling cars under order of a superior, held sufficient.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

In an action for injuries received in coupling cars, a plea that plaintiff was injured while working after he had been ordered to quit held faulty.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

In an action for injuries received in coupling cars, held, that a demurrer to a plea of contributory negligence should have been overruled.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

In an action for injuries received in coupling cars, a plea that plaintiff assumed the risk by choosing a more hazardous method *held* defective.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

In an action for injuries received in coupling cars, a plea that plaintiff was injured while violating a rule of the company *held* faulty.—*Bear Creek Mill Co. v. Parker* (Ala.) 700.

Evidence in action for injuries to employé *held* not to sustain verdict for plaintiff.—*Russell v. Allen* (La.) 78.

That a tie was left alongside of a railroad track near a path used by flagmen in the discharge of their duties *held* not to show negligence, under the evidence, rendering railroad liable to a flagman injured by falling over the tie.—*Neider v. Illinois Cent. R. Co.* (La.) 366.

In action by railroad flagman for injuries from stumbling over slag on roadbed, *held* error not to permit defendant to show slag used by other responsible roads.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

In action by railroad flagman for injuries, *held* error to permit him to show his train was short-handed, and he performing extra duties.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

Where a switchman was injured by stumbling in the nighttime over a piece of slag beside the track, it was error to refuse to permit defendant to show that no accident had ever before happened at that place.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 4.

MECHANICS' LIENS.

§ 1. Right to lien.

Rev. St. § 1743, providing that the lien of a subcontractor shall exist for the amount due by the owner to the contractor, refers only to the amount due by the owner on account of the improvements made by the contractor for the owner.—*Hathorne v. Panama Park Co.* (Fla.) 812.

§ 2. Enforcement.

A bill by a subcontractor to enforce his lien, alleging facts which do not make it appear that, at the time of the service of the notice required by Rev. St. § 1743, any amount was due the contractor by the owner on account of the improvements made, is demurrable.—*Hathorne v. Panama Park Co.* (Fla.) 812.

MINORS.

See "Infants."

MISJOINDER.

Of causes of action, see "Action," § 1.
Of parties in equity, see "Equity," § 2.

MISREPRESENTATION.

See "False Pretenses."

By insured, see "Insurance," § 3.

MITIGATION.

Of damages, see "Damages," § 1.

MODIFICATION.

Of contract, see "Contracts," § 3.

MONEY PAID.

No recovery can be had against one party for money expended at the request of another nor authorized to bind the party sued.—*Little Bros. Fertilizer & Phosphate Co. v. Wilmott* (Fla.) 808.

MONEY RECEIVED.

Recovery of tax paid, see "Taxation," § 5.

MORTGAGES.

Assignment of right of redemption, see "Assignments," § 1.

By or to administrators, see "Executors and Administrators," § 2.

By or to corporations, see "Corporations," § 4.
Mortgagee as party to bill to reform insurance policy, see "Reformation of Instruments," § 1.

Of personal property, see "Chattel Mortgages."
Of wife's separate estate, see "Husband and Wife," § 2.

§ 1. Requisites and validity.

Facts *held* to show an enforceable equitable mortgage, not arising from mere deposit of title deeds.—*Woodruff v. Adair* (Ala.) 515.

Where plaintiff executed a mortgage to defendant, to be used in securing a settlement for a stated sum of a joint judgment, and, on failing to secure such settlement, defendant settled by paying a larger sum, he cannot enforce such mortgage.—*Sheats v. Scott* (Ala.) 573.

Under Code 1892, § 4233, parol evidence of grantor *held* insufficient to show a conveyance absolute on its face to be a mortgage.—*Schwartz v. Lieber* (Miss.) 954.

§ 2. Construction and operation.

As against a bona fide purchaser relying on the record title, one *held* not entitled to assert nondelivery of a deed.—*Woodruff v. Adair* (Ala.) 515.

Right under stipulation in mortgage for an attorney's fee in case of foreclosure defined as to services in resisting redemption.—*American Freehold Land Mortg. Co. v. Pollard* (Ala.) 630; *Pollard v. American Freehold Land Mortg. Co.*, Id.

§ 3. Rights and liabilities of parties.

Where a mortgagor of land assigns a deposit made by him as additional security for bonds secured by the mortgage, the assignee has the right, as against a subsequent purchaser of the land at execution sale, to have the land exhausted before the deposit is applied to the bonds.—*Moses v. Philadelphia Mortgage & Trust Co.* (Ala.) 612.

Where a trustee in a mortgage to secure bonds buys some of the bonds with money deposited with him by the mortgagor as further security for the bondholders, the mortgagor may assign the bonds so purchased, subject to the equities of the other bondholders.—*Moses v. Philadelphia Mortgage & Trust Co.* (Ala.) 612.

§ 4. Payment or performance of condition, release, and satisfaction.

The insurance money paid to mortgagee should not be diverted in payment of an unsecured debt, but to the mortgage notes, and a diversion extinguished the notes as to the heirs of the deceased maker thereof.—*Burbank v. Buhler* (La.) 201.

Requests for acknowledgment of satisfaction of mortgage held not a sufficiently strict compliance with Ann. Code 1892, § 2451, to support an action for the penalty under the section.—*British & American Mortg. Co. v. Burke* (Miss.) 51.

§ 5. Foreclosure by exercise of power of sale.

Sale under power in a mortgage is voidable only on seasonable election by the mortgagor or persons claiming under him.—*Woodruff v. Adair* (Ala.) 515.

Sale under power in mortgage is a foreclosure, and cuts off equity of redemption.—*Woodruff v. Adair* (Ala.) 515.

Laws 1896, p. 105, held to necessitate record in the clerk's office of a change of treasurers by a company whose treasurer held title for it as trustee, in order that the new treasurer might pass title.—*Shipp v. New South Building & Loan Ass'n* (Miss.) 804.

§ 6. Foreclosure by action.

A surety on the first note to mature on a series of notes secured by a mortgage held, under the terms of the instrument, entitled to have such note credited with a pro rata share of the proceeds of a sale of the mortgaged property, but not to have the entire proceeds credited thereon.—*Bostick v. Jacobs* (Ala.) 136.

Where mortgaged property is purchased at a foreclosure by the mortgagee, and sold for an increased price, sureties on notes secured by the mortgage are not entitled to have the proceeds of the latter sale applied on deficiency on the notes on which they are sureties.—*Bostick v. Jacobs* (Ala.) 136.

Where a trustee in a mortgage to secure bonds buys some of the bonds with money deposited with him by the mortgagor as further security for the bondholders, and the mortgagor thereafter assigns the bonds so purchased, the assignee is a bondholder, subject to the equities of the other bondholders, and may foreclose.—*Moses v. Philadelphia Mortgage & Trust Co.* (Ala.) 612.

§ 7. Redemption.

A bill by a junior against a senior mortgagee for redemption, which fails to allege the amount due on the junior mortgage and makes no tender of the amount of the senior mortgage, is demurrable.—*Higman v. Humes* (Ala.) 574.

Under Code, § 3507, a mortgagor held not entitled to redemption, for insufficiency of tender.—*Burke v. Brewer* (Ala.) 602.

Disaffirmance within two years of sale under power in mortgage held to give right to redeem, though suit is not brought for more than two years.—*Douthit v. Nabors* (Ala.) 625.

Rights and liabilities between mortgagee in possession and mortgagor defined.—*American Freehold Land Mortg. Co. v. Pollard* (Ala.) 630; *Pollard v. American Freehold Land Mortg. Co.*, *Id.*

A mortgagee, purchasing without authority, at a sale under a power, held a mortgagee in possession and accountable only as such.—*National Mut. Building & Loan Ass'n v. Houston* (Miss.) 911.

A mortgagee held entitled to credit for costs of foreclosure sale under a power, though it was voidable; he purchasing without authority.—*National Mut. Building & Loan Ass'n v. Houston* (Miss.) 911.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 23.

Direction of verdict in civil actions, see "Trial," § 3.

In equity, see "Equity," § 2.

New trial in civil actions, see "New Trial," § 2.

New trial in criminal prosecutions, see "Criminal Law," § 23.

Presentation of objections for review, see "Appeal and Error," § 3.

Quashing indictment or information, see "Indictment and Information," § 4.

Relating to pleadings, see "Pleading," § 5.

Striking out evidence, see "Trial," § 1.

MULTIFARIOUSNESS.

See "Equity," § 2.

MULTIPLICITY OF SUITS.

Jurisdiction in equity to avoid, see "Equity," § 1.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Drainage districts, see "Drains," § 1.

Liability for injury to property taken for public use, see "Eminent Domain," § 2.

Mandamus, see "Mandamus," § 2.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 2.

§ 1. Creation, alteration, existence, and dissolution.

The proceeding by petition to have petitioner's land excluded from the corporate limits of a town, authorized by Rev. St. § 720, as amended by Laws 1897, c. 4601, is one at law, and the judgment can be reviewed only by writ of error, and not by an appeal.—*Heebner v. Town of Orange City* (Fla.) 879.

A town held not to have cause of action against a railroad company for giving its name to a station near it.—*Gulf & S. I. R. Co. v. Town of Seminary* (Miss.) 953.

§ 2. Proceedings of council or other governing body.

Whether a charge against a member of a city council, if proved, is sufficient, is for the ultimate determination of the courts.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

The authority conferred on members of a city council to expel one of its members by two-thirds vote on five days' notice and an opportunity to be heard presupposes a charge sufficiently grave to justify expulsion.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

A statement, made in confidence by a member of a council to the mayor, that he had heard rumors reflecting on the integrity of other members of the council, held privileged, and no ground for the expulsion of the member.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

The courts are disinclined to hold the speaking of slanderous words as to other members of a city council a ground for removal of a member of such council.—*State ex rel. McMahon v. City Council of New Orleans* (La.) 22.

Where notice and opportunity to defend have been given to a member of a city council, and

evidence has been adduced, the court will not go behind the judgment to inquire into the amount of the evidence.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

§ 3. Officers, agents, and employés.

Cases in which notice of hearing of an application to remove a municipal officer may be dispensed with defined.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

The power conferred on the city of New Orleans by its charter to remove officers is neither greater nor less than the city would have had if the instrument had been silent on the subject.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

Where a municipal officer has a franchise in the office resulting from an election or appointment for a term fixed by law, there must be a hearing before removal.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

Where a municipal officer is a mere employé, he may be removed without notice.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

In the absence of express grant or implied limitation of authority, a municipal corporation possesses the incidental power to remove for cause the corporate officers, whether elected by it or by the people.—*State ex rel. McMahon v. City Council of New Orleans (La.) 22.*

§ 3½. Property.

The sewerage and water board, and the city council of New Orleans, in contracting to purchase sewerage plant, *held* acting within the power conferred on them by constitutional amendment (Act No. 6, Extra Session 1899) and their action was not subject to judicial control.—*Brennan v. Sewerage & Water Board (La.) 563; City of New Orleans v. New Orleans Sewerage Co., Id.*

In amendment of constitution (Act No. 6, Extra Session 1899), authorizing the sewerage and water board to acquire for the city of New Orleans the plant and franchises of any water or sewerage company in that city, *held* that the word "plant" applies to the physical means provided by those particular companies for the accomplishment of the ends for which they were established.—*Brennan v. Sewerage & Water Board (La.) 563; City of New Orleans v. New Orleans Sewerage Co., Id.*

§ 4. Public improvements.

Assessment for street improvements, under ordinance providing for it without regard to benefits, *held* void.—*City Council of Montgomery v. Foster (Ala.) 610.*

That the payments are to be made out of that part of the future revenues reserved for public improvements does not render the contract valid.—*State ex rel. Woulfe v. St. Paul (La.) 88.*

Act No. 30 of Extra Session of 1877 prevents the city of New Orleans from entering into a contract by which the cost of paving a street is to be paid out of the revenues of future years, to be settled in the meantime by the issuance of interest-bearing certificates.—*State ex rel. Woulfe v. St. Paul (La.) 88.*

Provisions of a charter construed, and *held*, that the city may require the owners of lots fronting on particular streets to construct and keep in repair the sidewalks and curbs in front of such lots.—*Town of New Iberia v. Fontellieu (La.) 369.*

The power to compel the owners of urban property to construct banquettes in front of the same *held* the police power, to be exercised under the general grants of power in the charter.—*Town of New Iberia v. Fontellieu (La.) 369.*

A bridge tax levied under the authority of the constitution on all property generally in a ward is not a local assessment, though a vote of the taxpayers of the ward is required for its imposition.—*Griggsby Construction Co. v. Freeman (La.) 309.*

§ 5. Police power and regulations.

Claim of the amount of a fine in a complaint for violation of a city ordinance *held* surplusage and immaterial.—*City of Talladega v. Fitzpatrick (Ala.) 252.*

An ordinance punishing the disturbance of a religious assembly *held* not unreasonable.—*City of Talladega v. Fitzpatrick (Ala.) 252.*

Under Acts 1900-1901, p. 1557, §§ 5, 18, a city ordinance *held* not in conflict with Code, § 4654.—*City of Talladega v. Fitzpatrick (Ala.) 252.*

An affidavit, though not drawn in regular form, may be sufficient to sustain proceedings in the mayor's court for violation of a city ordinance.—*Town of Minden v. McCrary (La.) 468.*

§ 6. Use and regulation of public places, property, and works.

Pillars of a building in a street *held* an infringement of the right of an adjoining owner to light, air, and view, which would entitle him to enjoin the erection of the pillars, even though the defendant owned the fee in the street, subject only to the public use.—*First Nat. Bank v. Tyson (Ala.) 144.*

The erection in a street of pillars by a property owner *held* an irreparable injury, entitling an adjoining property owner to an injunction restraining it.—*First Nat. Bank v. Tyson (Ala.) 144.*

Allegations in a bill by a property owner to restrain the erection in a street of pillars of a building by an adjoining owner *held* sufficient on demurrer.—*First Nat. Bank v. Tyson (Ala.) 144.*

A person sustaining a peculiar injury as a result of the existence of a nuisance in a city street may enjoin such nuisance, without first applying to the city authorities for relief.—*First Nat. Bank v. Tyson (Ala.) 144.*

An encroachment of 22 inches on the sidewalk by pillars of a building is a public nuisance, without regard to whether they are erected for ornament or utility.—*First Nat. Bank v. Tyson (Ala.) 144.*

A municipal corporation, in the absence of a statutory grant of such power, cannot authorize the erection in city streets of a building which constitutes a nuisance.—*First Nat. Bank v. Tyson (Ala.) 144.*

The easement of view from every part of a public street, as well as that of light and air, belongs as a valuable right to one owning property abutting on the street, and will be protected by the courts against illegal encroachments.—*First Nat. Bank v. Tyson (Ala.) 144.*

§ 7. Torts.

Evidence in a personal injury action against a city for damages resulting from partial obstruction of a street *held* to make a case for jury.—*City of Meridian v. McBeath (Miss.) 53.*

§ 8. Fiscal management, public debt, securities, and taxation.

Where the taxpayers of a town at a special election authorize the authorities to incur a debt of \$10,000 and interest, and a levy of a special tax of five mills for ten years on the valuation and assessment fixed by the constitution, the authority is void, in so far as the debt and interest exceed the special tax authorized to be levied to pay the same.—*Gray v. Bourgeois (La.) 42.*

Where municipal authorities attempt to apply a special tax provided for a debt incurred by a special election to debts created anterior to the authorization of the tax, or for debts incurred for purposes not authorized by the constitution, the same may be prevented by injunction.—*Gray v. Bourgeois* (La.) 42.

Under authority granted by the taxpayers of a town to incur a debt and to issue bonds, the authorities may, without issuing bonds, create the debt and levy a special tax within the constitutional limit.—*Gray v. Bourgeois* (La.) 42.

It is not necessary, at a special election held under Const. arts. 232, 281, seeking to obtain from property tax payers of a town authority to incur a debt for a designated purpose, that the debt to be incurred for each particular purpose should be specifically set out.—*Gray v. Bourgeois* (La.) 42.

Citizens who have voted to tax themselves for a public improvement have a standing in court to complain that the property acquired is not being used for the purpose contemplated.—*Sugar v. City of Monroe* (La.) 961.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT SOCIETIES.

See "Insurance," § 9.

NAMES.

Designation of person in indictment, see "Indictment and Information," § 2.

Of towns, see "Municipal Corporations," § 1.

NATIONAL BANKS.

See "Banks and Banking," § 3.

NAVIGABLE WATERS.

See "Waters and Water Courses."

§ 1. Rights of public.

A railroad company, constructing a bridge across a navigable stream so negligently as to obstruct the navigation, is responsible for resulting damages.—*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.) 456.

§ 2. Riparian and littoral rights.

Where a point in the Mississippi river was gradually submerged, and thereafter the land reappeared, the doctrine of reappearance of land after submergence controls.—*Hughes v. Birney's Heirs* (La.) 30.

Where, after submergence, the water disappears from the land, and its identity can be established by reasonable marks or by situation or boundary lines, the proprietorship returns to the original owner.—*Hughes v. Birney's Heirs* (La.) 30.

NAVIGATION.

See "Navigable Waters," § 1.

NEGLIGENCE.

Causing death, see "Death," § 2.

By particular classes of parties.

See "Carriers," §§ 1, 2; "Municipal Corporations," § 7.

Employers, see "Master and Servant," §§ 3-8.

Railroad companies, see "Railroads," §§ 2-6.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

Condition or use of particular species of property, works, or machinery.

See "Highways," § 1; "Railroads," §§ 2-6; "Street Railroads," § 2.

Contributory negligence.

Of passenger, see "Carriers," § 2.

Of person injured by operation of railroad, see "Railroads," § 3.

Of servant, see "Master and Servant," § 7.

§ 1. Actions.

Where declaration in action for negligence sets forth the acts relied on, without stating that they were negligently done, it must appear from the direct averments of the declaration that the acts causing the injury were per se the result of negligence.—*Consumers' Electric Light & St. R. Co. v. Pryor* (Fla.) 797.

Where negligence is the basis of recovery, it is not necessary for the declaration to set out the facts constituting the negligence.—*Consumers' Electric Light & St. R. Co. v. Pryor* (Fla.) 797.

An action *held* to be one for specific negligence, so as not to render pertinent the rules applicable to public nuisances, or evidence based on such a theory of the case.—*Advance Gin & Mill Co. v. Thomas* (Miss.) 316.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

Ground for new trial in criminal prosecutions, see "Criminal Law," § 23.

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 23; "Homicide," § 12.

Necessity of motion for purpose of review, see "Appeal and Error," § 3.

Review of rulings on application for, see "Criminal Law," § 30.

§ 1. Grounds.

Motion for a new trial in an action for wrongful attachment *held* improperly refused; the damages awarded by the jury being, under the evidence, excessive.—*Hamilton v. Maxwell* (Ala.) 13.

Denial of new trial for newly discovered evidence *held* not subject to reversal on appeal.—*Jernigan v. Clark* (Ala.) 686.

§ 2. Proceedings to procure new trial.

Evidence of the jurors as to the manner of arriving at the verdict is not admissible on a motion for a new trial.—*Montgomery St. Ry. v. Mason* (Ala.) 261.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

Election under drainage law, see "Drains," § 2.

Hearing of application to remove city officer, see "Municipal Corporations," § 3.

Loss insured against, see "Insurance," § 6.

Taking depositions, see "Depositions."

To set aside judicial sale, see "Judicial Sales."

To particular classes of parties.

See "Attorney and Client," § 1; "Principal and Agent," § 1.
 Purchaser of land, see "Vendor and Purchaser," § 2.

OBJECTIONS.

Necessity for purpose of review, see "Appeal and Error," § 3; "Criminal Law," § 26.
 To evidence, see "Trial," § 1.
 To validity of process, see "Process," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

OBSTRUCTING JUSTICE.

Facts held to authorize conviction of defendant of resisting an officer in arresting him while drunk in a public place in the presence of two or more persons.—*Brown v. State* (Miss.) 952.

OBSTRUCTIONS.

Of process, see "Obstructing Justice."

OFFICERS.

Health officers, see "Health."
 Mandamus, see "Mandamus," § 2.
 Quo warranto, see "Quo Warranto."
 Resisting officer, see "Obstructing Justice."

Particular classes of officers.

See "Clerks of Courts"; "Justices of the Peace"; "Receivers"; "Registers of Deeds."
 Assessors of taxes, see "Taxation," § 4.
 Collectors of taxes, see "Taxation," § 6.
 County officers, see "Counties," § 1.
 Municipal officers, see: "Municipal Corporations," § 3.
 School officers, see "Schools and School Districts," § 1.

§ 1. Liabilities on official bonds.

A bill by a surety on the bond of a public officer, seeking contribution from sureties on other bonds, held not demurrable on the ground that such other bonds were not statutory, under Code, § 3089.—*Carter v. Fidelity & Deposit Co. of Maryland* (Ala.) 632.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 10.
 In criminal prosecutions, see "Criminal Law," § 12.

OPINIONS.

Of courts, see "Courts," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 4, 5.

OVERCHARGE.

By carrier, see "Carriers," § 1.

OYSTERS.

See "Fish."

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PARENT AND CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."
 Habeas corpus to obtain custody of child, see "Habeas Corpus," § 2.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

PARTIES.

Admissions as evidence, see "Evidence," § 6.
 Designation in judgment, see "Judgment," § 2.
 Domicile or residence as affecting venue, see "Venue," § 1.
 Persons concluded by judgment, see "Judgment," § 4.
 Persons entitled to foreclose mortgage, see "Mortgages," § 6.
 Persons entitled to maintain action to quiet title, see "Quieting Title," § 1.
 Persons entitled to revive action on death of party, see "Abatement and Revival," § 1.
 Persons liable for trespass, see "Trespass," § 1.

In particular actions or proceedings.

See "Quieting Title," § 2.
 For cancellation of public land grant, see "Public Lands," § 1.
 On liquor dealer's bond, see "Intoxicating Liquors," § 2.
 To foreclose pledge, see "Pledges."
 To reform instrument, see "Reformation of Instruments," § 1.

To particular classes of conveyances, contracts, or transactions.

See "Fraudulent Conveyances," § 2.

§ 1. Defects, objections, and amendment.

Facts held to show waiver of objection to intervening in suit.—*Douthitt v. Nabors* (Ala.) 625.

In an action to quiet title, held, that the improper joinder of a party defendant could not be raised by the other defendant.—*Worthington v. Miller* (Ala.) 748.

The nonjoinder of a necessary party will not be regarded on appeal, when not complained of in the pleadings.—*Rothrock Const. Co. v. Port Gibson Brick Mfg. Co.* (Miss.) 116.

PARTITION.**§ 1. Actions for partition.**

Complainant's rights in realty held barred by their not having been asserted during 40 years after ouster.—*Jellerson v. Pettus* (Ala.) 663.

Under Rev. Civ. Code, art. 1289, any one has the right to demand the division of property held in common, and defendant must set up any objections thereto, either by answer or exception, other than an exception of no cause of action.—*Succession of Glancy* (La.) 356.

Where parties own property in common with an insane person, they have an absolute right to put an end to the indivision.—*Sallier v. Rosteet* (La.) 383.

Property in partition may be appraised after judgment ordering the partition.—*Sallier v. Rosteet* (La.) 383.

Where plaintiff, in partition against heirs, claims under a judgment sale of an heir's interest, and the heirs file a bill to set aside the partition sale on the ground that the partition plaintiff had no title, the heir under whom the partition plaintiff claims is a proper party.—*Moore v. Somerville* (Miss.) 294.

Under Code, § 3118, one of several defendants in partition *held* entitled to open the case for all.—*Moore v. Somerville* (Miss.) 294.

PARTNERSHIP.

§ 1. The relation.

Where a partnership created in another state does business in the state, the character of the liability of its members is to be determined by the law merchant.—*Cameron v. Orleans & J. Ry. Co.* (La.) 208.

Where by their representations and conduct parties have agreed to everything that as a matter of law is necessary to constitute a partnership, a disclaimer in their contract of an intent to enter into the partnership relation is not conclusive as to third persons.—*Cameron v. Orleans & J. Ry. Co.* (La.) 208.

§ 2. Rights and liabilities as to third persons.

Where it is not shown that a firm knew that a partner had mortgaged the firm property, the copartners cannot be bound as having ratified such act.—*Kahn v. Becnel* (La.) 444.

A partner, who is not the special agent of the firm, has no authority to execute a mortgage as against his copartners.—*Kahn v. Becnel* (La.) 444.

A partner is bound by his declarations of indebtedness as mortgagor.—*Kahn v. Becnel* (La.) 444.

Where, in a suit against a "company," the written contract showed it was made with an individual, and there was no proof of agency, there could be no recovery.—*Rothrock Const. Co. v. Port Gibson Mfg. Co.* (Miss.) 484.

§ 3. Dissolution, settlement, and accounting.

Evidence considered, and *held* sufficient to show that an accounting and division of the proceeds was had on dissolution of a partnership.—*Shows v. Folmar* (Ala.) 495.

Where one partner made a settlement and division of the assets of another partnership of which his firm was a member, and his firm accepted the assets allotted, it was bound thereby, though none of the other members were present.—*Shows v. Folmar* (Ala.) 495.

In a partnership accounting, where an amount paid by one of the partners is charged on the joint account and afterwards credited on the personal account, it is a proper showing of indebtedness and credit.—*L. J. Mestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PARTY WALLS.

Party-wall agreement between purchaser of lot and seller, who owned adjoining one, construed.—*Lagomarsino v. Crowe* (Ala.) 661.

PASSENGERS.

See "Carriers," § 2.

PATENTS.

For public lands, see "Public Lands," § 1.

PAYMENT.

See "Compromise and Settlement."

Ry garnishee, see "Garnishment," § 3.

Ry receiver, see "Receivers," § 3.

Part payment within statute of limitations, see "Limitation of Actions," § 3.

Recovery for money paid, see "Money Paid."
Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Mortgages," § 4.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Taxes, see "Taxation," § 5.

§ 1. Application.

The rules in the Civil Code for the imputation of payments when two debts are of the same nature and equally onerous are to be applied where the interests of third persons are involved.—*Burbank v. Buhler* (La.) 201.

PENALTIES.

For unlawful discrimination by carriers, see "Carriers," § 1.

For violations of gaming laws, see "Gaming," § 2.

Under contracts, see "Damages," § 2.

PERJURY.

§ 1. Prosecution and punishment.

Indictment for perjury *held* to sufficiently designate the offense on the trial for which the false swearing was done.—*Bradford v. State* (Ala.) 742.

Proof of any one of the assignments in an indictment for perjury is sufficient.—*Bradford v. State* (Ala.) 742.

Evidence *held* admissible under indictment for perjury to show the false swearing.—*Bradford v. State* (Ala.) 742.

On a trial for perjury committed in the county court, it is enough to prove substantially what defendant said.—*Bradford v. State* (Ala.) 742.

PERSONAL INJURIES.

See "Negligence."

Caused by negligence of telegraph company, see "Telegraphs and Telephones," § 1.

To employe, see "Master and Servant," §§ 3-8.

To passenger, see "Carriers," § 2.

To person on or near railroad tracks, see "Railroads," §§ 3, 4.

To traveler on highway, see "Highways," § 1;
"Municipal Corporations," § 7.

PETITION.

In pleading, see "Pleading," § 1.

PHYSICIANS AND SURGEONS.

Preferential claims against decedents' estates for professional services, see "Executors and Administrators," § 4.

On prosecution under Cr. Code, § 5333, contention by defendant that boards of medical examiners discriminate against all but regular physicians *held* of no avail.—*Bragg v. State* (Ala.) 767.

Persons practicing osteopathy *held* practicing medicine, within Civ. Code, § 3261, and Cr. Code, § 5333.—*Bragg v. State* (Ala.) 767.

On prosecution under Cr. Code, § 5333, a contention that the Alabama Medical Association and boards of censors were not regularly organized under the constitution of the association *held* of no avail to defendant.—*Bragg v. State* (Ala.) 767.

Civ. Code, § 3261, and Cr. Code, § 5333, requiring physicians to have certificates of qualification as prerequisite to right to practice, *held* constitutional.—*Bragg v. State* (Ala.) 767.

PLEA.

In civil actions, see "Pleading," § 2.
In criminal prosecutions, see "Criminal Law," § 6.

PLEADING.

As evidence, see "Equity," § 3.

Allegations as to particular facts, acts, or transactions.

See "Adverse Possession," § 2.

Statute of frauds, see "Frauds, Statute of," § 2.
Statute of limitations, see "Limitation of Actions," § 4.

In actions by or against particular classes of parties.

See "Corporations," § 4.

Co-sureties, see "Principal and Surety," § 2.

Stockholders, see "Corporations," § 3.

Telegraph company, see "Telegraphs and Telephones," § 1.

In particular actions or proceedings.

See "Cancellation of Instruments," § 1; "Creditors' Suit"; "Detinue"; "Equity," § 2; "False Imprisonment," § 1; "Libel and Slander," § 2; "Malicious Prosecution," § 2; "Negligence," § 2; "Partition," § 1; "Quieting Title," § 2; "Trespass," § 1.

Condemnation proceedings, see "Eminent Domain," § 3.

Election contest, see "Elections," § 3.

For breach of contract, see "Contracts," § 4.

For discharge from employment, see "Master and Servant," § 1.

For injuries to animals, see "Railroads," § 5.

For personal injuries, see "Carriers," § 2; "Master and Servant," § 8; "Railroads," §§ 3, 4; "Telegraphs and Telephones," § 1.

Indictment or criminal information or complaint, see "Indictment and Information."

On bill or note, see "Bills and Notes," §§ 2, 3.

On foreign judgment, see "Judgment," § 7.

Pleas in criminal prosecutions, see "Criminal Law," § 6.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

To enforce mechanic's lien, see "Mechanics' Liens," § 2.

To recover license tax, see "Licenses," § 1.

To redeem from mortgage, see "Mortgages," § 7.

To restrain injury to property taken for public use, see "Eminent Domain," § 4.

§ 1. Declaration, complaint, petition, or statement.

When the allegations of a declaration containing only one count are inconsistent, they neutralize each other, and the declaration will be held bad on demurrer.—Florida Cent. & P. R. Co. v. Ashmore (Fla.) 832.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

A plea in an injunction suit by a property owner to restrain an adjoining owner from erecting pillars in the street held bad for duplicity.—First Nat. Bank v. Tyson (Ala.) 144. 748.

Special pleas in an action for personal injuries held provable under the general denial.—Postal Tel. Cable Co. v. Jones (Ala.) 500.

Where a joint plea by several defendants adopts as a part thereof a separate plea by one, the latter will be considered as if included in the body of the former.—Louisville & N. R. Co. v. Hall (Ala.) 603.

Where, in a suit against a corporation, the cross bill avers that defendant is a corporation, and the answer thereto does not deny the averment, it must be taken as true.—Rothrock Const. Co. v. Port Gibson Mfg. Co. (Miss.) 484.

§ 3. Demurrer or exception.

Sustaining of one ground of demurrer to a complaint, though others are overruled, warrants final judgment against plaintiff, he not amending.—Terry v. Allen (Ala.) 664.

§ 3½. Profert, oyer, and exhibits.

In an action by a factor, where plaintiff, in accordance with an order therefor, filed her notes and accounts, and included in her return accounts showing the balance due by defendants to her deceased husband, it sufficiently brought all claims before the court for the purpose of the trial.—Kahn v. Becnel (La.) 444.

§ 4. Filing, service, and withdrawal.

There is no error in refusing to permit the withdrawal of the plea to the merits to interpose a plea insisting on the statutory privilege of being sued in some other county.—Little Bros. Fertilizer & Phosphate Co. v. Wilmott (Fla.) 808.

§ 5. Motions.

Objection that a plea does not set up a valid defense cannot be made by motion to strike out. Demurrer is the proper remedy.—Troy Fertilizer Co. v. State (Ala.) 618.

Where a paragraph of a complaint is conceived to be material, but defective in statement, it cannot be taken advantage of by motion to strike.—Marx v. Miller (Ala.) 765.

In an action for breach of a contract of hiring, held not error to refuse to strike a paragraph of the complaint.—Marx v. Miller (Ala.) 765.

Additional pleas, amounting only to the general issue, may be stricken out on motion.—Consumers' Electric Light & St. R. Co. v. Fryor (Fla.) 797.

§ 6. Defects and objections, waiver, and aid by verdict or judgment.

A demurrant waives all objections to pleading not stated as a matter to be argued, except those extending to defects showing no cause of action.—Florida Cent. & P. R. Co. v. Ashmore (Fla.) 832.

Failure to state cause of action is not cured by verdict.—Florida Cent. & P. R. Co. v. Ashmore (Fla.) 832.

Where there is in a declaration no allegation as to facts necessary to create a liability, the defect is not waived by failure to point it out in a demurrer filed.—Florida Cent. & P. R. Co. v. Ashmore (Fla.) 832.

PLEDGES.

A creditor, seeking in equity to subject property of a third person pledged to him for his debt, is not required to make his debtor a party defendant; the latter being beyond the jurisdiction of the court, not amenable to its process, and no relief being asked against him.—Springfield Co. v. Ely (Fla.) 892.

The fact that the party authorized to pledge another's stock certificates for payment of his own specific debt also pledges them for other debts due by him to the creditor does not affect the validity of the pledge for the authorized debt.—Springfield Co. v. Ely (Fla.) 892.

Where money is borrowed on a promise to furnish as collateral security bills of lading, and the borrower pays for the property and retains the bill until the property is seized at suit of his creditor, the lender acquires no lien.—Cameron v. Orleans & J. Ry. Co. (La.) 208.

Where the pledgee fails to account for collateral security, he is liable for the amount at which the security was sold.—Hennessey v. Stempel (La.) 394.

Pledgee must account to the pledgor for amounts collected on a claim against third per-

sons left with him as collateral.—*Hennessey v. Stempel* (La.) 894.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 5.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POLL.

Of jury, see "Criminal Law," § 17.

POSSESSION.

See "Adverse Possession."

As condition precedent to action to quiet title, see "Quieting Title," § 1.

As notice to purchaser, see "Vendor and Purchaser," § 2.

Of demised premises, see "Landlord and Tenant," § 4.

To sustain trespass, see "Trespass," § 1.

POWERS.

Of attorney, see "Principal and Agent."

Of sale in mortgage, see "Mortgages," § 5.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Detinue"; "Mandamus," § 3; "Prohibition"; "Quo Warranto," § 1; "Real Actions"; "Trespass," § 1.

Particular proceedings in actions.

See "Abatement and Revival"; "Costs"; "Damages," § 6; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial"; "Venue."

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Procedure in criminal prosecutions.

See "Criminal Law"; "Intoxicating Liquors," § 4.

Bastardy proceedings, see "Bastards," § 1.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 2.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 3; "New Trial"; "Certiorari."

PREFERENCES.

By insolvent corporations, see "Corporations," § 5.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 11.

PRELIMINARY INJUNCTION.

See "Injunction," § 8.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

Time to contest tax title, see "Taxation," § 9.

PRESENTMENT.

By grand jury, see "Indictment and Information."

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Criminal Law," § 8; "Homicide," §§ 6-8.

Of death, see "Death," § 1.

On appeal or error, see "Appeal and Error," § 10½; "Criminal Law," § 30.

PRIMARY ELECTIONS.

See "Elections," § 2.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Factors."

Admissions by agent, see "Evidence," § 6.

Agency of partner for firm, see "Partnership," § 2.

§ 1. **Rights and liabilities as to third persons.**

In an action to determine the invalidity of a mortgage of a wife's property to secure her husband's debt, evidence held sufficient to show that the one who negotiated the mortgage with the husband was agent of the mortgagee.—*Russell v. Peavy* (Ala.) 492.

Where a person has been constituted a special agent, and his authority has been revoked before he acts, the principal will not be bound by its subsequent performance.—*Florida Cent. & P. R. Co. v. Ashmore* (Fla.) 832.

General powers contained in a power of attorney must be construed with reference to the special powers in connection with which the general authority is given; and, where a special power given therein as to a particular feature of the business is expressly limited, the limitation will control.—*First Nat. Bank v. Kirkby* (Fla.) 881.

A general power as managing agent of a corporation does not clothe the agent with authority to mortgage the principal's property.—*First Nat. Bank v. Kirkby* (Fla.) 881.

PRINCIPAL AND SURETY.

See "Guaranty."

Liabilities of sureties on bonds for performance

of duties of trust or office, see "Officers," § 1.

Liabilities of sureties on bonds in legal proceedings, see "Injunction," § 4.

§ 1. **Creation and existence of relation.**

Under Code 1896, § 3089, where a sheriff filled out his official bond and procured the signatures of sureties, and the bond was filed and approved, such sureties are bound, though the sheriff did not sign it.—*McKissack v. McClendon* (Ala.) 486.

§ 2. **Rights and remedies of surety.**

The right to contribution by the surety on the bond of a public officer against the sureties on other bonds may extend to costs of defending a suit on the bond.—*Carter v. Fidelity & Deposit Co. of Maryland* (Ala.) 632.

In an action for contribution by a surety, a dismissal as to a part of the defendants on payment of their proportion could not be objected to by another defendant; his liability not having been increased thereby.—*Carter v. Fidelity & Deposit Co. of Maryland* (Ala.) 632.

A bill by a surety on the bond of a public officer for contribution from sureties on other bonds was not demurrable for failing to allege that the moneys of the state were converted by the defaulting officer after the execution of defendant's bond.—*Carter v. Fidelity & Deposit Co. of Maryland* (Ala.) 632.

PRIORITIES.

Between mortgages and judgment liens, see "Judgment," § 5.
Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRISONS.

In view of Acts 1896, p. 99, and Code 1892, § 2747, and the fact that whipping is not a legal punishment, *held*, that a convict may not be whipped for discipline.—*Davis v. State* (Miss.) 922.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 1.

PROBATE.

Of will, see "Wills," § 2.

PROCESS.

Resistance or obstruction, see "Obstructing Justice."

In actions against particular classes of parties.
Foreign insurance companies, see "Insurance," § 8.

In particular actions or proceedings.

On appeal, see "Appeal and Error," § 4.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Prohibition"; "Quo Warranto"; "Certiorari"; "Sequestration."

§ 1. **Defects, objections, and amendment.**

Where a sheriff's return of a summons was valid on its face, objection thereto should have been by plea.—*Lamb v. Russel* (Miss.) 916.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

§ 1. **Nature and grounds.**

The district courts being given jurisdiction under the law to appoint receivers only in certain specified cases, prohibition will lie to restrain further action, where there has been an ex parte appointment of a receiver in a case not included in such specification.—*State ex rel. Dauphin v. Ellis* (La.) 335.

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of death, see "Death," § 1.
Of loss insured against, see "Insurance," § 6.

PROPERTY.

See "Animals"; "Fish."

Adverse possession, see "Adverse Possession."

Protection of rights of property by injunction, see "Injunction," § 2.

Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 20.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

PUBLIC BUILDINGS.

See "Counties," § 2.

PUBLIC DEBT.

See "Municipal Corporations," § 8; "Schools and School Districts," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 4.

PUBLIC LANDS.

§ 1. **Survey and disposal of lands of United States.**

Where the old board of commissions for the Western district of the territory of Orleans, under Act Cong. 1807, confirmed a claim to land, followed by confirmation by congress, it operated as a grant from the government, and the ownership of the land was not held in abeyance until a patent issued.—*Jopling v. Chachere* (La.) 243.

Certificates of purchase of swamp and overflowed land *held* not sufficient to establish title thereto.—*Cohn v. Pearl River Lumber Co.* (Miss.) 292.

Plaintiff *held* to have no right to have refunded to him money paid the state for purchase of land.—*Cohn v. Pearl River Lumber Co.* (Miss.) 292.

Though title based on certificates of purchase of swamp and overflowed lands fails, there is no law authorizing a refunding of the purchase money.—*Cohn v. Pearl River Lumber Co.* (Miss.) 292.

The land commissioner *held* not a proper party to a bill asking for cancellation of grants of land issued to defendant, or for return of purchase money paid by plaintiff to the state.—*Cohn v. Pearl River Lumber Co.* (Miss.) 292.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

PUNISHMENT.

See "Criminal Law," § 81.
Of prisoners, see "Prisons."

PUNITIVE DAMAGES.

See "Damages," § 3.

QUANTUM MERUIT.

See "Work and Labor."

QUASHING.

Indictment or information, see "Indictment and Information," § 4.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 3.
In criminal prosecutions, see "Criminal Law," § 20; "Homicide," §§ 9-11.

QUIETING TITLE.

§ 1. Right of action and defenses.

A remainderman, pending possession by the life tenant, can maintain an action to quiet title.—*Worthington v. Miller* (Ala.) 748.

Where complainant's title is a legal one, he must be in possession in order to maintain a bill to remove cloud from title.—*Clem v. Meserole* (Fla.) 783.

§ 2. Proceedings and relief.

A bill to quiet title under Code, § 809 et seq., is not insufficient, by reason of the inclusion of unnecessary allegations tracing plaintiff's title and describing defendant's claim.—*Bledsoe v. Price* (Ala.) 325.

A bill to quiet title under Code, § 809 et seq., is not rendered insufficient or multifarious by reason of a prayer for the cancellation of the muniment of title under which defendant claims.—*Bledsoe v. Price* (Ala.) 325.

A bill to quiet title *held* not bad for want of equity.—*Bledsoe v. Price* (Ala.) 325.

A complaint in an action to quiet title *held* not objectionable on account of the averment of cumulative facts.—*Worthington v. Miller* (Ala.) 748.

A demurrer to the entire bill, in an action to quiet title by a party out of possession claiming title to a part of the land as remainderman pending possession of the life tenant, was properly overruled.—*Worthington v. Miller* (Ala.) 748.

In an action to quiet title, where the cloud consists of a sheriff's deed alleged to have been obtained through collusion with the debtor, it was proper, though not essential, to make the collusive debtor a party defendant.—*Worthington v. Miller* (Ala.) 748.

Description in a complaint to confirm title, referring to a fence, *held* not insufficient on the theory that an allegation as to the "stock law" showed there were no fences.—*Bynum v. Stinson* (Miss.) 910.

Though the description of the premises in a bill to confirm title begins, "about 2½ acres lying," it is not insufficient; the boundaries of the premises being given.—*Bynum v. Stinson* (Miss.) 910.

QUO WARRANTO.

§ 1. Jurisdiction, proceedings, and relief.

Under Rev. St. § 1272, a final judgment in quo warranto, adjudicating the title to an of-

fice in favor of relator, can be superseded on filing a bond properly conditioned.—*Simonton v. State* (Fla.) 809.

A supersedeas in quo warranto does not annul the judgment, but only suspends further action in relation thereto, as provided by Rev. St. § 1272, subd. 2, and relates to the status of the parties as existing at the time it becomes operative.—*Simonton v. State* (Fla.) 809.

RAILROADS.

See "Street Railroads,"; "Taxation," §§ 2, 4. As employers, see "Master and Servant." Carriage of goods and passengers, see "Carriers."

§ 1. Indebtedness, securities, liens, and mortgages.

One who furnishes ties and lumber to a contractor who is building a railroad *held* to have no claim against the company for which the road was being built, where he has served no notice and taken no steps to preserve his rights.—*Cameron v. Orleans & J. Ry. Co.* (La.) 208.

§ 2. Operation—Companies and persons liable for injuries.

The discharge of receivers *held* a defense to an action against them for the negligent killing of a servant.—*McGhee v. Willis* (Ala.) 301.

In an action against the receivers of a railroad company for the killing of a servant in their employ by the negligence of another employé, it must be shown that such servants were in the employ of the receivers.—*McGhee v. Willis* (Ala.) 301.

§ 3. — Accidents at crossings.

In an action against a railroad for injuries received at a crossing, a plea of contributory negligence *held* good.—*Central of Georgia Ry. Co. v. Freeman* (Ala.) 778.

Count in an action against a railroad for injuries received at a crossing, alleging a too high rate of speed, *held* not to state a cause of action.—*Central of Georgia Ry. Co. v. Freeman* (Ala.) 778.

Count in an action against a railroad for injuries received at a crossing, alleging a failure to ring the bell or blow the whistle, *held* not to state a cause of action.—*Central of Georgia Ry. Co. v. Freeman* (Ala.) 778.

In an action for injuries sustained at a railroad crossing, *held*, that the question whether the engineer could have avoided the accident, notwithstanding plaintiff's negligence, was for the jury.—*Cottrell v. Southern Ry. Co.* (Miss.) 1.

In action against railroad company for running down a buggy and killing a 15 year old girl riding therein, *held* error to give peremptory instruction for defendant.—*Allen v. Kansas City, M. & B. R. Co.* (Miss.) 3.

§ 4. — Injuries to persons on or near tracks.

A complaint for running over a person on track should show that, when injured, he was not a trespasser, or that the persons in charge of the train became aware of his perilous position.—*Gadsden & A. U. Ry. Co. v. Julian* (Ala.) 135.

Person walking on railroad track *held* a trespasser, though persons were accustomed to walk there without objection.—*Louisville & N. R. Co. v. Mitchell* (Ala.) 735.

Pedestrian, struck by train while crossing railroad, *held* guilty of contributory negligence.—*Louisville & N. R. Co. v. Mitchell* (Ala.) 735.

Complaint for death of person on railroad track *held* not to charge a wanton or willful injury, but mere negligence.—*Louisville & N. R. Co. v. Mitchell* (Ala.) 735.

Running of a railroad train at an illegal rate of speed and without signals in a city, by reason of which a person crossing the tracks was injured, *held* recklessness amounting to willfulness, without regard to plaintiff's right to be where he was struck.—*Stevens v. Yazoo & M. V. R. Co. (Miss.)* 311.

In an action for injuries sustained by a person while crossing railroad tracks in a city, evidence *held* to require a submission of the case to the jury.—*Stevens v. Yazoo & M. V. R. Co. (Miss.)* 311.

In an action for the death of plaintiff's child at a public crossing, evidence examined, and *held* error to direct a verdict for defendant.—*Dennis v. New Orleans & N. E. R. Co. (Miss.)* 914.

§ 5. — Injuries to animals on or near tracks.

A complaint charging the killing of hogs by a railroad company as a result of a breach of a contract by the company to maintain fences *held* not subject to demurrer in failing to allege when the contract was first broken.—*Evans v. Southern Ry. Co. (Ala.)* 138.

An agreement of a railroad company to fence its track *held* to render the company *prima facie* liable for the killing of stock entering the right of way because of failure to so fence.—*Evans v. Southern Ry. Co. (Ala.)* 138.

In an action against a railroad for injuries to horse, owing to a train having driven him into a trestle, an instruction *held* not erroneous under the evidence.—*Alabama G. S. R. Co. v. Hall (Ala.)* 259.

In an action against a railroad for injuries to horse, owing to a train having driven him into a trestle, an instruction *held* not erroneous, as authorizing recovery, though the horse would have run into the trestle, though the train had been stopped.—*Alabama G. S. R. Co. v. Hall (Ala.)* 259.

In action against railroad for injuries to a horse, owing to a train having driven him into a trestle, *held* not error to refuse defendant's request for the general affirmative charge.—*Alabama G. S. R. Co. v. Hall (Ala.)* 259.

Complaint against a railroad in action for injuries to a horse, a train having driven him into a trestle, *held* not demurrable.—*Alabama G. S. R. Co. v. Hall (Ala.)* 259.

Evidence in an action against a railroad for the killing of a cow considered, and *held*, that the general charge for defendant was properly refused.—*Kansas City, M. & B. R. Co. v. Childers (Ala.)* 717.

Evidence in an action against a railway for injury to a mule *held* to require submission of the question of defendant's negligence.—*Kansas City, M. & B. R. Co. v. Wagand (Ala.)* 744.

In an action for negligently killing plaintiff's mule, where there was no evidence that the engineer alone was charged with the duty of keeping a lookout, the jury could consider any fault in the conduct of the fireman.—*Kansas City, M. & B. R. Co. v. Wagand (Ala.)* 744.

Where plaintiff's mule was injured by defendant's train while plaintiff was employed with his team on defendant's roadbed, plaintiff was entitled to recover for any negligence of defendant's servants.—*Kansas City, M. & B. R. Co. v. Wagand (Ala.)* 744.

The circumstances surrounding the killing of a horse *held* not to bring the case within the provision of Ann. Code, § 1808, providing that injuries "by the running of locomotives or cars" shall be *prima facie* proof of negligence by the company's servants.—*Lowe v. Alabama & V. Ry. Co. (Miss.)* 907.

The circumstances surrounding the killing of a horse *held* not to establish willfulness, wan-

tonness, or lack of reasonable care on the part of the railroad engineer.—*Lowe v. Alabama & V. Ry. Co. (Miss.)* 907.

In an action against a railway company for killing a horse, the question of the negligence of defendant's servant *held*, under the evidence, for the jury.—*Alabama & V. Ry. Co. v. Moore (Miss.)* 908.

§ 6. — Fires.

Burden of proof in action for negligent setting of fire by a locomotive considered.—*Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)* 745.

Evidence that it was dry weather *held* competent on the issue whether fire was set by sparks from a locomotive.—*Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)* 745.

Evidence that train was short, and sparks emitted many and large, *held* competent on issue whether a locomotive was properly equipped and handled.—*Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)* 745.

RAPE.

§ 1. Offenses and responsibility therefor.

It is not essential to the crime of assault with intent to commit rape that the perpetrator should have intended that his accomplished act should be rape.—*Jacobi v. State (Ala.)* 158.

§ 2. Prosecution and punishment.

Where an indictment for rape does not charge that the victim was under the age of consent, and the evidence does not show nonconsent, a conviction cannot be sustained.—*Alfred v. State (Miss.)* 54.

RATIFICATION.

Of mortgage by corporation, see "Corporations," § 4.

REAL ACTIONS.

See "Ejectment."

In a petitory action against a defendant, claiming title by patent from state, plaintiff is without interest to urge that the officers of the state were without authority to issue patent.—*Willis v. Ruddock Cypress Co. (La.)* 386; *In re Willis, Id.*

Where, in a petitory action, a tax title is set up in the answer, it is open to every objection of law or fact, as if they had been specially pleaded in the petition.—*Willis v. Ruddock Cypress Co. (La.)* 386; *In re Willis, Id.*

REASONABLE DOUBT.

Instructions as to, see "Criminal Law," § 21.

RECEIVERS.

Effect of operation of railroad by receiver as to liability for personal injuries, see "Railroads," § 2.

Of corporations in general, see "Corporations," § 5.

Prohibition to restrain appointment of, see "Prohibition," § 1.

Review of order refusing discharge, see "Appeal and Error," § 1.

§ 1. Nature and grounds of receivership.

An owner of realty is entitled to the appointment of a receiver pending an action of ejectment against an insolvent.—*Hereford v. Hereford (Ala.)* 651.

Facts alleged in a bill brought to enforce laborers' liens *held* not to authorize receivership

to take charge of the debtor's property.—First Nat. Bank v. Kirkby (Fla.) 881.

§ 2. Management and disposition of property.

Unpaid subscriptions to the capital stock of a limited corporation are assets, which the receiver must collect and apply to the payment of the debts.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

Where an attorney is appointed for absent creditors, his compensation is a charge on the sum coming to such creditors.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

A former receiver, who, in a suit to destitute him, resigns, must settle with his successor, and his bond should not have been canceled until settlement was made.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

§ 3. Allowance and payment of claims.

Funds in a receiver's hands subject to no special privilege must be first applied in paying the claims which are entitled to rank as general privileges priming the lessor's privilege, and only for any balance left can recourse be had against the fund which is subject to the lessor's special privilege.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

Creditors are not precluded in the matter of contesting claims set up against an insolvent estate, except by the filing of an account and its homologation contradictorily with them after notice and delays required to be given.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

§ 4. Accounting and compensation.

A receiver of a succession should ask for an order that all costs incurred and those to be incurred to the date of final settlement be taxed and paid by privilege from the fund stated in the account.—Standard Cotton Seed Oil Co. v. Excelsior Refining Co. (La.) 221.

Where the amount to be distributed is but a little more than \$9,000, and the receiver is allowed a commission of 5 per cent., no greater percentage than 10 per cent. should be allowed his attorney.—Standard Cotton Seed Oil Co. v. Excelsior Refining Co. (La.) 221.

In insolvent estates, in estimating the fees of the receiver and his attorney, care should be taken not too greatly to deplete by charges the small store of funds constituting the common stock.—Standard Cotton Seed Oil Co. v. Excelsior Refining Co. (La.) 221.

Expenses and charges of receivership should be in proportion to the interests involved and the results achieved.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

Where assets are not accounted for in a final account of a receiver, the case will be remanded, though there was a failure to complain of this omission in the opposition filed.—City Item Co-op. Printing Co. v. Phoenix Furniture Concern (La.) 469.

RECEIVING STOLEN GOODS.

An indictment for receiving stolen goods must describe the property, and, where it embraces only a part of what was stolen, that received must be described.—Gabriel v. State (Fla.) 779.

A charge of receiving stolen goods, to wit, "two cases of cigars, both of the value of \$500," will not be sustained by proof of the receipt by defendant of a lot of loose cigars not in cases.—Gabriel v. State (Fla.) 779.

On a prosecution for receiving stolen property, testimony tending to prove an arrange-

ment between the thief and defendant, whereby the thief was to steal and defendant receive from him a certain kind of property as the defendant should need it, is admissible, where the testimony tends to show that the particular property charged in the indictment was received by defendant in pursuance of such arrangement.—Anthony v. State (Fla.) 818.

RECORDS.

As notice, see "Vendor and Purchaser," § 2. Transcript on appeal or writ of error, see "Appeal and Error," § 6; "Criminal Law," § 28.

REDEMPTION.

From mortgage, see "Mortgages," § 7. From sale on execution, see "Execution," § 4. From tax sales, see "Taxation," § 8.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

Reformation of insurance policy, see "Insurance," § 1.

§ 1. Proceedings and relief.

Mortgagee, whose debt is less than a fire policy, held necessary party to a bill for reformation and recovery on the policy as reformed.—Taylor v. Glens Falls Ins. Co. (Fla.) 887.

REGISTERS.

In chancery, see "Equity," § 5.

REGISTERS OF DEEDS.

A lender who has advanced money on the faith of a certificate of nonalienation of property has a right of action on the register's bond to recover the loss sustained, where such property has in fact been alienated.—Gordon v. Stanley (La.) 531.

Under Civ. Code, art. 2257, a certification by register of conveyances that "according to the records of his office" the property has not been alienated renders him liable for damages sustained by a party acting on such certificate, if a conveyance was registered, though not properly indexed.—Gordon v. Stanley (La.) 531.

REHEARING.

See "New Trial."

On appeal or writ of error, see "Appeal and Error," § 8.

RELATIONSHIP.

As affecting qualifications of juror, see "Jury," § 4.

RELEASE.

See "Compromise and Settlement."

Of mortgage, see "Mortgages," § 4.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.

Of evidence in criminal prosecutions, see "Criminal Law," § 9.

RELIGIOUS SOCIETIES.

Where a trustee of an incorporated church is expelled from ecclesiastical membership therein, the court has no jurisdiction, under Code, §§ 1302-1305, to compel his restoration to such

membership by mandamus.—*Hundley v. Collins* (Ala.) 575.

REMAINDERS.

Created by deed, see "Deeds," § 2.

A remainder-man, whose estate is limited to commence after a precedent life estate, cannot maintain ejectment before the death of the life tenant.—*Laster v. Blackwell* (Ala.) 166.

Evidence in ejectment by remainder-man considered, and *held* insufficient to show that the life tenant died prior to the institution of the suit.—*Laster v. Blackwell* (Ala.) 166.

The fact that a life tenant should protect the inheritance from injury, and might sue for injuries thereto, does not affect the right of action of the remainder-men for waste committed by a third party.—*Learned v. Ogden* (Miss.) 278.

REMOVAL OF CAUSES.

§ 1. Origin, nature, and subject of controversy.

A case based entirely on state laws *held* not removable to the federal courts, though it may suggestively state defenses involving federal questions.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Landlord and Tenant," § 8.

REPEAL.

Of statute, see "Statutes," § 8.

REPLEVIN.

See "Detinue."

REPLICATION.

In pleading, see "Equity," § 2.

REQUESTS.

For instructions in criminal prosecutions, see "Criminal Law," § 22.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of insurance policy, see "Insurance," § 2.

RESERVATIONS.

For grantor in assignment, see "Assignments for Benefit of Creditors," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 9.

RESIDENCE.

As qualification of right of suffrage, see "Elections," § 1.

RES JUDICATA.

See "Judgment," § 4.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 25-30; "Justices of the Peace," § 3.

REVOCATION.

Of letters testamentary, see "Executors and Administrators," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 6.

ROADS.

Streets in cities, see "Municipal Corporations," §§ 6, 7.

ROBBERY.

An indictment for robbery considered, and *held*, that the description of the property taken was sufficient.—*Nevill v. State* (Ala.) 596.

SALES.

See "Vendor and Purchaser."

By auction, see "Auctions and Auctioneers."

Of intoxicating liquors, see "Intoxicating Liquors."

Of property belonging to estate assigned for benefit of creditors, see "Assignments for Benefit of Creditors," § 2.

Of property of decedent under order of court, see "Executors and Administrators," § 6.

Of public lands, see "Public Lands," § 1.

On execution, see "Execution," § 4.

On foreclosure of mortgage, see "Mortgages," § 5.

On order or judgment of court, see "Judicial Sales."

Partition sales, see "Partition," § 1.

Tax sales, see "Taxation," § 7.

§ 1. Requisites and validity of contract.

Under Civ. Code, arts. 2450, 2451, a hope of a future crop is made merchantable.—*Losecco v. Gregory* (La.) 985.

Where only the hope of a future crop is sold, the price need not be restored, though the crop entirely fails.—*Losecco v. Gregory* (La.) 985.

Where a future crop is sold, the sale becomes null if the crop fails entirely, or practically so, and the price must be restored.—*Losecco v. Gregory* (La.) 985.

§ 2. Construction of contract.

Contract under which defendant sold "two crops of oranges on my place as follows: (1) All oranges that my trees may produce in the year 1899; (2) all oranges that my trees may produce in the year 1900,"—construed, and *held*, that the sale was of the hope of the crops, and not of the crops themselves, and that the purchaser could not recover back the part of the price paid, and must pay the unpaid part.—*Losecco v. Gregory* (La.) 985.

In determining whether the subject of the sale of a future crop was a crop itself, or the mere hope of it, the comparison between the price agreed upon and the value of the crop is to be considered.—*Losecco v. Gregory* (La.) 985.

Where, in a contract for an orange crop, the purchaser assumes all risks, the assumption applies to the crop, and not to the trees themselves.—*Losecco v. Gregory* (La.) 985.

A clause in a contract for the purchase of an orange crop for two years, providing that the "purchaser assumes all risks," means all usual, known, and foreseen risks.—*Losecco v. Gregory* (La.) 985.

§ 3. Performance of contract.

Defendant, in detinue for a horse, held to have had title.—*Lightman v. Boyd* (Ala.) 714.

§ 4. Operation and effect.

Where machinery has been sold to a planter, and he has attached it to his plantation, and the property has been sold under a pre-existing mortgage, the seller cannot, after the sale, recover the machinery from the purchaser.—*W. T. Adams Mach. Co. v. Newman* (La.) 38.

Where all the essential elements of an absolute sale are present in a contract, the rights of the parties and of others dealing with them are not affected, though the contract may be intended as a conditional sale.—*W. T. Adams Mach. Co. v. Newman* (La.) 38.

A bank, buying a draft from the vendor, to which a bill of lading is attached, is placed, as to the buyer, in the same situation as its assignor stood, and is liable to the buyer, who had paid the draft, for breach of contract in the delivery and quality of the corn.—*Russell v. Smith Grain Co. (Miss.)* 287; *Searles v. Same, Id.*

§ 5. Warranties.

A hope of a crop is a presently existing thing, and, not being susceptible of delivery, its delivery accompanies the act of sale, and the seller does not warrant its continued existence.—*Losecco v. Gregory* (La.) 985.

§ 6. Remedies of seller.

In an action for the price of goods to be shipped "at once," but not shipped for two weeks, instruction that the vendor had a reasonable time to investigate the purchaser's solvency, etc., held properly refused.—*Oklahoma Vinegar Co. v. Hamilton* (Ala.) 306.

§ 7. Remedies of buyer.

In an action for the balance of the price of onion sets, held, that it was for the jury to determine whether the agreed price should be abated, though the buyer had not returned the sets.—*Frith v. Hollan* (Ala.) 494.

SANITY.

Presumption as to sanity of accused, see "Criminal Law," § 8.

SATISFACTION.

See "Compromise and Settlement."

Of mortgage, see "Mortgages," § 4.

SCHOOLS AND SCHOOL DISTRICTS.

§ 1. Public schools.

Residents of a school district, who do not show that their own children are incommode, or that their taxes are increased by the manner in which the boundaries of a school district have been fixed, are without right to resist a tax levied in the district, having no ground of complaint.—*Burnham v. Police Jury of Claiborne Parish* (La.) 87.

In determining whether compliance with Acts 1888, No. 81, § 11, requiring school boards to divide their parishes into school districts, was sufficiently formal, much less strict compliance held necessary in connection with the mere distribution of school funds than in connection with the exercise of the taxing power.—*Burnham v. Police Jury of Claiborne Parish* (La.) 87.

The parish school board must limit itself as to debts to the revenue of the calendar year in

which the debts are contracted.—*Andrus v. Board of Directors of Parish of St. Landry* (La.) 420.

Disbursements by the treasurer of a school fund of a parish, otherwise than on warrants drawn by the president and countersigned by the secretary of the parish board of school directors, are positively prohibited by law.—*Andrus v. Board of Directors of Parish of St. Landry* (La.) 420.

Under Acts 1888, No. 81, §§ 7, 10, the parish boards of school directors of the school funds, with the sanction of the state board of education, when suitable buildings and sites have been otherwise supplied, may establish such high schools as may be necessary and draw upon the general school fund before apportionment of the same.—*Andrus v. Board of Directors of Parish of St. Landry* (La.) 420.

Where a particular school district has received less than its share of the fund, it is entitled to be made good on the next apportionment.—*Andrus v. Board of Directors of Parish of St. Landry* (La.) 420.

Where a building has been constructed with bonds issued on a vote to build a schoolhouse, such building will not be allowed to be converted into a theater.—*Sugar v. City of Monroe* (La.) 961.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

In criminal prosecutions, see "Criminal Law," § 7.

SEDUCTION.

§ 1. Criminal responsibility.

In a prosecution for seduction, where some evidence tended to show that the sexual act was by force, an instruction that, unless the evidence showed beyond reasonable doubt that prosecutrix consented, defendant could not be convicted, should have been given.—*Hall v. State* (Ala.) 750.

In a prosecution for seduction, instruction held prejudicial to defendant, because not mentioning testimony of prosecutrix favorable to defendant.—*Hall v. State* (Ala.) 750.

SELF-DEFENSE.

As justification for homicide, see "Homicide," § 4.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 24; "Homicide," § 14.

SEPARATE ESTATE.

Of married woman, see "Husband and Wife," § 2.

SEPARATION.

See "Husband and Wife," § 4.

SEQUESTRATION.

Where there was a judicial sequestration, and a sequestrator appointed contradictorily to collect bills and to prevent loss, he was properly ordered to deliver over the property after deducting his costs and reasonable charges.—*L. J. Meestier & Co. v. A. Chevalier Paving Co.* (La.) 520.

Affidavit in sequestration, that plaintiff feared that defendant would conceal or dispose of the crop, denied by defendant, held to give rise to an inquiry into the reasonableness of

the fear expressed by plaintiff.—*Pierce v. Sturdivant* (La.) 530.

Where the right to sequester is contested on the averment of insufficient grounds, the inquiry is toward ascertaining whether the debtor was doing or saying that from which the creditor might apprehend an intent to do the hurtful thing that the sequestration would prevent.—*Pierce v. Sturdivant* (La.) 530.

Affidavit of sequestration against growing crop, stating that plaintiff feared defendant would conceal or dispose of the crop, *held* sustained by the evidence.—*Pierce v. Sturdivant* (La.) 530.

SERVICE.

Of process on foreign insurance company, see "Insurance," § 8.

SERVICES.

See "Master and Servant," § 2; "Work and Labor."

SETTLEMENT.

See "Account Stated"; "Compromise and Settlement."

By partners, see "Partnership," § 3.
Of bill of exceptions, see "Exceptions, Bill of," § 2.

SEWERS.

Use and regulation, see "Municipal Corporations," § 6.

SINKING FUNDS.

For municipal indebtedness, see "Municipal Corporations," § 8.

SLANDER.

See "Libel and Slander."

SPECIAL VENIRE.

See "Jury," § 3.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 4.
Of case or facts for purpose of review, see "Appeal and Error," § 6.
Of facts agreed on for submission to court, see "Submission of Controversy."
Of plaintiff's claim, see "Pleading," § 1.

STATES.

Control of liquor traffic by state agencies, see "Intoxicating Liquors," § 1.
Courts, see "Courts."
Public land, see "Public Lands," § 1.

§ 1. **Property, contracts, and liabilities.**
The state cannot be bound by a contract made in its behalf by a public officer not having ac-

tual authority to make such contract, even though he has so conducted himself with reference thereto as to estop himself from denying its validity.—*Camp v. McLin* (Fla.) 927.

STATUTES.

Judicial notice of statutes, see "Evidence," § 1.
Laws impairing obligation of contracts, see "Constitutional Law," § 2.

Provisions relating to particular subjects.

See "Animals"; "Attachment," § 2; "Bankruptcy," § 1; "Banks and Banking," § 1; "Bastards," § 1; "Clerks of Courts"; "Corporations," § 3; "Counties," § 1; "Creditors' Suit"; "Descent and Distribution"; "Drains," § 1; "Elections," §§ 1, 2; "Eminent Domain," § 1; "Exceptions, Bill of," § 2; "Fish"; "Gaming," § 2; "Intoxicating Liquors"; "Limitation of Actions," § 1; "Mechanics' Liens"; "Taxation."

Liability on official bonds, see "Officers," § 1.
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Statute of frauds, see "Frauds, Statute of."
Trial by jury, see "Jury," § 1.

§ 1. **Enactment, requisites, and validity in general.**

Acts 1898-99, p. 1776, providing a complete system for the establishment and regulation of adjacent stock law districts in Clay county, *held* not invalid as an attempt to extend an act without re-enacting its provisions.—*Street v. Hooten* (Ala.) 580.

§ 2. **Subjects and titles of acts.**

The title of Acts 1898-99, p. 1776, "to amend an act entitled 'An act to provide for the extension of stock law in Clay county,' approved February 11, 1897," *held* sufficient, and the act valid, though the act which it purported to amend was invalid, under Const. art. 4, § 2.—*Street v. Hooten* (Ala.) 580.

Acts 1900-1901, p. 288, establishing a dispensary in Florence, *held* not a violation of Const. 1875, art. 4, § 2.—*Mitchell v. State* (Ala.) 687; *Powers v. City of Florence*, *Id.*

§ 3. **Repeal, suspension, expiration, and revival.**

Act Feb. 21, 1887 (Acts 1886-87, p. 190), providing that the board of revenue shall select and draw jurors, *held* repealed by Act March 2, 1901 (Acts 1900-1901, p. 1904), as, the two being conflicting and the latter an affirmative act reversing the subject-matter of the former, it was evidently intended as a substitute for it.—*Edson v. State* (Ala.) 308.

§ 4. **Construction and operation.**

Where a statute is re-enacted after its interpretation by the courts, the re-enactment will be construed as an express judicial affirmation of such interpretation.—*White v. State* (Ala.) 320.

In order to justify the court in holding a statute void, it must be alleged and proved that it was unconstitutional.—*State v. Sonier* (La.) 175.

To discover the true meaning of a law, the cause which induced its enactment must be considered.—*Richard v. Lazard* (La.) 559.

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STAY.

Of execution of sentence, see "Criminal Law," § 24.

STOCK.

See "Animals."

Corporate stock, see "Corporations," § 2.

STOCKHOLDERS.

Of corporations, see "Corporations," § 3.

STOLEN GOODS.

See "Receiving Stolen Goods."

STREET RAILROADS.

See "Railroads."

Carriage of passengers, see "Carriers," § 2.

§ 1. Establishment, construction, and maintenance.

Acts 1891, c. 4071, defining the liability of railroad companies in certain cases, and providing for a presumption of negligence arising from the injury or damage, applies to street railroads.—Consumers' Electric Light & St. R. Co. v. Pryor (Fla.) 797.

The measure of duty required of street railroads under Acts 1891, c. 4071, is that their agents exercise all ordinary and reasonable care and diligence.—Consumers' Electric Light & St. R. Co. v. Pryor (Fla.) 797.

Under Acts 1896, No. 10, providing that, on paving the street, a street railway shall pay in proportion to the space occupied by its roadbed, the roadbed consists of the foundation on which the superstructure rests.—City of Shreveport v. Shreveport Belt Ry. Co. (La.) 189.

In determining the proportion of the space for which a street railway must pay on the paving of the street, the outside of the track cannot be considered, on the ground that the road is also benefited by the adjacent pavement.—City of Shreveport v. Shreveport Belt Ry. Co. (La.) 189.

§ 2. Regulation and operation.

In an action against a street car company for injuries to a pedestrian, an instruction is

properly refused that limits the duty of the company's employes to the time when they became aware of plaintiff's danger, without reference to ordinary care to discover his dangerous situation.—Consumers' Electric Light & St. R. Co. v. Pryor (Fla.) 797.

Employes of street car company are not required to stop a car until it becomes evident to a person of ordinary prudence that a pedestrian has failed in his duty to take due care and has placed himself in a perilous situation.—Consumers' Electric Light & St. R. Co. v. Pryor (Fla.) 797.

Street cars, regardless of the power by which they are impelled, have no superior rights to other vehicles or pedestrians, in the absence of a specific legislative act.—Consumers' Electric Light & St. R. Co. v. Pryor (Fla.) 797.

Boy of 13, injured by a street car moving at the rate of six miles an hour, held guilty of contributory negligence.—Kaiser v. New Orleans & O. R. Co. (La.) 75.

Where urchins have been stealing rides on the rear of electric cars in a city street, the employe who has tried to make them desist is justified in catching hold of one of the boys and lecturing him.—Palmsano v. New Orleans City R. Co. (La.) 364.

Where a street railway employe catches a boy stealing a ride, and after lecturing him lets him go, and he on being turned loose runs blindly into an approaching car, neither the employe nor his employer is liable therefor.—Palmsano v. New Orleans City R. Co. (La.) 364.

STREETS.

See "Municipal Corporations," §§ 6, 7.

SUBMISSION.

To arbitration, see "Arbitration and Award," § 1.

SUBMISSION OF CONTROVERSY.

Submission of a cause in equity held to include certain demurrers.—Henderson v. Hall (Ala.) 840; Hall v. Henderson, Id.

SUBROGATION.

A person paying a mortgage debt at the request of the mortgagor *held* entitled to subrogation.—*Motes v. Roberson* (Ala.) 226.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Collection of taxes, see "Taxation," § 6.
Recovery of possession by landlord, see "Landlord and Tenant," § 4.

SUMMONS.

See "Process."

SUPREME COURTS.

See "Courts," § 3.

SURETYSHIP.

See "Principal and Surety."

SURPRISE.

Ground for new trial, see "Criminal Law," § 23.

SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

SURVIVORSHIP.

Evidence, see "Death," § 1.

SWAMP LANDS.

See "Public Lands," § 1.

SWINDLING.

See "False Pretenses."

TAXATION.

Appellate jurisdiction in suits involving validity of tax, see "Courts," § 3.
Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

Local or special taxes.

See "Drains," § 1; "Municipal Corporations," § 3; "Schools and School Districts," § 1.

Assessments for municipal improvements, see "Municipal Corporations," § 4.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 2; "Licenses," § 1.

§ 1. Nature and extent of power in general.

The prohibition of the revenue law against taxing property twice in the same year does not apply to taxation in another state.—*Griggsby Construction Co. v. Freeman* (La.) 399.

It is not double taxation to tax the same thing in two jurisdictions, where each has a right to tax it.—*Griggsby Construction Co. v. Freeman* (La.) 399.

§ 2. Liability of persons and property.

Where a city is the owner of land used as a levee, it cannot be dispossessed by means of a

tax suit based on assessment of the land as the property of a private individual.—*City of New Orleans v. Fredericks* (La.) 80.

On a claim for exemption from taxation under provision of the constitution, every reasonable doubt is resolved adversely to the claimant.—*Louisiana & N. W. R. Co. v. State Board of Appraisers* (La.) 184.

Under Const. art. 230, providing that railroads constructed thereafter and completed before January 1, 1904, should be exempt from taxation, the roadbed of a railroad which was in such condition that it only lacked 20 per cent. of completion and a total of 815 feet of bridge and trestle work in a distance of some 18 miles was not exempt.—*Louisiana & N. W. R. Co. v. State Board of Appraisers* (La.) 184.

Where a claim to land was confirmed under Act Cong. 1807, and the confirmation was followed by the confirmation by congress, the property so confirmed became subject to state taxation.—*Jopling v. Chachere* (La.) 243.

A contractor's outfit, consisting of mules, scrapers, etc., brought from another state to be used in the construction of a railroad bed, on which work it was likely to be occupied for several months, is taxable in the state.—*Griggsby Construction Co. v. Freeman* (La.) 399.

Blacksmith's tools and commissary stores, kept by a corporation in connection with an outfit for doing construction work, are liable to taxation.—*Griggsby Construction Co. v. Freeman* (La.) 399.

Under Acts 1894, c. 34, § 3, assessments for back taxes cannot be made against property purchased by legatees with their legacies, because the testator failed to pay the taxes on such legacies.—*Adams v. Schwartz's Heirs* (Miss.) 280.

A decision by the supreme court as to the constitutionality of charter provisions exempting railroad property from taxation *held* necessary to constitute the exemptions a rule of law applying to the property.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

The escape of railroad property from assessment and taxation *held* not to render it exempt for the back taxes in the hands of an innocent purchaser, unless the state was estopped by a rule of property.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

Laws 1884, pp. 29-31, Laws 1886, p. 49, and Laws 1890, p. 13, recognizing the supposed exemption of certain railroads from taxation, and declaring the legislative intent in regard thereto, *held* not to create exemptions otherwise non-existent.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

Laws 1878, p. 233, granting a certain railroad an exemption from taxation, *held* to have been repealed by Code 1880, §§ 597-608.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

Under Const. 1869, art. 12, § 13, legislation seeking to confer an exemption from taxation on certain railroads (Laws 1870, pp. 268, 316-327; Laws 1871, p. 237; Laws 1873, p. 562; Laws 1882, p. 1011; and Laws 1884, p. 936), *held* to be unconstitutional.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

Laws 1882, p. 1011, and Laws 1884, p. 936, containing provisions whereby certain railroads to be thereby consolidated might appropriate taxes to the payment of prospective construction debts, *held* not to apply to portions of the road built at the time of the consolidation.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

The construction of a railroad under two charters, only one of which authorized the appropriation of the taxes of the road to the payment of debts to be incurred in the construction, *held* to preclude a claim for such exemption.—*Yazoo & M. V. R. Co. v. Adams* (Miss.) 937.

Laws 1870, p. 288, providing for an exemption to a certain railroad from taxation, *held to have been repealed by Laws 1875, p. 68, Laws 1878, p. 78, and Code 1880, §§ 597-608, so that Laws 1882, p. 1011, giving a reorganization all the grants of the old company, granted no exemption from taxation.*—*Yazoo & M. V. R. Co. v. Adams (Miss.) 937.*

One who claims exemption from taxation must clearly show that all the conditions on which the exemption was based have been at all times fulfilled.—*Yazoo & M. V. R. Co. v. Adams (Miss.) 937.*

§ 3. Place of taxation.

Where the termini and the direction of the line of a taxing district are unmistakable, the boundary line of such district is designated with sufficient certainty.—*Burnham v. Police Jury of Claiborne Parish (La.) 87.*

§ 4. Levy and assessment.

Taxes for the current year are not included in the term "back taxes," as used in Acts 1898, No. 170, § 12, providing that no back taxes for more than three years shall be assessed.—*Methodist Episcopal Church v. City of New Orleans (La.) 101.*

Property liable to taxation, which is entered on the assessment roll as exempt, *held* omitted from the assessment, within the meaning of Acts 1898, No. 170, providing for the assessment of property which has been omitted.—*Methodist Episcopal Church v. City of New Orleans (La.) 101.*

In a proceeding to annul an assessment, an exemption relied on must be affirmatively established.—*Methodist Episcopal Church v. City of New Orleans (La.) 101.*

Where a taxpayer has been twice requested to furnish a list of his property for assessment, he is, under Acts 1898, No. 170, § 7, estopped from contesting the correctness of the assessment filed.—*Griggsby Construction Co. v. Freeman (La.) 399.*

That property tax payers of a parish have authorized the levy of a five-mill tax on all the property in a parish, including that within the town therein, in favor of a particular railroad enterprise, is no obstacle to the imposition at the same time of a five-mill tax on all the property within the town in favor of the same enterprise, by the vote of the property owners therein, under Const. art. 270, and Acts 1898, No. 202.—*Vicksburg, S. & P. R. Co. v. Good-enough (La.) 404.*

It was not necessary for an assessor, in preparing his assessment rolls, to give previous notice to the owner of certain property that he intended to raise the assessment over that of the previous year.—*Legendre v. Assessor of Parish of St. Charles (La.) 523; In re Elfer, Id.*

A contention that, because by judgment of court the assessment of a plantation was fixed at a certain sum for the year 1899, the assessor was without authority to increase it in the year 1900, is unfounded.—*Legendre v. Assessor of Parish of St. Charles (La.) 523; In re Elfer, Id.*

A bill will not lie to make a tax collector's conveyance conform to a description which did not exist at the time of the assessment.—*Boone v. Dunion (Miss.) 1.*

Code 1892, § 3904, authorizing the tax collector to assess such persons and personal property as he may find unassessed by the assessor, is constitutional.—*Powell v. McKee (Miss.) 919.*

Under Code 1892, §§ 3746, 3747, assessment of personal property "to the unknown owner" is proper, when the owner cannot be found.—*Powell v. McKee (Miss.) 919.*

¹ Code 1892, §§ 3875-3878, taken in connection with Const. § 112, *held* to confer no jurisdic-

tion on the board of railroad assessors to determine questions of tax exemptions, so as to render them res judicata.—*Yazoo & M. V. R. Co. v. Adams (Miss.) 937.*

§ 5. Payment and refunding or recovery of tax paid.

Taxes voluntarily paid to an officer authorized to receive them cannot be recovered from such officer by the party paying them.—*Johnson v. Atkins (Fla.) 879.*

The giving of a certificate by the sheriff and tax collector that the poll tax was paid for the year previous to that in which the certificate was issued, *held* not antedating the certificate, within the prohibition of Const. 1898, art. 196.—*McAyeal v. Murrell (La.) 395.*

§ 6. Collection and enforcement against persons or personal property.

A suit to relieve property of taxes assessed against it for one or more years is a proceeding for the reduction of assessments, authorizing the attorney of the tax collector to be compensated by 10 per cent. on the amount collected.—*Methodist Episcopal Church v. City of New Orleans (La.) 101.*

In a suit before a justice to recover a state tax, the tax collector need not be represented by the district attorney.—*Willis v. Ruddock Cypress Co. (La.) 386; In re Willis, Id.*

§ 7. Sale of land for nonpayment of tax.

To constitute a valid tax sale, there must have been an assessment sufficiently accurate as to description to identify the property.—*Scott v. Parry (La.) 188.*

A sale under a judgment for a state tax rendered by a justice need not be approved by the auditor, except as a matter affecting the right to pay costs out of the state funds.—*Willis v. Ruddock Cypress Co. (La.) 386; In re Willis, Id.*

Where property is acquired after the completion of the assessment roll, the person who was then president of the corporation acquiring the property will be presumed to have continued to hold the same position down to the time of the service of the notice of delinquency.—*Harvey v. Gulf States Land & Improvement Co. (La.) 475.*

Where property is sold after the completion of the assessment, the notice of delinquency may be addressed to the vendor, and by serving on the purchaser a notice so addressed the tax officers comply with Acts 1898, No. 170, §§ 50, 51.—*Harvey v. Gulf States Land & Improvement Co. (La.) 475.*

Sale for taxes of separate tracts of land together in one lump *held* void.—*Hewes v. Seal (Miss.) 55.*

§ 8. Redemption from tax sale.

Where separate tracts of land were sold for taxes in one piece, contrary to law, any party in interest could redeem any one of the tracts from the sale, and could not be required to redeem the whole.—*Hewes v. Seal (Miss.) 55.*

§ 9. Tax titles.

Under Code 1886, §§ 459, 597, and Code 1890, §§ 3921, 4078, 4083, 4084, a purchaser of land at an invalid tax sale has no lien on the land for subsequent taxes thereon paid by him, except when the invalidity of the sale has been determined in a suit between him and the owner, as prescribed in sections 4083, 4084.—*Sheffield City Co. v. Tradesmen's Nat. Bank (Ala.) 598.*

Under Const. 1879, art. 210, and Acts 1888, No. 85, it is not obligatory on the tax collector to recite in his tax deed that, before offering the property as a whole, he had offered the least quantity that any bidder would buy for the

taxes, interest, and costs, and, if it be a fact that such offering was made, the tax purchaser can prove it by evidence aliunde.—*Cane v. Herndon* (La.) 33.

The presumption established by Const. 1879, art. 210, in favor of the prima facie validity of a tax deed, extends to the meaning of the language used.—*Cane v. Herndon* (La.) 33.

In an action to annul a tax title to support the plea of prescription of three years, under Acts 1874, No. 105, the tax purchaser must show actual possession for three years before suit.—*Scott v. Parry* (La.) 188.

The prescription of five years as against all informalities affecting a tax title does not apply where the defect arises from an insufficient description on the assessment of the property.—*Scott v. Parry* (La.) 188.

The failure of a tax collector in his deed to recite proper facts does not render the tax sale to which it refers an absolute nullity.—*Jopling v. Chachere* (La.) 243.

The official return of the officer, showing the manner in which a tax notice was served, or parol evidence, held admissible to correct an erroneous recital in a tax collector's deed.—*Harvey v. Gulf States Land & Improvement Co.* (La.) 475.

TELEGRAPHS AND TELEPHONES.

§ 1. Establishment, construction, and maintenance.

In an action for personal injuries alleged to have been caused by defendant telegraph company's failure to keep its wires out of a highway, its duty so to do held to have been sufficiently stated.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

Evidence held to make the question of whether or not defendant telegraph company exercised due care to keep its wires out of a highway one for the jury.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

Evidence held to warrant a finding that the use of a rotten cross-arm to support defendant telegraph company's wires was the proximate cause of plaintiff's injuries.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

Complaint in personal injury action held to sufficiently state the negligence relied on.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

Giving of certain charge as to defendant's negligence held not inconsistent with refusal to give the general affirmative charge for defendant.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

§ 2. Regulation and operation.

Facts held to establish that a telegram had not been seasonably delivered, entitling the sender to recover statutory damages.—*Western Union Tel. Co. v. Pallotta* (Miss.) 310.

In an action for delay in delivering a telegram, the sender held not entitled to recover special damages for loss of work alleged to have resulted therefrom.—*Western Union Tel. Co. v. Pallotta* (Miss.) 310.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

Facts held to show a disseisin and ouster of those claiming as co-tenants.—*Jellerson v. Petrus* (Ala.) 603.

A co-tenant held to have secured no additional right by a purchase of the property at a sale under a trust deed.—*Wyatt v. Wyatt* (Miss.) 317.

TENDER.

On redemption of mortgage, see "Mortgages," § 7.

TESTAMENT.

See "Wills."

THEFT.

See "Larceny."

TICKETS.

For carriage of passengers, see "Carriers," § 2.
Parol evidence, see "Evidence."

TIME.

For notice of tableau of administrator, see "Executors and Administrators," § 8.
For payment of interest, see "Interest," § 2.
For taking appeal or suing out writ of error, see "Appeal and Error," § 4.
Time for filing motion to dismiss appeal, see "Appeal and Error," § 7.

TITLE.

Color of title, see "Adverse Possession."
Of statutes, see "Statutes," § 2.
Removal of cloud, see "Quieting Title."
Sufficiency of title offered at auction sale, see "Auctions and Auctioneers."
Sufficiency of title of seller of goods, see "Sales," § 3.
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 1.
Tax titles, see "Taxation," § 9.
Title of lessor, see "Landlord and Tenant," § 1.

TORTS.

By particular classes of parties.

See "Municipal Corporations," § 7.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 1.

Particular torts.

See "False Imprisonment," § 1; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass"; "Trove and Conversion"; "Waste."

Causing death, see "Death," § 2.

A complaint in action on contract held demurrable, on the ground that no consideration was alleged; defendants being under no duty to perform the obligation independent of contract.—*Newton v. Brook* (Ala.) 722.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," § 6; "Criminal Law," § 28.

TRESPASS.

Ejection of trespasser, see "Carriers," § 2.
To the person, see "False Imprisonment."

§ 1. Actions.

In an action for trespass quare clausum fregit, possession of the locus in quo and liberum tenementum may be proved under the general issue.—*Louisville & N. R. Co. v. Hall* (Ala.) 603.

Evidence *held* competent as tending to connect one with a trespass.—*Carter v. Fulgham* (Ala.) 684.

Persons *held* joint tort feasons in trespass.—*Carter v. Fulgham* (Ala.) 684.

Possession alone *held* enough to sustain trespass against a mere wrongdoer, not owning the chattel taken.—*Carter v. Fulgham* (Ala.) 684.

In action to recover the penalty given by Code, § 4137, an instruction *held* properly refused, as not warranted by the evidence.—*Jernigan v. Clark* (Ala.) 686.

In action to recover penalty imposed by Code, § 4137, for trespass, a plea *held* demurrable.—*Jernigan v. Clark* (Ala.) 686.

In an action to recover the statutory penalty imposed by Code, § 4137, evidence as to a previous controversy between the parties as to cutting of trees on other land *held* properly excluded.—*Jernigan v. Clark* (Ala.) 686.

In an action to recover the penalty imposed by Code, § 4137, testimony that plaintiff gave defendant permission to cut such trees as he needed for crossways purposes *held* not pertinent.—*Jernigan v. Clark* (Ala.) 686.

In action to recover penalty imposed by Code, § 4137, *held*, on appeal, that it would be presumed defendant's plea was disproved.—*Jernigan v. Clark* (Ala.) 686.

In action to recover the penalty given by Code, § 4137, a requested instruction *held* properly refused.—*Jernigan v. Clark* (Ala.) 686.

In action to secure penalty given by Code, § 4137, an instruction on the defense *held* proper.—*Jernigan v. Clark* (Ala.) 686.

TRESPASS TO TRY TITLE

See "Ejectment."

TRIAL.

See "New Trial"; "Witnesses."

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 2.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 3.

Trial of particular civil actions or proceedings.

See "Detinue"; "Malicious Prosecution," § 2; "Trespass," § 1.

Against carriers, see "Carriers," § 1.

For breach of warranty, see "Sales," § 7.

For injuries to animals, see "Railroads," § 5.

For personal injuries, see "Master and Servant," § 8; "Railroads," §§ 3, 4.

For price of goods, see "Sales," § 6.

For wrongful attachment, see "Attachment," § 3.

On insurance policy, see "Insurance," § 9.

Probate proceedings, see "Wills," § 2.

Suits to try tax titles, see "Taxation," § 9.

To enforce stockholder's liability, see "Corporations," § 3.

Trial of right to property levied on, see "Attachment," § 2; "Execution," § 3.

Trial of criminal prosecutions.

See "Disturbance of Public Assemblage"; "Larceny," § 2; "Seduction," § 1.

Criminal prosecutions, see "Criminal Law," §§ 10, 17; "Homicide," §§ 9-11.

For illegal sale of liquors, see "Intoxicating Liquors," § 4.

§ 1. Reception of evidence.

A general objection to all of the testimony of a witness is properly overruled, when a part of

it is competent.—*Hamilton v. Maxwell* (Ala.) 13.

Where a portion of the testimony of a witness was unobjectionable, a motion to strike out his entire testimony should be overruled.—*Brown v. Fowler* (Ala.) 684.

An admission that a witness would make a certain statement is no better evidence than the statement itself of the witness.—*Losecco v. Gregory* (La.) 985.

§ 2. Arguments and conduct of counsel.

In an action by a flagman for injuries sustained, owing to his having stumbled over a piece of slag beside a track, it was error not to permit defendant's counsel to argue to the jury the long and safe use of the place since it was ballasted with slag.—*Southern Ry. Co. v. McLellan* (Miss.) 283.

§ 3. Taking case or question from jury.

In an action on an injunction bond for attorney's fees, that a witness based his opinion on what he had been told by another *held* not to make the giving of an affirmative charge for plaintiffs erroneous.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

Statement when affirmative charge may not be given.—*Carter v. Fulgham* (Ala.) 684.

In an action to recover a statutory penalty, under Code, § 4137, for cutting trees, the name of one defendant partner being stricken, it was proper not to instruct that the jury should find for defendants, "late partners."—*Jernigan v. Clark* (Ala.) 686.

When the question of negligence in an action for injuries to a pedestrian by a street car arises on a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence is for the jury.—*Consumers' Electric Light & St. R. Co. v. Pryor* (Fla.) 797.

§ 4. Instructions to jury.

Instruction *held* to erroneously single out and give undue prominence to one fact.—*Postal Tel. Cable Co. v. Jones* (Ala.) 500.

In an action against a carrier for failure to deliver freight, an instruction as to consideration of a waybill on the question of delivery *held* properly refused.—*Alabama Midland Ry. Co. v. Thompson* (Ala.) 672.

Where the evidence was conflicting, an instruction that, if the jury believe the evidence, they will find for defendant, was properly refused.—*Alabama Midland Ry. Co. v. Thompson* (Ala.) 672.

In an action on an injunction bond for attorney's fees, a charge as to the consideration of certain testimony *held* properly refused.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

In an action on an injunction bond, a charge requiring plaintiff to make out his case by "competent evidence" *held* properly refused.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

In an action on an injunction bond, a charge to find for defendant if there was an element of uncertainty in the evidence *held* properly refused.—*Jesse French Piano & Organ Co. v. Forbes* (Ala.) 678.

A charge *held* inconsistent.—*Carter v. Fulgham* (Ala.) 684.

A requested charge *held* bad, as argumentative, and singling out a fact on which special stress is laid.—*O'Neal v. Curry* (Ala.) 697.

Charge asserting that a chattel mortgage does not operate as a conveyance of the legal title "or right of possession" *held* properly refused on the evidence.—*Long v. State* (Fla.) 870.

In a civil action for assault, where the testimony as to malice conflicted, it was error to

charge that, if the jury found for plaintiff, they could consider defendant's pecuniary condition.—*Lopez v. Jackson* (Miss.) 117.

§ 5. Waiver and correction of irregularities and errors.

The mere fact that the trial judge did not mark "Given" on a charge which was requested by plaintiff and given *held* not reversible error, in the absence of objection or exception.—*Bessemer Sav. Bank v. Anderson* (Ala.) 716.

TROVER AND CONVERSION.

§ 1. Actions.

After termination of receivership, a receiver *held* not entitled to maintain trover for personalty of which he had had charge as receiver.—*Henderson v. Pilley* (Ala.) 490.

Evidence *held* to show as a matter of law that plaintiff, in action against a railroad for conversion of an injured mule, abandoned the animal.—*Kansas City, M. & B. R. Co. v. Wagaud* (Ala.) 744.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."
Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."
Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Management and disposal of trust property.

A trustee's application to a court of equity for direction and guidance as to the disposition of the trust funds, when not made in a pending suit, should be by bill, and not by petition.—*Stapylton v. Neeley* (Fla.) 868.

Circumstances stated entitling a trustee to apply to a court of equity for direction in the disposition of trust funds.—*Stapylton v. Neeley* (Fla.) 868.

§ 2. Establishment and enforcement of trust.

That public moneys deposited with a bank by a tax collector are intermingled with its funds and incapable of identification does not prevent its collection as a trust fund on insolvency of the bank.—*Fogg v. Hebdon* (Miss.) 285.

That a tax collector, required by Code 1892, § 3840, to settle monthly, has accounted for public funds deposited in a bank, which has become insolvent, does not preclude him from afterwards maintaining a suit to establish such deposit as a trust fund.—*Fogg v. Hebdon* (Miss.) 285.

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§ 1. Usurious contracts and transactions.

A peremptory instruction for plaintiff, in an action on a note wherein defendant's evidence tended to show usury, *held* erroneous.—*Brown v. West* (Miss.) 52.

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§ 1. Performance of contract.

Vendor should tender a title not suggestive of future litigation.—*Carter v. Morris Building & Land Imp. Ass'n* (La.) 473.

§ 2. Rights and liabilities of parties.

Facts *held* to show no such possession as to put a purchaser on notice.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

Record of deed of land *held* not notice of greater interest of grantor in land than shown by record.—*Scotch Lumber Co. v. Sage* (Ala.) 607.

Record of a deed from another than the record owner is not constructive notice to a subsequent purchaser of a prior unrecorded deed.—*Tennessee Coal, Iron & R. Co. v. Gardner* (Ala.) 622.

§ 3. Remedies of purchaser.

Where defendant sold tracts of land, describing the tracts as correctly as possible and selling all the land he owned in the locality, *held* that, in making up the total number of acres sold, the vendor was entitled to include the acres not described with those described.—*Mount v. Harrell* (La.) 72.

In action by purchaser of land for failure of vendor to perform, *held*, that the claim for damages was too speculative to be a cause for judgment.—*Watt v. Williams* (La.) 85.

VENUE.

Designation of venue in indictment, see "Indictment and Information," § 2.

§ 1. Domicile or residence of parties.

Where a party has removed from one parish to another without a formal declaration of intention under Civ. Code, art. 42, he may be sued within the year, at the option of the party claiming, in either parish, as provided by Code Prac. art. 167.—*Vallee v. Hunsberry* (La.) 359.

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Directing verdict in civil actions, see "Trial," § 3.

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By tenant by curtesy, see "Curtesy."

In an action for waste in cutting timber, the sawmill books of defendant were not admissible.—*Learned v. Ogden (Miss.)* 278.

In an action for waste in cutting timber, the number of stumps of trees counted by witnesses did not tend to fix the number of trees cut by defendant.—*Learned v. Ogden (Miss.)* 278.

In an action for waste in cutting trees, plaintiffs must show with reasonable certainty what trees were severed by defendant.—*Learned v. Ogden (Miss.)* 278.

WATERS AND WATER COURSES.

See "Drains"; "Levees"; "Navigable Waters."

Water courses in cities, see "Municipal Corporations," § 6.

§ 1. Natural lakes and ponds.

In action for injuries from overflow of defendant's lake, *held* not error to refuse to instruct that, if the waters overflowed by reason of an unprecedented rainfall, plaintiff could not

recover.—*Birmingham Ry. & Electric Co. v. Dorse (Ala.)* 493.

In an action for injuries from overflow of a lake, the burden was on plaintiff to show that the lake was under defendant's control.—*Birmingham Ry. & Electric Co. v. Dorse (Ala.)* 493.

§ 2. Public water supply.

Under a contract by a rice farmer with a canal irrigating company in process of construction, *held*, that the mere fact that the company failed to have the canal completed, though it was physically possible to have done so, did not carry with it liability for damages.—*Cotton v. Jennings Irrigating Co. (La.)* 193.

In an action against a waterworks company for the destruction of plaintiff's property by fire, the water service being defective, evidence *held* to show that failure of the fire department was attributable to plaintiff.—*Planters' Oil Mills v. Monroe Waterworks & Light Co. (La.)* 376.

WEAPONS.

On a prosecution for carrying concealed weapons, *held* error to give the general affirmative charge for the state.—*Hampton v. State (Ala.)* 230.

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§ 1. Requisites and validity.

An instrument in form a deed, which bequeathed and conveyed land and personal property now possessed or to be possessed, *held* a deed, and not a will.—*Harper v. Reaves (Ala.)* 721.

§ 2. Probate, establishment, and annulment.

On a will contest, *held* proper to refuse to charge that if the jury found that it were as reasonable to infer that the alleged witnesses subscribed their names out of testatrix's presence as in it, they should find for contestant.—*Woodroof v. Hundley (Ala.)* 570.

On a will contest, evidence *held* to amount to prima facie showing of due execution of will.—*Woodroof v. Hundley (Ala.)* 570.

On a will contest, it was proper not to admit declarations of testatrix that the will in question was not her will.—*Woodroof v. Hundley (Ala.)* 570.

On a will contest, *held* proper not to admit certain evidence offered as tending to show revocation.—*Woodroof v. Hundley (Ala.)* 570.

On a will contest, evidence of witness to show due execution *held* admissible.—*Woodroof v. Hundley (Ala.)* 570.

On a will contest, proponent, to render the will admissible in evidence, must show prima facie its due execution.—*Woodroof v. Hundley (Ala.)* 570.

Application to set aside probate of will *held* barred by laches.—*Whitaker v. McKinney (Ala.)* 695.

§ 3. Construction.

Deeds of remainder-men in fee after a life estate, the remainder-men having not survived life tenant, *held* to have passed the fee.—*Acree v. Dabney (Ala.)* 127.

A will *held* to give certain sons of testator the remainder in fee after a life estate.—*Acree v. Dabney* (Ala.) 127.

Will devising property to all testator's kin in Louisiana and Texas *held* to include relatives of the half blood.—*Lusby v. Cobb* (Miss.) 6.

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Of plea, see "Criminal Law," § 6.

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§ 1. Attendance, production of documents, and compensation.

The trial judge can assign for the production of books and papers on a subpoena duces tecum another day than the one fixed for the trial.—*Succession of Marks* (La.) 401.

§ 2. Competency.

Husband of woman separately indicted *held* competent witness against male defendant in prosecution for living in adultery.—*Campbell v. State* (Ala.) 635.

On criminal prosecution, a child of 10 years *held* competent to testify.—*Walker v. State* (Ala.) 703.

Rev. St. § 1095, disqualifying certain persons from testifying against the estate of deceased persons, does not prohibit one interested in the suit from testifying to a conversation between the decedent and a third party, in which he took no part.—*Withers v. Sandlin* (Fla.) 829.

Original books of account, showing transactions with a deceased person, must, to be admissible, appear to the court to be fairly kept and free from erasures and interlineations.—*Chapin v. Mitchell* (Fla.) 875.

Under Rev. St. § 1095, precluding a party from testifying to transactions and communications with a person deceased or insane, matters not properly a part of the suppletory oath necessary in connection with the introduction of original books of account, as authorized by section 1120, cannot be testified to.—*Chapin v. Mitchell* (Fla.) 875.

Rev. St. § 1095, prohibiting a party from testifying to transaction or communication with an insane or deceased person, does not prevent the introduction of the original books of account of either party, as authorized by section 1120, nor does it prohibit the necessary suppletory oath.—*Chapin v. Mitchell* (Fla.) 875.

§ 3. Examination.

A defendant in homicide *held* to have been properly cross-examined on a certain matter.—*Stevens v. State* (Ala.) 270.

On a prosecution for murder, *held* proper to sustain an objection to a question on cross-examination of a state's witness as to whether he had heard deceased threaten defendant's life.—*Andrews v. State* (Ala.) 665.

On prosecution for murder, questions by solicitor for state, put to defendant, as to why he thought certain remark by deceased, which precipitated the difficulty, had been intended for him, were proper.—*Mann v. State* (Ala.) 704.

On prosecution for murder, question whether certain redirect examination of witness was in rebuttal *held* addressed to the trial court's discretion.—*Mann v. State* (Ala.) 704.

On criminal prosecution, question whether certain interrogation of a witness was leading *held* addressed to the court's discretion.—*Mann v. State* (Ala.) 704.

On a prosecution for murder, *held* not error to sustain objection to a question to defendant as to how far he had retreated.—*Mann v. State* (Ala.) 704.

Where, on a criminal prosecution, a witness appeared to the trial court to be unwilling, *held* within such court's discretion to allow the solicitor for the state to lead him.—*Mann v. State* (Ala.) 704.

On a criminal prosecution, *held* not error to allow the solicitor for the state to ask a witness, for the purpose of refreshing his memory, whether he had not testified to certain facts on the preliminary trial of defendant.—*Mann v. State* (Ala.) 704.

A trial court has discretion to permit leading questions.—*Anthony v. State* (Fla.) 818.

An objection that a question is not re-direct examination will not be sustained, where the question objected to is proper to explain the testimony on cross-examination.—*State v. McQueen* (La.) 412.

§ 4. Credibility, impeachment, contradiction, and corroboration.

A witness in a criminal prosecution, whose evidence tends to establish an alibi, and who denies on cross-examination that he had stated that defendant said that he had committed the crime, cannot be impeached as to such denial.—*Carter v. State* (Ala.) 231.

Where the state's evidence tended to show that a certain person was engaged in the gaming for which defendant was being prosecuted, it was error to refuse to permit such person's employer, testifying for defendant, to state whether such person was absent from his work any during that month.—*James v. State* (Ala.) 237.

A witness for defendant, in a prosecution for selling liquor to a person of intemperate habits, may be asked, on cross-examination, for the purpose of showing his interest, if a prosecution is not pending against him for the same offense.—*McCormack v. State* (Ala.) 268.

Where a witness for defendants in homicide denies a conspiracy on direct examination he may be impeached, after the proper foundation has been laid, by proof of his declarations, the day before the homicide, that defendants would be out, and "h——" would be raised the next day.—*Stevens v. State* (Ala.) 270.

The refusal to allow certain questions on cross-examination, tending to affect the credibility and accuracy of the witness, *held* not erroneous.—*Southern Ry. Co. v. Brantley* (Ala.) 300.

Where, on a trial for robbery, the complaining witness had testified that a companion of defendant used a pistol, evidence that such companion had a pistol was admissible to corroborate such testimony.—*Nevill v. State* (Ala.) 598.

Questions to witnesses for impeaching purposes *held* proper.—*Sanders v. State* (Ala.) 654.

It was proper to refuse to charge that, if a witness had been successfully impeached, his testimony should be disregarded.—*Sanders v. State* (Ala.) 654.

Facts *held* not to show bad feeling on the part of plaintiff's witness toward defendant.—*O'Neal v. Curry* (Ala.) 697.

A minor, instituting prosecution for giving him intoxicating liquor, and being the only witness, though testifying he is friendly to defendant, may be asked if his father is friendly to him.—*Bennetfield v. State (Ala.)* 717.

On a criminal prosecution, where a conviction could not have been had without the testimony of a certain witness, it was reversible error to permit the state to support his credibility by showing, on his examination in chief, statements by him to others out of court and in the absence of defendant.—*Johnson v. State (Miss.)* 49.

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